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NOTES

ON THE

DAKOTA REPORTS.

CASES IN 1. DAK.

1 DAK. 1, UNITED STATES v. THE CORA, 46 N. W. 503.

1 DAK. 5, BRUGUIER v. UNITED STATES, 46 N. W. 502.

"Feloniously," in indictment.

Cited in *Brown v. State*, 127 Wis. 193, 106 N. W. 536, 7 A. & E. Ann. Cas. 258, holding information for rape sufficient though "feloniously" or its equivalent did not appear therein.

Bad count in indictment as ground for reversal.

Cited in *People v. Odell*, 1 Dak. 197, 46 N. W. 601, holding that a conviction will not be reversed because one count of the indictment is bad, if there are other counts sufficient to sustain it.

1 DAK. 11, WALDRON v. EVANS, 46 N. W. 607.

Validity of contracts.

Cited in note in 4 L.R.A. 682, on contracts growing out of illegal or immoral acts not enforceable.

Admissibility of documents as evidence.

Cited in *Hoffman v. Hendricks*, 21 Okla. 479, 96 Pac. 589, 17 A. & E. Ann. Cas. 379, holding written document admissible though parol evidence is necessary to show its connection with the matter in issue.

Cited in notes in 136 Am. St. Rep. 49, on account stated; 138 Am. St. Rep. 472, on admissibility in evidence of books of account.

1 DAK. 17, CAMPBELL v. CASE, 46 N. W. 504.

Implied repeal of statute.

Cited in *State v. Welbes*, 11 S. D. 86, 75 N. W. 820, holding that the Dak. Rep.—1.

provision of Dak. Comp. Laws, § 1644, requiring the county treasurer to send to the state treasurer state funds paid into his hands before specified dates, was repealed by 1 S. D. Laws 1891, chap. 113, requiring county treasurers to furnish statements, on dates specified, showing the amount of state taxes collected, and to forward the total amount of tax to the state treasurer immediately on receiving notice; *Jernigan v. Holden*, 34 Fla. 530, 16 So. 413, holding that the saving clause as to persons not within the state at the time their rights to recover real estate accrued, in Fla. act November 10, 1828, was repealed by Fla. act January 8, 1848, which was a revision of the former act, and did not contain such saving clause, and, if not, was repealed by the general limitations act of 1872 (Fla. Laws, chap. 1869, McClell. Dig. p. 730), which was a general revision of all other acts upon the subject of limitations; *Thomas v. State*, 17 S. D. 579, 97 N. W. 1011, holding that act providing for board of charities and corrections and covering the entire subject matter, impliedly repeals a former law relating to such board.

1 DAK. 25, FRALEY v. BENTLEY, 46 N. W. 506.

Admissibility of parol evidence as to consideration.

Cited in *DeGoey v. VanWyk*, 97 Iowa, 491, 66 N. W. 787, holding that one sued upon a note may show an agreement between the plaintiff and a codefendant by which upon the execution of a certain mortgage the former was released from liability on such note; *Grabow v. McCracken*, 23 Okla. 612, 23 L.R.A.(N.S.) 1218, 102 Pac. 84, 18 A. & E. Ann. Cas. 503, holding parol evidence admissible to show that matured standing crop of corn was reserved by grantor as part of consideration; *Smith v. Gaub*, 19 N. D. 337, 123 N. W. 827, holding parol evidence admissible to contradict recital of consideration in deed.

Sufficiency of contract as to definiteness.

Cited in *First Nat. Bank v. Park*, 117 Iowa, 552, 91 N. W. 826, holding contract not void for uncertainty if intention of the parties can be fairly gathered from the instrument; *Iowa-Minnesota Land Co. v. Conner*, 136 Iowa, 674, 112 N. W. 820, holding recoverable damages for breach of contract to erect store building and conduct store business upon premises of another, though the improvements are not definitely described.

Effect of breach of contract.

Cited in *Moseley v. Chicago, B. & Q. R. Co.* 57 Neb. 636, 78 N. W. 293, holding that the breach by a railroad company of a contract in a deed to construct and operate a railroad over the deeded land within a reasonable time does not entitle the grantor to a cancellation of the deed.

Burden of proving sufficiency of consideration.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding burden of proving insufficiency of consideration to support written instrument, upon party seeking to invalidate same.

1 DAK. 38, BENTLEY v. FRALEY, 46 N. W. 505.

1 DAK. 42, CLARK v. BATES, 46 N. W. 510, Affirmed in 95 U. S. 204, 24 L. ed. 471.

1 DAK. 60, FARMERS' NAT. BANK v. RASMUSSEN, 46 N. W. 574.

Validity of stipulations for attorney's fee.

Cited in *Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555, holding valid, stipulation in mortgage for reasonable attorney's fee in case of foreclosure.

Cited in note in 55 Am. St. Rep. 438, on validity of stipulations for attorneys' fees.

Criticized in *Danforth v. Charles*, 1 Dak. 285, 46 N. W. 576, upholding provision in mortgage for reasonable attorney's fees if suit should be commenced.

Right to attorney's fees as stipulated.

Cited in *Hovey v. Edmison*, 3 Dak. 449, 22 N. W. 594, holding attorney's fees allowable to foreclosure of mortgage stipulating therefor notwithstanding insufficient tender by mortgagor.

Effect of stipulation for attorney's fees on negotiability of note.

Cited in *Montgomery v. Crossthwait*, 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498, holding that the negotiability of a promissory note is not destroyed by a stipulation therein to pay all costs of collecting if not paid at maturity; *Stapleton v. Louisville Bkg. Co.* 95 Ga. 802, 23 S. E. 81, holding a promissory note not rendered non-negotiable by a stipulation to pay all costs and 10 per cent on amount for counsel fees, if placed in the hands of an attorney for suit; *Benn v. Kutzschan*, 24 Or. 28, 32 Pac. 763, holding the negotiability of a note in no way affected by a stipulation for a reasonable attorney's fee in addition to the costs and disbursements provided by statute; *Oppenheimer v. Farmers' & M. Bank*, 97 Tenn. 19, 33 L.R.A. 767, 56 Am. St. Rep. 778, 36 S. W. 705, holding a note not non-negotiable because of a stipulation on its face to pay all reasonable attorney's fees for collecting the same in case of suit, as the amount to be paid is not uncertain until after its maturity and its dishonor by the maker. *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 273, 56 N. W. 458, 48 Am. St. Rep. 381, holding a note not non-negotiable for uncertainty because of a stipulation to pay 10 per cent attorney's fees if placed in attorney's hands for collection.

1 DAK. 63, PEOPLE v. WINTERMUTE, 46 N. W. 694.

Effect of repeal of statute.

Cited in note in 94 Am. Dec. 220, on effect of repeal of criminal statute.

Errors in regard to grand jury.

Cited in *Cochran v. State*, 89 Ala. 40, 8 So. 78, holding that an indictment will be quashed where one who acted as grand juror in finding the indictment was not selected or drawn as such; *State v. Carlson*, 39 Or.

19, 62 Pac. 1016, holding that when no right of appeal exists from a court's decision as to the qualification of one whose name is drawn as a grand juror, a refusal to set aside an indictment for any disqualification on such juror's part is not error.

Cited in notes in 28 L.R.A. 201, on qualification of grand jurors; 12 Am. St. Rep. 909, on challenges of grand jurors.

1 DAK. 113, ELK POINT v. VAUGHN, 46 N. W. 577.

Validity of grants under organic act prohibiting grant of private charters or special privileges.

Cited in *Plattsmouth v. Nebraska Teleph. Co.* 80 Neb. 460, 14 L.R.A. (N.S.) 654, 127 Am. St. Rep. 779, 114 N. W. 588, holding valid ordinance granting telephone company right to use street, where the exclusive right to so use it was not granted; *Whitman College v. Berryman*, 156 Fed. 112, holding valid provision in charter to college exempting all its property from taxation.

License for sale of intoxicating liquors.

Cited in notes in 114 Am. St. Rep. 299, 302-304, on power of municipality to regulate dealing in intoxicating liquors; 30 L.R.A. 432, on limit of amount of license fees; 14 L.R.A. (N.S.) 795, on amount of liquor-license fee as characterizing statute or ordinance imposing it as prohibitory or regulative.

Punishment of act which is crime under city and state law.

Cited in note in 17 L.R.A. (N.S.) 54, on power of municipality to punish act also an offense under state law.

1 DAK. 125, YANKTON COUNTY v. ROSSTEUSCHER, 46 N. W. 575.

Effect of harmless error during trial.

Cited in *Lowry v. Southern R. Co.* 117 Tenn. 507, 101 S. W. 1157, holding that reversal will not be reversed for error in charge to jury where complaining party could not have been injured thereby; *Territory v. Gay*, 2 Dak. 125, 2 N. W. 477, holding exclusion of evidence which would reduce offense from murder to manslaughter not prejudicial where defendant is convicted of manslaughter only; *People v. Wintermute*, 1 Dak. 63, 46 N. W. 694, holding that conviction will be reversed for error in denying challenge to grand jury on ground of prejudice without inquiring the extent of such prejudice if accused could have been prejudiced.

1 DAK. 131, FROST v. FLICK, 46 N. W. 508.

Effect of irregularities in tax assessment roll.

Cited in *Corbet v. Rocksbury*, 94 Minn. 397, 103 N. W. 11, holding assessment roll sufficient as basis for tax levy, though auditor failed to sign jurat under assessor's signature, and error in name of township occurred on cover but proper name appeared in other places; *Farrington v. New England Invest. Co.* 1 N. D. 102, 45 N. W. 191, holding that the absence of a verification from the assessment roll does not invalidate the

assessment in equity; *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724, holding a tax invalidated by failure of the county board of equalization to meet on the date fixed by statute or the day thereafter, to hear objections, although they meet on a subsequent date; *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, holding that failure to verify assessment roll by assessor, does not make assessment void in action to set aside tax levy and enjoin collection of taxes.

Injunction against collection of tax.

Cited in *Macomb v. Lake County*, 9 S. D. 466, 70 N. W. 652, holding that a stockholder may sue in equity to restrain the collection of a tax on his shares of stock where it creates an apparent lien on his land; *Chicago & N. W. R. Co. v. Rolfsen*, 23 S. D. 405, 122 N. W. 343, holding that injunction does not lie to restrain collection of illegal personal tax where remedy at law not shown to be inadequate; *Farrington v. New England Invest. Co.* 1 N. D. 102, 45 N. W. 191, holding that collection of tax should be enjoined only where property is exempt, tax unwarranted, or persons assuming to act are without authority, or that proper taxing officials have acted fraudulently.

Cited in notes in 69 Am. Dec. 199, on injunction against collection of taxes and assessments; 22 L.R.A. 699-702, 704, on injunction to restrain the collection of illegal taxes.

Distinguished in *Dakota Loan & T. Co. v. Codington County*, 9 S. D. 159, 68 N. W. 314, holding tender alone of valid portion of tax sufficient to entitle one to enjoin collection of void excess; *Evans v. Fall River County*, 9 S. D. 137, 68 N. W. 195, in which the concurring judge states that he desires nothing contained in the decision to be construed as an intimation that the holding of *Frost v. Flick* should be abandoned or modified; *Bode v. New England Invest. Co.* 6 Dak. 499, 42 N. W. 658, 45 N. W. 197, holding that no previous tender of a tax is required before bringing an action to have the tax declared void, where no assessment has been made by the proper authorities.

1 DAK. 140, EX PARTE SCOTT, 46 N. W. 512, Appeal from judgment dismissing writ in 1 Dak. 142, 46 N. W. 571.

1 DAK. 142, UNITED STATES EX REL. SCOTT v. BURDICK, 46 N. W. 571.

Sale of intoxicating liquors to Indians.

Cited in *United States v. Belt*, 128 Fed. 168, holding that act prohibiting sale of intoxicating liquors to Indians applies to Indians who are students at the Carlisle school; *Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134, holding that Mont. Comp. Stat. div. 4, § 160, providing that one who sells intoxicating liquors to an Indian shall be guilty of a felony, is not in conflict with U. S. Rev. Stat. § 2139, relating to the same offense or U. S. Const. art. 1, § 8, subd. 3, vesting in Congress power to regulate commerce with Indian tribes.

Territorial jurisdiction of territorial courts.

Cited in *United States v. Beebe*, 2 Dak. 292, 11 N. W. 505, holding that

the jurisdiction of each of the territorial district courts within their respective districts is coextensive with that of the Federal courts.

1 DAK. 151, SANDERS v. REISTER, 46 N. W. 680.

Liability for injury from unguarded excavation or obstruction.

Cited in *Lepnick v. Gaddis*, 72 Miss. 200, 26 L.R.A. 686, 48 Am. St. Rep. 547, 16 So. 213, holding that the owner of a vacant lot which had long been used as a common or part of the highway, liable to one who fell into a cistern located thereon while attempting to use the highway on a dark night; *Flint v. Bowman*, 42 Tex. Civ. App. 354, 93 S. W. 479, holding land owner not liable where plaintiff on account of heavy snow fall wandered from road and his team fell into unguarded well nearly half a mile from the road.

Cited in notes in 26 L.R.A. 690, on liability for dangerous condition of private grounds lying open beside a highway or frequented path; 87 Am. Dec. 666, on owner's liability for injury to persons coming on his premises.

Distinguished in *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L.R.A. 215, 18 S. E. 782, relieving a railroad company from liability to one injured by a mail crane while standing on land of the company, near the mail crane, for the purpose of witnessing the catch of a mail pouch.

Burden of proving contributory negligence.

Cited in *M. S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996; *New Castle Bridge Co. v. Doty*, 37 Ind. App. 84, 76 N. E. 557,—holding, in action for personal injury, that burden is upon defendant; *Smith v. Chicago, M. & St. P. R. Co.* 4 S. D. 71, 55 N. W. 717, holding burden of proving contributory negligence on defendant unless plaintiff in proving his case gives evidence tending to prove such negligence.

Cited in note in 33 L.R.A.(N.S.) 1100, 1161, 1184, on burden of proof as to contributory negligence.

Admissibility of declarations.

Cited in notes in 95 Am. Dec. 66, 68, on admissibility of declarations; 93 Am. Dec. 280, on declarations of party admissible in his own favor; 24 L.R.A.(N.S.) 254, on admissibility of expressions or statements, subsequent to injury, or present pain.

1 DAK. 179, WOOD v. BANGS, 46 N. W. 586.

When injunction lies.

Cited in *Smith v. Rogers County*, 26 Okla. 819, 110 Pac. 669, denying injunction to restrain county commissioners from letting contract for building bridge, remedy at law being adequate.

Powers of municipalities.

Cited in note in 2 Am. St. Rep. 101, on powers of municipalities.

Mode of enforcing liability of municipality.

Cited in note in 68 Am. Dec. 297, on mode of enforcing liability of counties and legislative power to modify or impair same.

1 DAK. 197, PEOPLE v. ODELL, 46 N. W. 601.**Intoxication as defense in criminal prosecution.**

Cited in *State v. Kapelino*, 20 S. D. 591, 108 N. W. 335, holding instruction as to intoxication as defense sufficient where given in the language of the statute; *Lyle v. State*, 31 Tex. Crim. Rep. 103, 19 S. W. 903, holding evidence of the intoxication of defendant at the time of the alleged commission of crime, admissible when the condition or status of the mind is an essential element of the offense (as in perjury), although Tex. Pen. Code, art. 40a, Willson's Crim. Stat. § 92, provides that neither intoxication nor temporary insanity of the mind produced by the voluntary recent use of ardent spirits shall constitute any excuse for the commission of crime, nor mitigate either the degree or penalty thereof.

Cited in notes in 8 L.R.A. 33, on voluntary intoxication in extenuation of crime; 36 L.R.A. 465, on what intoxication will excuse crime; 26 L. ed. U. S. 873, on evidence of intoxication of accused as defense.

Sufficiency of indictment to support conviction.

Cited in *Territory v. Conrad*, 1 Dak. 363, 46 N. W. 605, holding that a verdict that the jury find the defendant guilty of assault with intent to do bodily harm and without justifiable and excusable cause is inferentially an acquittal of a charge in the indictment of an assault by shooting with intent to kill; *Mulloy v. State*, 58 Neb. 204, 78 N. W. 525, holding that an information under Neb. Crim. Code, § 17b, for an assault with intent to inflict a great bodily injury, will sustain a conviction for an assault and battery; *Brantley v. State*, 9 Wyo. 102, 61 Pac. 139, holding that one charged with an assault with an intent to commit murder in the first degree, may be found guilty of the principal offense charged, or of an assault with intent to commit murder in the second degree, or of an assault with intent to commit manslaughter.

What judicial action may be taken on Sunday.

Distinguished in *Ex parte Tice*, 32 Or. 179, 49 Pac. 1038, holding that under Hill's Anno. Laws, § 208, similar to Dak. Code Civ. Proc. § 388, and Hill's Anno. Laws, § 928, providing that "no court can be opened, nor can any judicial business be transacted on a Sunday . . . except . . . (1) to give instruction to a jury deliberating on their verdict; (2) to receive a verdict or discharge a verdict; (3) for the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature," a court is powerless to discharge a jury on Sunday without their agreement or some immediate necessity.

Reception of verdict in absence of judge.

Cited in *State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 A. & E. Ann. Cas. 87, holding that verdict cannot be received by clerk in absence of judge, though defendant consent thereto.

1 DAK. 206, HOLT v. VAN EPS, 46 N. W. 689.**Prima facie value of note.**

Cited in *Patterson v. Plummer*, 10 N. D. 95, 86 N. W. 111, holding corporate stock presumptively worth par; *Robertson v. Moses*, 15 N. D. 351,

108 N. W. 788, holding that prima facie value of a note is its face with interest to date; Grigsby v. Day, 9 S. D. 585, 70 N. W. 881, holding that amount due on notes and mortgages will be presumed to be amount they were given to secure.

Evidence of value.

Cited in *Anderson v. First Nat. Bank*, 6 N. D. 497, 72 N. W. 916, holding evidence of market value of notes of individuals incompetent.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

When nonsuit granted.

Cited in note in 24 Am. Dec. 620, on grant of compulsory nonsuits.

Measure of damages for conversion or detention of personalty.

Cited in *Jandt v. South*, 2 Dak. 46, 47 N. W. 779, holding that personal expenses, loss of time, expenses of attorney, and attorneys' fees, are not elements of damages under the statute giving compensation to the prevailing party as damages for the wrongful detention of property.

Cited in notes in 27 Am. Dec. 688, as to when exemplary damages are allowable; 9 N. D. 636, on damages in actions for trover and conversion.

Sufficiency of verdict.

Cited as leading case in *Johnson v. Glaspey*, 16 N. D. 335, 113 N. W. 602, holding retrial proper where verdict failed to cover all the material issues submitted.

Cited in *Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75; *Hickey v. Breen*, 40 Mont. 368, 106 Pac. 881,—holding verdict insufficient where it fails to find upon all the material issues; *Uhlig v. Garrison*, 2 Dak. 99, 2 N. W. 258, holding verdict in ejectment that jury find for plaintiff "the legal title" to the land in controversy without finding on other issues raised by pleadings, radically defective.

Cited in note in 24 L.R.A. (N.S.) 18, on what special verdict must contain.

Distinguished in *Baum Iron Co. v. Union Sav. Bank*, 50 Neb. 387, 69 N. W. 939, holding that in an action of replevin a verdict that the jury "find for the said plaintiff, that at the commencement of this action the plaintiff was and now is entitled to the possession of the following described articles, to wit: . . . of" a specified value, responds to plaintiff's claim of ownership.

Sufficiency of judgment.

Cited in *Anderson v. Alseth*, 6 S. D. 566, 62 N. W. 435, holding that findings of fact on which judgment rests, must be sufficient to sustain it; *Jandt v. South*, 2 Dak. 46, 47 N. W. 779, holding that a judgment will be reversed on appeal where the court below, after hearing the testimony, could not find on a material issue.

Error first urged upon appeal.

Cited in *Dole v. Burleigh*, 1 Dak. 227, 46 N. W. 692, holding failure of court to find as to lack of consideration for note sued on ground for reversal though first raised on appeal when made a material issue under the pleadings; *Galloway v. McLean*, 2 Dak. 372, 9 N. W. 98, holding errors

competent upon the record reviewable on appeal though no exception was taken in the trial court; *Murry v. Burris*, 6 Dak. 170, 42 N. W. 25, holding that questions affecting jurisdiction may be first heard on appeal; *Nichols v. Weston County*, 13 Wyo. 1, 76 Pac. 681, 1 A. & E. Ann. Cas. 543, holding that judgment not supported by the pleadings or the findings may be reversed on the record though no exceptions were taken and no motion made in court below.

1 DAK. 224, BOND v. CHARLEEN, 46 N. W. 585.

1 DAK. 227, DOLE v. BURLEIGH, 46 N. W. 692.

Sufficiency of answer.

Cited in *Mead v. Pettigrew*, 11 S. D. 529, 78 N. W. 945, holding denial of "each and every material allegation" in complaint except as specifically admitted, insufficient; *Hoffman v. Gallatin County*, 18 Mont. 224, 44 Pac. 973, holding an answer bad which contained denials which were inconsistent with the express admissions of the answer, which were evasive, and which did not deny the direct and specific statements of the complaint.

Necessity for exception.

Cited in *Galloway v. McLean*, 2 Dak. 372, 9 N. W. 98, holding errors competent upon the record reviewable on appeal though no exception was taken in the trial court.

Necessity and sufficiency of finding or verdict.

Cited in *Jandt v. South*, 2 Dak. 46, 47 N. W. 779, holding that a judgment will be reversed on appeal where the court below after hearing the testimony, could not find on a material issue; *Estill v. Irvine*, 10 Mont. 509, 26 Pac. 1005, holding that a failure after a proper request to make a finding on a material issue in an equitable proceeding is not justified by the fact that the result would not have been altered; *Anderson v. Alseth*, 6 S. D. 566, 62 N. W. 435, holding that the findings of fact on which a judgment rests must be sufficient to sustain it; *Uhlig v. Garrison*, 2 Dak. 99, 2 N. W. 258, holding a verdict in ejectment that the jury find for plaintiff "the legal title" to the land in controversy, without finding on other issues of fact raised by the pleadings, radically defective.

Right to urge insufficiency of own pleading.

Cited in *Cole v. Cady*, 2 Dak. 29, 3 N. W. 322, holding that the party interposing an insufficient pleading will not be permitted to urge its insufficiency on appeal.

What may take place of bill of exceptions.

Distinguished in *Merchants' Nat. Bank v. McKinney*, 4 S. D. 226, 55 N. W. 929, holding that stenographer's or referee's notes of the evidence can not take the place of a bill of exceptions or statement of the case settled by the judge though so stipulated by the parties.

Curing error by filing additional findings.

Distinguished in *North v. Peters*, 138 U. S. 271, 34 L. ed. 936, 11 Sup. Ct. Rep. 346, holding that under Dak. Code Civ. Proc. §§ 266, 267, the omission to file findings of fact, judgment having been entered, is a mere

irregularity which the court may cure by filing additional findings before an appeal is taken or a bill of exceptions is settled and signed by the judge.

1 DAK. 286, TREADWAY v. SCHNAUBER, 46 N. W. 464.

Powers of municipalities.

Cited in *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156, holding that a municipal corporation cannot, in the absence of express legislative power authorizing it, require property owners to pay fees for building permits.

Cited in note in 2 Am. St. Rep. 93, 101, on powers of municipalities.

Length of legislative session.

Cited in *Cheyney v. Smith*, 3 Ariz. 143, 23 Pac. 680 (dissenting opinion), on "sixty days duration" as meaning sixty consecutive days including Sundays.

Nature of county.

Cited in note in 1 L.R.A. 757, on counties as quasi corporations.

Notice of powers of county commissioners.

Cited in *Meek v. Meade County*, 12 S. D. 162, 80 N. W. 182, holding one contracting with county commissioners in regard to the establishment of a highway charged with notice of their legitimate powers.

1 DAK. 285, DANFORTH v. CHARLES, 46 N. W. 576.

1 DAK. 289, PEOPLE v. SPONSLER, 46 N. W. 459.

Followed without discussion in *People v. Wambole*, 1 Dak. 301, 46 N. W. 463.

What are indictable offenses.

Cited in *People ex rel. Yearian v. Spiers*, 4 Utah, 385, 10 Pac. 609, 11 Pac. 509, holding that at common law the keeping of a house of ill fame, wilfully residing therein, and resorting thereto for lewdness, were indictable offenses.

Practice in accordance with common law.

Cited in *United States v. Beebe*, 2 Dak. 292, 11 N. W. 505, holding that the panels of the grand and petit jurors are properly selected and summoned by open venire as at common law, on a trial for murder committed on an Indian reservation within the territory, as no statute has been passed in regard thereto.

1 DAK. 301, PEOPLE v. WAMBOLE, 46 N. W. 463.

1 DAK. 302, PEOPLE v. BRIGGS, 46 N. W. 451.

Mode of selecting public officers.

Distinguished in *Territory on the Information of French v. Cox*, 6 Dak. 501 (District Court), holding that the governor is not prevented from appointing trustees of public institutions without the advice and consent of the legislative council, in accordance with Dak. Comp. Laws, § 1392.

empowering him to fill vacancies resulting from the removal of prior incumbents, by the provisions of U. S. Rev. Stat. §§ 1857, 1858, that the governor of a territory shall appoint all officers not therein otherwise provided for, with the advice and consent of such council, and may fill vacancies caused by resignation or death occurring during the recess of the council.

1 DAK. 308, PEOPLE v. SWEETSER, 46 N. W. 452.

Construction of statutes.

Cited in *Levi v. Anniston*, 155 Ala. 149, 46 So. 237, holding that where section one of an act forbids sale of junk without license, and section two forbids purchase from one without license, conviction may be had without showing violation of both sections.

— Use of “and” and “or.”

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. State*, 172 Ind. 147, 87 N. E. 1034, holding “and” to mean “or” in Railroad “Full Crew” statute; *People v. Lytle*, 7 App. Div. 553, 40 N. Y. Supp. 153, 11 N. Y. Crim. Rep. 229, holding “and” and “or” convertible, where used in criminal statute, as the sense and intent of the statute may require; *Clay v. Central R. & Bkg. Co.* 84 Ga. 345, 10 S. E. 967, holding that under Ga. Code, § 2971, as amended by the act of October 27, 1887, providing that a parent may recover for the homicide of a child, upon whom she or he is dependent, “or” who contributes to his or her support, a parent cannot recover unless dependent upon such child for support and such deceased child contributed to the support of the said parent; *Collins Granite Co. v. Devereux*, 72 Me. 422, holding that Me. Stat. 1876, chap. 90, giving the laborer a lien for thirty days after granite is cut and dressed “or” until such granite is sold “or” shipped on board a vessel, gives a lien upon the stone for at least thirty days after it is cut and dressed and as much longer as it remains unsold, and not shipped on board a vessel; *People v. Lytle*, 7 App. Div. 553, 40 N. Y. Supp. 153, holding that the absence or disqualification of the assistant district attorney, if there be one, is not a condition to authority to appoint a special district attorney under N. Y. Laws 1883, chap. 123, § 90, providing for such an appointment when the district attorney “and” his assistant, if he has one, shall be absent or disqualified, as the word “and” is to be construed as “or.”

Cited in note in 48 Am. Dec. 573, 574, on construction of “and” for “or” or vice versa in wills.

Amendment of statute.

Cited in *Brown v. German-American Title & T. Co.* 174 Pa. 443, 34 A2l. 335, holding that Pa. P. L. 1891, No. 54, providing that Pa. P. L. 1883, No. 116, “is hereby amended to read as follows,” repeals the latter as to all matters wherein the two differ, and as to everything else merges the old law in the new; *Marquette v. Berks County*, 3 Pa. Super. Ct. 36, holding that a statute amending an earlier one is to be read into it as if its provision had always been there, and does not repeal by implication an in-

intervening statute relating to a branch of the same subject, but which is not inconsistent with either the original or the amendatory act.

Cited in note in 4 L.R.A. 308, effect of amendment on act amended.

Distinguished in *Brooke v. Kaufman*, 6 Pa. Dist. R. 513, holding that while an amendment is, as to matters arising subsequently to it, to be read into the amended statute as if its provisions had always been there, such is not the case as to matters arising prior to the passage of the amendment.

Sufficiency of indictment.

Cited in *State v. Hayes*, 17 S. D. 128, 95 N. W. 296, holding indictment for rape sufficient though it did not contain the word "ravish," where it set out the acts constituting the offense.

Cited in note in 23 L.R.A. (N.S.) 583, as to whether indictment or information for unlawful liquor sale must state purchaser's name.

Liability for act of copartner, servant or agent.

Cited in note in 41 L.R.A. 664, on criminal and penal liability for act of copartner, servant, or agent.

1 DAK. 320, McCALL v. UNITED STATES, 46 N. W. 608.

What may be proved by general reputation.

Cited in note in 11 Eng. Rul. Cas. 440, on proving matters of public interest by reputation and by declarations of deceased persons.

Admissibility of maps.

Cited in *United States v. Beebe*, 2 Dak. 292, 11 N. W. 505, holding maps from office of surveyor, of general territory, admissible to show place where crime with which defendant is charged was committed.

Title to Indian reservation.

Cited in *Golden Terra Min. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98, holding that no title to mining grounds on the Sioux Indian Reservation could be held or transferred by persons residing thereon in violation of the treaty under which such reservation was created; *Uhlig v. Garrison*, 2 Dak. 71, 2 N. W. 253, holding that the tract of country set apart for the Sioux Indians by the treaty of 1868 became an Indian reservation to all intents and purposes.

1 DAK. 335, CHEATHAM v. WILBER, 46 N. W. 580.

Review of instructions to jury.

Cited in *Grantz v. Deadwood*, 20 S. D. 495, 107 N. W. 832, holding that instructions to jury cannot be reviewed on appeal in the absence of the evidence, and of the other instructions given, unless it appears that no other instructions were given on the particular point.

Time for exceptions to instructions.

Cited in *Uhe v. Chicago, M. & St. P. R. Co.* 4 S. D. 505, 57 N. W. 484, holding that there is no distinction as to time when exceptions may be taken between instructions given at request of counsel and those given by the judge on its own motion.

1 DAK. 348, YANKTON COUNTY v. FAULK, 46 N. W. 583.

1 DAK. 351, WALDRON v. CHICAGO & N. W. R. CO. 46 N. W. 456.

Conclusiveness of findings of fact.

Cited in *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454, holding that findings of fact by the court will not be disturbed on appeal in case of a substantial conflict in the evidence.

Liability of carrier for goods.

Cited in note in 37 L.R.A. 179, on delivery to impostor by carrier.

—For articles checked as baggage.

Cited in *New Orleans & N. E. R. Co. v. Shackelford*, 87 Miss. 610, 4 L.R.A.(N.S.) 1035, 112 Am. St. Rep. 461, 40 So. 427, holding carrier liable for value of sample case knowingly checked as baggage by its agent, though it was not bound to accept it for transportation as baggage; *Bergstrom v. Chicago, R. I. & P. R. Co.* 134 Iowa, 223, 10 L.R.A.(N.S.) 1119, 111 N. W. 818, 13 A. & E. Ann. Cas. 239, holding carrier bound by acts of its agent in accepting for transportation as baggage, articles not usually carried as such; *Kansas City, Ft. S. & M. R. Co. v. McGahey*, 63 Ark. 344, 36 L.R.A. 781, 58 Am. St. Rep. 111, 38 S. W. 659, holding that a carrier which has accepted for transportation as baggage trunks and boxes which contain property not personal baggage, of which fact it has notice from the size of the trunks and boxes, is responsible therefor as for baggage.

Cited in notes in 99 Am. St. Rep. 346, 355, on liability for loss of baggage; 14 L.R.A. 515, on liability of passenger carrier in transporting merchandise intrusted to it by a passenger; 10 L.R.A.(N.S.) 1120, on act of baggageman in receiving articles as baggage as binding on carrier.

Effect of voluntary appearance.

Cited in *Bonesteel v. Gardner*, 1 Dak. 372, 46 N. W. 590, holding that voluntary appearance by defendant in action for recovery of personal property and the answering and contesting of the case on the merits give the court jurisdiction though the proceedings for obtaining possession of the property were irregular and defective.

1 DAK. 363, TERRITORY v. CONRAD, 46 N. W. 605.

Sufficiency of indictment to sustain conviction.

Cited in *State v. McLennen*, 16 Or. 59, 16 Pac. 879, holding a verdict of guilty of an assault with a dangerous weapon responsive to an indictment charging an assault with a loaded revolver with intent to kill; *State v. Peterson*, 23 S. D. 629, 122 N. W. 667, holding that indictment for assault with intent to kill will not sustain verdict of assault with intent to do great bodily harm; *State v. Johnson*, 3 N. D. 150, 54 N. W. 547, holding verdict of guilty of "assault and battery with intent to do bodily harm as charged in information" which charges assault and battery with deadly

weapon with intent to kill, sufficient to sustain sentence for simple assault and battery but for no higher offense.

Cited in note in 45 L.R.A. 137, 155, on effect of excessive sentence.

1 DAK. 372, BONESTEEL v. GARDNER, 46 N. W. 590.

1 DAK. 379, TERRITORY v. CHARTRAND, 46 N. W. 583.

Evidence in prosecution for keeping house of ill fame.

Cited in *Territory v. Stone*, 2 Dak. 155, 4 N. W. 697, holding evidence of general reputation of house alleged to have been kept as house of ill fame admissible; *Winslow v. State*, 5 Ind. App. 306, 32 N. E. 98 (dissenting opinion), which holds that on a prosecution for keeping a house of ill fame, the character of the house may be proved by reputation; *State v. Harris*, 14 N. D. 501, 105 N. W. 621, on admissibility of evidence as to reputation of house during certain time; *State v. Cambron*, 20 S. D. 282, 105 N. W. 241, holding admissible evidence as to who came there, when, and for what purpose and as to manner of conducting the business.

Prejudicial error in instructions.

Cited in *Territory v. Keyes*, 5 Dak. 244, 38 N. W. 440, holding instruction on criminal trial that a higher court will protect defendant's rights if the court makes errors not prejudicial error; *Young v. Harris*, 4 Dak. 367, 32 N. W. 97, holding erroneous statement in isolated part of charge not ground for reversal if taken together it gives a full and correct statement of the law.

1 DAK. 387, GRESS v. EVANS, 46 N. W. 1132.

Settlement of bill of exceptions.

Cited in *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467, 11 N. W. 497, holding that bill of exceptions must be settled by the trial judge in the presence of the parties or after proper notice to adverse party and must thereafter be signed by such judge.

Requisites of record on appeal.

Cited in *Fargo v. Palmer*, 4 Dak. 232, 29 N. W. 463, holding that abstract of transcript on appeal should contain only matters appearing in the record and should be a true, concise abridgement thereof, showing sufficient to permit of a complete understanding of the case and the facts relied on for reversal and also that all the necessary steps to perfect the appeal and present the errors complained of have been complied with.

Conveyance in fraud of creditors.

Cited in *Kansas Moline Plow Co. v. Sherman*, 3 Okla. 204, 32 L.R.A. 33, 41 Pac. 623, holding that the transfer of property by a vendor to defraud his creditors is also fraudulent as against the vendee, if he is in a position where a reasonably prudent man could and would have known of the fraudulent intent of the vendor; *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, holding that a petition alleging that the defendant, a chattel mortgagor, sold the mortgaged property "fraudulently for the purpose of hin-

dering, delaying, and defrauding the creditors of" said mortgagor, cannot be held to allege facts showing good faith on the part of defendant.

Effect of failure to record conveyance.

Cited in *Rosenbaum v. Foss*, 7 S. D. 83, 63 N. W. 538, holding a mortgage of all one's "right, title, and interest in and to" certain mortgaged property not hostile to a prior unrecorded mortgage thereon, of which the second mortgagee had no knowledge.

Cited in note in 16 L.R.A. (N.S.) 1075, on precedence as between conveyance for nominal or inadequate consideration and senior unrecorded conveyance.

What constitutes notice of rights in property.

Cited in *Betts v. Letcher*, 1 S. D. 182, 46 N. W. 193, holding that actual, open, and notorious possession of land is constructive notice to the purchaser of all the rights of the occupant in the land.

Cited in note in 23 Am. Dec. 49, on notice from circumstances putting one on inquiry.

Who are good faith purchasers.

Cited in *Hentig v. Redden*, 35 Kan. 471, 11 Pac. 398, raising but not deciding the question whether a purchaser under a quitclaim deed is entitled to the rights of a bona fide purchaser without notice.

1 DAK. 403, CLAY COUNTY v. SIMONSEN, 46 N. W. 592, Re-affirmed on later hearing in 2 Dak. 112, 2 N. W. 260.

What acts covered by official bond.

Cited in *Milwaukee v. United States Fidelity & G. Co.* 144 Wis. 603, 129 N. W. 786, holding that bond of clerk of Milwaukee municipal court covered his acts as ex officio clerk of district court.

Liability of custodian of public funds.

Cited in *Cameron v. Hicks*, 65 W. Va. 484, 64 S. E. 832, 17 A. & E. Ann. Cas. 926, holding that custodian of public fund is liable therefor as an insurer and only loss by act of God, or the public enemy will relieve him from liability.

Cited in notes in 67 Am. Dec. 366, 368, on what will exonerate public officers from payment of money once in their custody; 91 Am. St. Rep. 520, 527, 579, on acts for which sureties on official bonds are liable.

When appeal will lie.

Cited in *Harris Mfg. Co. v. Walsh*, 2 Dak. 41, 3 N. W. 307, holding that appeal will not lie from order sustaining demurrer to part of answer without any judgment thereon and before any final determination of the litigation upon the parties; *Pierre Waterworks Co. v. Hughes County*, 5 Dak. 145, 37 N. W. 733, holding that an appeal to the district court will lie from a decision of the board of county commissioners sitting as a board of equalization, under a statute authorizing an appeal from all decisions of the "board of county commissioners" on matters properly before them.

Time to fill vacancy in office.

Cited in *Stutsman County v. Mansfield*, 5 Dak. 78, 37 N. W. 304, holding

that vacancy created by county treasurer's refusal to qualify after re-election must be immediately filled by county commissioners.

1 DAK. 437, TERRITORY EX REL. McKINNIS v. HAND, 46 N. W. 685.

1 DAK. 451, TERRITORY v. BANNIGAN, 46 N. W. 597.

Instructions as to reasonable doubt.

Cited in *Lovett v. State*, 30 Fla. 142, 17 L.R.A. 705, 11 So. 550, holding erroneous an instruction on a trial for murder, that "where the law says that you must be satisfied beyond a reasonable doubt before you can convict, it means that your mind must be so thoroughly convinced that you would act upon the conviction in matters of the highest concern and importance to yourself." *State v. Martin*, 29 Mont. 273, 74 Pac. 725, holding instruction defining "moral certainty" not essential where definition of "reasonable doubt" was given; *State v. Reddington*, 7 S. D. 368, 64 N. W. 170, holding a charge dispensing with proof of premeditated design, and allowing a conviction on proof of an act dangerous to others and evincing a depraved mind regardless of human life, reversible error; *State v. Montgomery*, 9 N. D. 405, 83 N. W. 873, holding that, although an instruction defining reasonable doubt as a doubt that a reasonable man may "present and explain" is open to criticism, it is not prejudicial to the accused.

Cited in note in 48 Am. St. Rep. 577, on reasonable doubt.

1 DAK. 471, TERRITORY v. TAYLOR.

What constitutes libel.

Cited in note in 15 Am. St. Rep. 338, on newspaper libel.

1 DAK. 479, TERRITORY v. TAYLOR.

Affidavits of jurors to impeach verdict.

Cited in *State v. Forrester*, 14 N. D. 335, 103 N. W. 625, holding affidavits that they misunderstood charge not receivable to impeach verdict; *Coughran v. Markley*, 15 S. D. 37, 87 N. W. 2, holding that the affidavits upon which an order for publication of summons issues, must be based on the personal knowledge of the affiant; information and belief are insufficient.

Cited in note in 24 Am. Dec. 478, on affidavits of jurors to impeach their verdict.

1 DAK. 500, ANONYMOUS.

Sufficiency of affidavit for publication.

Cited in *Iowa State Sav. Bank v. Jacobson*, 8 S. D. 292, 66 N. W. 453, holding sufficient, affidavit for service by publication alleging deponent's own knowledge that defendant had removed from state some two or three years before and upon information and belief that he is not now a resident of the state but is a resident of a specified city in another state engaged in designated business and cannot after diligent search be found

within state, and that deponent is informed by specified persons that they have connections with him and that he resides in the city named.

1 DAK. 503, SODERBERG v. SODERBERG.

1 DAK. 504, WHALEY v. CARTER.

1 DAK. 505, HOYT v. WILLIAMS.

1 DAK. 506, CHAMBERLAIN v. HUTCHINS.

1 DAK. 509, FLAHERTY v. GWINN, 12 MOR. MIN. REP. 605.

Location of mining claim.

Cited in *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036, holding that the failure of the locator of a mining claim to post two notices on his claim as required by a local regulation will not work a forfeiture of his title, when the rule does not also provide that noncompliance therewith will work a forfeiture of the claim.

Cited in note in 7 L.R.A.(N.S.) 777, 866, on location of mining claim.

Mining rights.

Cited in note in 63 Am. Dec. 104, on mining rights.

Dak. Rep.—2.

NOTES

ON THE

DAKOTA REPORTS.

CASES IN 2 DAK.

2 DAK. 1, WAMBOLE v. FOOTE, 2 N. W. 229.

Contracts of infants.

Cited in note in 18 Am. St. Rep. 575, 580, 583, 630, on contracts of infants.

Power of attorney by married woman.

Cited in notes in 84 Am. St. Rep. 763, 771, on power of attorney by married woman; 110 Am. St. Rep. 862, on revocation of power of attorney by marriage of principal.

Fatal defects in certificate of acknowledgment.

Cited in note in 108 Am. St. Rep. 528, 565, as to when defects in certificate of acknowledgment are fatal.

Time of publication of tax list.

Cited in *Cadman v. Smith*, 15 Okla. 633, 85 Pac. 346, holding that where statute requires delinquent tax list to be published three consecutive weeks, it means for twenty-one days, and sale held less than twenty-one days from first publication is void.

Validity of tax deed.

Cited in *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227, holding void and incapable of validation by statute, tax deed issued on sale, of which insufficient notice was given; *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570, holding tax deed void on its face, where it shows that two distinct and separate town lots required by statute to be assessed strictly were sold at public auction for gross consideration.

Who may purchase at tax sale.

Cited in *Burns v. Lewis*, 86 Ga. 591, 13 S. E. 123, holding that one in possession of realty under color of title and claim of right, who permits

it to be sold for taxes as the property of a former occupant having neither title nor possession, under a general fieri facias not specifying any particular property, cannot strengthen his title by being the purchaser at such sale.

Cited in note in 75 Am. St. Rep. 250, on who may purchase and enforce a tax title.

What property is taxable.

Cited in note in 11 L.R.A. 818, on taxability of all property not specially exempted.

2 DAK. 29, COLE v. CADY, 3 N. W. 322.

2 DAK. 39, GOLD STREET v. NEWTON, 3 N. W. 311.

Service of notice of appeal.

Cited in *Hoffman v. Bank of Minot*, 4 N. D. 473, 61 N. W. 1031, holding service of notice of appeal on clerk of court below jurisdictional; *Brooks v. Bigelow*, 9 S. D. 179, 68 N. W. 286, holding that notice of appeal must be served within the time and in the manner provided by the South Dakota statutes in order to perfect the appeal; *Minneapolis Threshing Mach. Co. v. Skau*, 10 S. D. 636, 75 N. W. 199, holding that an appeal from a justice's judgment will be dismissed in the absence of proof, in the record, of service of notice of appeal; *Hoffman v. Bank of Minot*, 4 N. D. 473, 61 N. W. 1031, holding that the appearance of respondent does not waive failure to serve notice of appeal; *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101, holding that a stipulation of parties waiving notice of appeal and bond for costs on appeal will not confer jurisdiction upon the appellate court, when the notice of appeal prescribed by statute is essential thereto.

Waiver by parties as affecting jurisdiction of court.

Cited in *Ayers, W. & R. Co. v. Sundback*, 5 S. D. 31, 58 N. W. 4, in which the court expresses the opinion, without deciding, that, though a defendant may by voluntary appearance waive service of the summons upon him, he cannot waive the issuance of the summons; *Hazeltine v. Browne*, 9 S. D. 351, 69 N. W. 579, holding neither giving of stipulation extending time for filing abstract on appeal nor filing of brief by respondent a waiver of appellant's failure to have the sureties on his undertaking justify within the time required by statute; *Chamberlain v. Hedger*, 10 S. D. 290, 73 N. W. 75, holding that an appeal will be dismissed where no judgment has been properly entered notwithstanding stipulation by attorneys waiving all regularities in perfecting an appeal; *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221, holding that action for conversion in justice's court cannot by stipulation of parties be transferred to circuit court before trial; *Bright v. Juhl*, 16 S. D. 440, 93 N. W. 648, holding that where time for appeal has expired, trial court cannot grant new trial, though parties have stipulated that motion for new trial may be heard.

2 DAK. 41, HARRIS MFG. CO. v. WALSH, 3 N. W. 307.**What orders are appealable.**

Cited in *Jung v. Myer*, 11 N. M. 378, 68 Pac. 933, holding void, territorial statute giving supreme court jurisdiction to hear appeal from interlocutory order, where organic act gives such court power to hear appeals from final judgments only; *Cole v. Cady*, 2 Dak. 29, 3 N. W. 322, holding not appealable order for injunction having force of writ of restitution restoring applicant to possession of mining property from which he has been ousted by force, violence, or fraud where parties are left to their legal rights on all other questions than right of possession.

Criticized as obiter in *Greeley v. Winsor*, 1 S. D. 618, 48 N. W. 214, holding Dakota Organic Act allowing appeals in all cases from "final decisions" not violated by act authorizing appeals from order sustaining or overruling a demurrer.

When judgment is a bar.

Cited in *Pearson v. Post*, 2 Dak. 220, 9 N. W. 684, holding an order on which no judgment is entered sustaining a demurrer to a complaint and giving plaintiff leave to serve an amended complaint not a bar to a further prosecution of the action.

Inclusion of one thing as exclusion of other.

Distinguished in Territory on the Information of *French v. Cox*, 6 Dak. 501, appx. holding the governor authorized to appoint trustees of public institutions without the advice and consent of the legislative council to fill vacancies occasioned by the removal of prior incumbents, notwithstanding provision of organic act authorizing governor to fill vacancy which happens from "resignation or death."

2 DAK. 46, JANDT v. SOUTH, 47 N. W. 779.**Attorney's fees as element of damages.**

Cited in *Gregory v. Woodberry*, 53 Fla. 566, 43 So. 504, holding attorney's fees not recoverable as element of damages in action of replevin, where not specially made such by statute; *Hegar v. De Groat*, 3 N. D. 354, 56 N. W. 150, holding the amount expended for attorneys' fees in an action to recover land not allowable as damages.

Cited in notes in 8 Am. St. Rep. 160, on attorney's fees as element of damages; 28 L.R.A.(N.S.) 763, on expense of bringing suit as part of compensatory damages recoverable in tort action.

Sufficiency of finding of fact.

Cited in *McKenna v. Whittaker*, 9 S. D. 442, 69 N. W. 587, holding a finding on each material issue of fact involved in the action, instead of a recital of merely evidential facts or of the language of the pleading, necessary.

2 DAK. 71, UHLIG v. GARRISON, 2 N. W. 253.**Right to sue on unlawful contract.**

Cited in *American Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 9 L.R.A.(N.S.) 1176, 108 N. W. 15, holding that foreign corporation cannot main-

tain action on contract entered into before the corporation had complied with statute governing right of such corporation to do business in the state; *Conrad Seipp Brewing Co. v. Green*, 23 S. D. 619, 122 N. W. 662, holding contract for sale of beer at wholesale, in violation of statute void, and price not recoverable.

— **Indian land leases.**

Cited in *Megreedy v. Macklin*, 12 Okla. 666, 73 Pac. 293, holding that action cannot be maintained on sub lease of Indian lands, not authorized by Department of Interior.

— **What constitutes estoppel.**

Cited in *Melody v. Great Northern R. Co.* 25 S. D. 606, 30 L.R.A. (N.S.) 568, 127 N. W. 543, to point that estoppel cannot be founded upon illegal act.

— **To deny landlord's title.**

Cited in *Mayes v. Cherokee Strip Live Stock Asso.* 58 Kan. 712, 51 Pac. 215, holding that in a suit for rent due under a lease of lands patented to the Cherokee Indians, the lessee may deny his lessor's title and question the legality of a lease which is void as contrary to public policy and in violation of U. S. Rev. Stat. § 2116.

— **Title to mining ground on Indian reservation.**

Cited in *French v. Lancaster*, 2 Dak. 346, 47 N. W. 395; *Golden Terra Min. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98; *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426,—holding that no title to mining ground within the Great Sioux reservation could be acquired prior to February 28, 1877.

Cited in note in 7 L.R.A. (N.S.) 787, on location of mining claim.

— **Following decision of governor.**

Cited in *Territory on the Information of French v. Cox*, 6 Dak. 501, appx., holding that the construction put by the governor on a statute empowering him to remove officers under certain conditions will be followed by the courts if possible without violence to its language.

2 DAK. 99, UHLIG v. GARRISON, 2 N. W. 258.

2 DAK. 112, CLAY COUNTY v. SIMONSEN, 2 N. W. 260.

2 DAK. 114, CLEVINGER v. MUTUAL L. INS. CO. 3 N. W. 313.

— **Power of insurance agent to bind company.**

Cited in *Dickinson v. National Life & Trust Co.* 20 S. D. 437, 107 N. W. 537, holding insurance company not bound by agreement of agent signed by him individually but not authorized by company, where policy provided that company would not be bound by any agreements with agent unless in writing and submitted to the company.

— **By waiver of provision in policy.**

Cited in *Ruthven Bros. v. American F. Ins. Co.* 92 Iowa, 316, 60 N. W. 663, holding that a provision in a fire insurance policy is valid, which provides that no officer, agent, or other representative of the company shall

have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto.

Cited in notes in 1 L.R.A. 222, on terms and conditions in insurance policy; how waived; 107 Am. St. Rep. 101, on waiver of provisions of nonwaiver or written waiver of conditions and forfeitures in policies; 16 L.R.A. (N.S.) 1180, on parol-evidence rule as to varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

Distinguished in *Burnham v. Greenwich Ins. Co.* 63 Mo. App. 85, holding that an insurance agent with general power to solicit and consummate insurance contracts may orally waive a provision in a policy issued by him requiring the assent to further insurance to be in writing, notwithstanding a further provision that such condition shall only be waived in writing indorsed on the policy.

Powers of mutual insurance company.

Cited in *Robison v. Wolf*, 27 Ind. App. 683, 62 N. E. 74, holding that a mutual insurance company cannot lawfully contract to make one who has paid a full annual premium a participant in a "special renewal dividend, consisting of 5 per cent of the gross premiums on all insurance in force written in the state of Indiana for ten years."

Cited as obiter in *Muller v. State L. Ins. Co.* 27 Ind. App. 45, 60 N. E. 958, holding that mutual life insurance company may lawfully contract with a policy holder that, "in consideration of his favorable influence and good will and of his having paid a full annual premium on a policy of \$5,000 insurance in said company" he is selected as one of 500 policy holders, each to be insured for a like amount, to participate in a special renewal commission dividend which was to be paid from the expense fund of the company, which fund was to be provided in a manner therein specified, the said dividends to continue as long as the policy remained in force.

Notice to insurance agent as notice to company.

Cited in *Taylor v. State Ins. Co.* 98 Iowa, 521. 60 Am. St. Rep. 210, 67 N. W. 577, holding that notice to an agent is not notice to the insurer that additional insurance has been placed upon a risk contrary to the conditions of its policy, when such agent was not authorized to act for the company in waiving any condition in the policy and it was not his duty to supervise risks or otherwise act for the company after the policy was issued; *Northern Assur. Co. v. Grand View Bldg. Asso.* 41 C. C. A. 207, 101 Fed. 77 (dissenting opinion), the majority holding that an insurance company is estopped from pleading prior insurance as a defense to liability, under a policy which contained a condition against same, unless with the consent of the insurer indorsed thereon, but which, without such indorsement, was delivered by an agent who had authority to make contracts to countersign and issue policies and collect premiums thereon, and who knew of the prior insurance, the policy being void from the time of delivery if at all.

2 DAK. 125, TERRITORY v. GAY, 2 N. W. 477.**Presence of accused at criminal trial.**

Cited in *State ex rel. Kotilinic v. Swenson*, 18 S. D. 196, 99 N. W. 1114; *State v. Pearce*, 19 S. D. 75, 102 N. W. 222, holding that in trial for felony defendant must be personally present at times prescribed by statute, but his presence is not essential at any other times; *Miller v. State*, 29 Neb. 437, 45 N. W. 451, holding that the accused need not be present at the argument of a motion to quash the information, a demurrer to the information, a plea in abatement, or a motion for a continuance; *Ward v. Territory*, 8 Okla. 12, 56 Pac. 704, holding that he need not be present when a motion for a new trial or when a motion in arrest of judgment is argued and passed upon by the trial court; *State v. Woolsey*, 19 Utah, 486, 57 Pac. 426, holding that he need not be present at the argument and overruling of a demurrer to an indictment; *Wood v. State*, 4 Okla. Crim. Rep. 436, 112 Pac. 11, holding personal presence of accused not necessary at times other than those prescribed by statute.

Prejudicial errors as to instructions.

Cited in *United States v. Adams*, 2 Dak. 305, 9 N. W. 718, holding that an instruction that if the court commits an error it may be corrected on appeal, but that if the jury errs in rendering a verdict of acquittal there is no remedy, is not reversible error, where defendant's guilt is so clearly shown as to justify a direction to find defendant guilty if the jury believe the undisputed evidence; *Crawford v. People*, 12 Colo. 290, 20 Pac. 769, holding it error for the court to refuse in a trial for murder to instruct upon the subject of voluntary manslaughter, when there is not an entire absence of evidence tending to establish the crime of manslaughter, because of that given by the defendant when upon the stand as a witness, however incredible or unreasonable that testimony may seem; *State v. Witherow*, 15 Wash. 562, 46 Pac. 1035, holding it error without prejudice where erroneous instructions are given by the trial court, but the only testimony introduced in the case is upon the part of the state, and there is no substantial conflict in the testimony either in the direct or cross-examinations, and the proof conclusively shows that the defendant is guilty of the crime with which he was charged.

2 DAK. 149, GOLD STREET v. NEWTON, 3 N. W. 329.**Time for settling bill of exceptions.**

Cited in *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467, 11 N. W. 497, holding that time of settlement of bill of exceptions of case should appear affirmatively and not be left to presumption.

Burden of proving irregularity.

Cited in *Redfield School Dist. No. 12 v. Redfield Independent School Dist. No. 20*, 14 S. D. 229, 85 N. W. 180, holding that the burden of proving the falsity of a statement in an order annexing adjacent territory to a city for educational purposes, that a petition had been presented, signed by a majority of the electors, rested upon the one asserting it, though the

petition itself did not state that the persons signing it constituted a majority of such electors.

2 DAK. 155, TERRITORY v. STONE, 4 N. W. 697.

Evidence in prosecution for keeping house of ill fame.

Cited in *State v. Hendricks*, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93; *Com. v. Murr*, 7 Pa. Super. Ct. 391, 15 Lanc. L. Rev. 243, 42 W. N. C. 264,—holding evidence of general reputation of house alleged to have been kept as house of ill fame admissible; *State v. Harris*, 14 N. D. 501, 105 N. W. 621, on admissibility of evidence as to reputation of house during certain months.

Cited in notes in 50 Am. Rep. 210, on evidence of reputation as house of ill fame; 20 L.R.A. 611, on evidence and instructions as to character of accused.

Liability of one leasing house for use as house of ill fame.

Cited in *State v. Des Moines Union R. Co.* 137 Iowa, 570, 115 N. W. 232, on liability of landlord who leases house for use as house of ill fame, as an aider and abettor in the offense.

Meaning of "permit."

Cited in *Larson v. Christianson*, 14 N. D. 476, 106 N. W. 51, holding that "permitting" house to be used for maintaining a nuisance means allowing such use with knowledge or notice thereof; *State v. Atlantic Coast Line R. Co.* 149 N. C. 470, 62 S. E. 755 (dissenting opinion), on meaning of "permitted."

Sufficiency of assignment of error.

Cited in *Bill v. Klaus*, 4 Dak. 328, 30 N. W. 171, holding that assignments of error so general and indefinite as to necessitate examination of another case to ascertain points presented will not be considered on appeal.

2 DAK. 175, PARLIMAN v. YOUNG, 4 N. W. 139, 711.

Necessity for best evidence.

Cited in note in 11 Eng. Rul. Cas. 506, on admissibility of secondary evidence.

Necessity for pleading estoppel.

Cited in note in 27 Am. St. Rep. 347, on necessity for pleading estoppel.

Effect of treating issue as sufficiently raised by pleadings.

Cited in *Bank of Stockham v. Alter*, 61 Neb. 359, 85 N. W. 300, holding that where in an action to reach the proceeds of the sale of mortgaged property, applied by the defendant on a note secured by another mortgage, the makers intervene to avoid the note for the amount claimed to be due, the issue thus raised as to the amount due is not barred by the running of the statute of limitations during trial, although the plaintiff did not specially plead the liability of the interveners and pray a recovery as to them until after the running of the statute against the enforcement of said liability in an independent action.

What constitutes an estoppel in pais.

Cited in *Eickelberg v. Soper*, 1 S. D. 563, 47 N. W. 953, holding an attor-

ney who procured certain judgments estopped by a reply in the negative in answer to a question by one about to purchase lands on which such judgments were apparent liens whether they were such in fact; *Burke v. Utah Nat. Bank*, 47 Neb. 247, 66 N. W. 295, holding that to constitute an estoppel in pais, the conduct of the party estopped must have been such as to warrant the other party in acting on the belief that the facts were as indicated by such conduct,—he must so have believed and acted.

Effect of subsequently giving substance of instructions refused.

Cited in *State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 A. & E. Ann. Cas. 87, holding refusal of instructions substantially covered by those given not reversible error.

2 DAK. 168, TERRITORY v. COUK, 47 N. W. 395.

Admissibility of declarations of deceased in prosecution for homicide.

Cited in *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, holding admissible evidence of statements of deceased to his wife shortly before he was killed as to where he was going and for what purposes.

2 DAK. 169, TERRITORY EX REL. HALL v. BRAMBLE, 5 N. W. 945.

Rights of heir pending administration.

Cited in *Lewon v. Heath*, 53 Neb. 707, 74 N. W. 274, holding that an heir may, during the pendency of administration, maintain ejectment for the possession of land of which the intestate died seised, unless the administrator has exercised the option to take possession for certain purposes given him by Neb. Comp. Stat. 1897, chap. 23, § 302; *Clark v. Bundy*, 29 Or. 190, 44 Pac. 282, holding that the appointment of an administrator does not suspend the running of the statute of limitations against an action in ejectment in favor of the heir of the decedent.

Distinguished in *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648, holding that an heir at law has no right of possession which will entitle him to maintain ejectment until administration is had of the estate.

Rights of children in homestead.

Cited in note in 56 L.R.A. 65, on rights of a child or children in homestead of parent.

2 DAK. 212, TERRITORY v. SCOTT, 6 N. W. 435.

Necessity for negating exceptions in statutes defining crimes.

Referred as to leading case in *Smythe v. State*, 2 Okla. Crim. Rep. 286, 101 Pac. 611, holding it unnecessary to negative exception in indictment under act making it unlawful "to sell, give away, barter, or otherwise furnish, except as in this act provided, any spirituous, vinous, fermented or malt liquors."

Cited in *Ex parte Hornef*, 154 Cal. 355, 97 Pac. 891, holding indictment for practicing dentistry without license sufficient without negating proviso that act did not apply to such as were practicing at time act was

passed; *Johnson v. People*, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133, holding that indictment need negative only such exceptions in statute defining a crime, as are descriptive of the offense; *State v. Donaldson*, 12 S. D. 259, 81 N. W. 299, holding that indictment for keeping saloon open on Sunday need not negative exception in statute as to drug stores; *American Button Hole & Overseaming Sewing Mach. Co. v. Moore*, 2 Dak. 280, 8 N. W. 131, holding that an exception in a subsequent clause or section of a statute need not be pleaded by the one claiming under the statute; *People v. Phippin*, 70 Mich. 6, 37 N. W. 808, holding that a complaint for practising medicine contrary to statute is sufficient, although it does not negative an exception found in the statute subsequent to the enacting clause; *People v. Pendleton*, 79 Mich. 317, 44 N. W. 615, holding that to warrant a conviction under Mich. Laws 1897, No. 129, providing "that it shall be unlawful for any officer, except officers of peace and night watches, legitimately employed as such, to go armed with a" specified or other offensive and dangerous weapon or instrument concealed upon his person, the exception, being in the enacting clause, must be proved as well as pleaded by the state; *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432, holding that under a statute providing in § 1 that it shall be unlawful for any person to bear concealed upon his person any deadly weapon; in § 2 for the punishment of violators, and in § 3 that "this act shall not apply to peace officers in the discharge of their official duties," the exception in said § 3 is not a part of the definition of the offense, and an indictment which does not state the exception in said § 3 is sufficient; *Young v. Territory*, 8 Okla. 525, 58 Pac. 724; *Parker v. Territory*, 9 Okla. 109, 59 Pac. 9, holding that under Okla. Laws 1895, p. 104, defining rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances;" etc., the clause "not the wife of the perpetrator" is so incorporated with, and in such a part of, the definition or description of the offense, that an indictment is not sufficient which does not negative such exception or provision.

Cited in note in 94 Am. Dec. 256, on charging crime in language of statute.

2 DAK. 220, PEARSON v. POST, 9 N. W. 684, Affirmed in 108 U. S. 418, 27 L. ed. 774, 2 Sup. Ct. Rep. 799.

Order sustaining demurrer as bar.

Cited in *Connor v. Corson*, 13 S. D. 550, 83 N. W. 588, holding order sustaining demurrer to complaint not bar to subsequent prosecution on new complaint within time allowed.

Evidence of surrounding circumstances.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding that under statute contract of guaranty may be explained by reference to circumstances under which it was made.

2 DAK. 249, EVERETT v. BUCHANAN, 6 N. W. 439, 8 N. W. 31.

Sufficiency of complaint in action in claim and delivery.

Cited in *Kierbow v. Young*, 20 S. D. 414, 8 L.R.A. (N.S.) 216, 107 N. W. 371, 11 A. & E. Ann. Cas. 1148, holding complaint insufficient where it failed to allege that plaintiff was the owner of the property, or had a special interest therein or was entitled to possession.

Title to mortgaged chattels.

Cited in *Edmission v. Drumm-Flato Commission Co.* 13 Okla. 440, 73 Pac. 958, holding that mortgagor has title and right to possession of mortgaged chattels until condition broken, when mortgagee may take possession but only for foreclosure and sale.

Conversion by chattel mortgage.

Cited in *Lovejoy v. Merchant's State Bank*, 5 N. D. 623, 67 N. W. 956, holding sale of mortgaged chattels by first mortgagee after taking possession at a private sale without foreclosure a wrongful conversion of the property extinguishing the mortgage lien; *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372, holding attempted foreclosure of chattel mortgage without substantial compliance with statute a conversion.

Validity of chattel mortgage.

Distinguished in *Lane v. Starr*, 1 S. D. 107, 45 N. W. 212, holding that a provision in a chattel mortgage authorizing the mortgagor to remain in possession and sell the property as agent of the mortgagee did not render it void as to creditors.

What is a conversion and who may sue for same.

Cited in notes in 9 N. D. 631, on who may maintain trover; 9 N. D. 632, on what amounts to conversion.

Remedy of pledgee.

Cited in note in 79 Am. Dec. 502, on remedy of pledgee.

2 DAK. 276, FRENCH v. LANCASTER, 9 N. W. 716.

Necessity for specification of errors.

Cited in *Caulfield v. Bogle*, 2 Dak. 464, 11 N. W. 511, holding allegation of error in decision of the court on which a motion for new trial is based and a demand for reversal must specify the error.

What transcript of evidence should contain.

Cited in *Tolman v. New Mexico & D. Mica Co.* 4 Dak. 4, 22 N. W. 505, holding that appellate court will not investigate a voluminous transcript of evidence where neither the abstract assignments of error nor bill of exceptions calls attention to particular portions thereof; *Fargo v. Palmer*, 4 Dak. 232, 29 N. W. 463, holding that abstract of transcript on appeal should contain only matters appearing in the record and should be a true, concise abridgment thereof, showing sufficient to permit of a complete understanding of the case and the facts relied on for reversal and also that all the necessary steps to perfect the appeal and present the errors complained of have been complied with.

Conclusiveness of verdict.

Cited in *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1, holding that verdict on substantially conflicting evidence will not be disturbed on appeal.

2 DAK. 260, AMERICAN BUTTON HOLE & OVERSEAMING SEWING MACH. CO. v. MOORE, 8 N. W. 131.**Rights of foreign corporations.**

Followed in *Cooper v. Ft. Smith & W. R. Co.* 23 Okla. 139, 99 Pac. 785, holding that foreign corporation has right to sue on contract though it has not complied with statute governing its right to do business in the state.

Cited in *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544, holding contracts by foreign corporation before compliance with statutory requirements not invalid for that reason; *Fuller & J. Mfg. Co. v. Foster*, 4 Dak. 329, 30 N. W. 166, sustaining right of foreign corporation to sue in absence of express legislation to contrary.

Cited in note in 24 L.R.A. 289, on recognition or exclusion of foreign corporations.

Mode of setting up noncompliance with statute as defense.

Cited in *Northern Assur. Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226, holding that where failure of foreign corporation to comply with statute does not appear on the face of the complaint, it cannot be raised by demurrer; *S. C. Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135, holding that the legal existence and powers of a plaintiff corporation are more properly tested by a demurrer, based upon the ground that the plaintiff has no capacity to sue, than by special demurrer to the first cause of action on the ground that it is ambiguous, unintelligible, and uncertain because it does not show the place, purpose, and objects of the plaintiff's incorporation, or where it carries on or transacts any kind of business whatever; *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931, holding that an assignee of a foreign corporation need not show compliance with the statutory conditions for the transaction of business within the state, but that noncompliance, if material, is defensive; *Keokuk Falls Improv. Co. v. Kingsland & D. Mfg. Co.* 5 Okla. 32, 47 Pac. 484, holding that a complaint is not demurrable because it fails to show affirmatively a compliance with Okla. Laws 1890, art. 20, chap. 18, adopted from and containing the provisions of Dak. Civ. Code, §§ 567-569.

Granting leave to amend on remitting case to lower court.

Cited in *Greely v. McCoy*, 3 S. D. 624, 54 N. W. 659, holding that appellate court may, on sustaining a demurrer to the complaint, grant plaintiff leave to amend; *Evans v. Hughes County*, 4 S. D. 33, 54 N. W. 1049, holding that supreme court may, on remitting a case, direct trial court to amend pleading.

2 DAK. 292, UNITED STATES v. BEEBE, 11 N. W. 505.**Mode of selecting jurors and grand jurors.**

Cited in *United States v. Kuntze*, 2 Idaho, 480, 21 Pac. 407, holding

that in criminal prosecution by the United States for crime arising under Federal statute, venire may issue to the United States marshal to summon jurors from the district at large; *United States v. Kuntze*, 2 Idaho, 480, 21 Pac. 407, holding that in the absence of statutory provision for the selecting or summoning of grand and petit jurors for the trial in the district court of cases arising under the laws and Constitution of the United States, the marshal may select jurors from the body of the district under open venire directed to him, as at common law; *Territory v. Murray*, 7 Mont. 251, 15 Pac. 145, holding that territorial courts are not within U. S. Rev. Stat. § 725 (U. S. Comp. Stat. 1901, p. 583), giving the United States courts power to punish certain contempts of their authority; *State v. Hayes*, 23 S. D. 596, 122 N. W. 652, holding directing sheriff to summon forthwith twenty-four citizens of county, possessing qualifications for jurors, proper method of drawing new jury upon discharge of panel; *Cathey v. Seattle Electric Co.* 58 Wash. 176, 108 Pac. 443, holding that in absence of statutory provision common law method of procuring jurors may be resorted to.

Cited in note in 12 Am. St. Rep. 903, on summoning and drawing grand jurors.

Following common law rule.

Cited in *State v. Severine*, 2 S. D. 238, 49 N. W. 1056, holding that the common law must be looked to for guidance as to the requisites and enforcement of an information, where the form and substantial particulars are not prescribed by statute.

Sufficiency of indictment.

Cited in *United States v. Spaulding*, 3 Dak. 85, 13 N. W. 357, 538, holding proper, recital in caption of indictment for crime against United States that indictment is found in and for district court of specified judicial district sitting for trial of cases arising under laws of United States.

Judicial notice as to location of land.

Cited in *Lyon v. Plankinton Bank*, 15 S. D. 400, 89 N. W. 1017, by Fuller, J., concurring specially in a judgment setting aside a fraudulent mortgage, taking the ground that, oral evidence having been erroneously introduced to show that the description of property in the deed as located in "Minnesota" was intended to cover property located in South Dakota, the court could not judicially notice the fact that the description applied to no land in the state of Minnesota; *Kreuger v. Schultz*, 6 N. D. 310, 70 N. W. 269, holding that courts will take judicial notice that lands within Indian country were so located and of the date when Indian right of occupancy was terminated by treaty.

Cited in note in 82 Am. St. Rep. 445, on judicial notice of localities and boundaries.

2 DAK. 305, UNITED STATES v. ADAMS, 9 N. W. 718.

What constitutes embezzlement.

Cited in note in 87 Am. St. Rep. 28, on embezzlement.

Intent as element of crime.

Cited in note in 11 L.R.A. 811, 812, on intent as an element of crime.
Prejudicial error in instructions.

Cited in *Territory v. Keyes*, 5 Dak. 244, 38 N. W. 440, holding instruction on criminal trial that a higher court will protect defendant's rights if the court makes errors not prejudicial error; *Young v. Harris*, 4 Dak. 367, 32 N. W. 97, holding that an instruction is not vitiated as a whole by the fact that a single sentence taken by itself might be considered erroneous, where the charge as a whole gives a full and correct statement of the law.

2 DAK. 332, TERRITORY EX REL. EISENMANN v. SHEARER, 8 N. W. 135.

Issuance of mandamus by district judge.

Cited in *Wenner v. Board of Education*, 25 Okla. 515, 106 Pac. 821, holding writ of mandamus signed and issued by judge of district court, valid.

When mandamus will lie.

Cited in *Cameron v. Parker*, 2 Okla. 277, 38 Pac. 14, holding that an incumbent of a public office who has been removed therefrom by the governor, may be compelled by mandamus to deliver the property and insignia of said office to his successor; *Driscoll v. Jones*, 1 S. D. 8, 44 N. W. 726, holding mandamus proper remedy by claimant of office to compel predecessor holding over to surrender books and other property of office.

Cited in notes in 98 Am. St. Rep. 885, on mandamus as proper remedy against public officers; 89 Am. Dec. 729, on law of mandamus; 31 L.R.A. 344, 348, on mandamus to compel surrender of office.

Time mandamus should issue.

Distinguished in *State ex rel. McGregor v. Young*, 6 S. D. 406, 61 N. W. 165, holding issuance of peremptory writ of mandamus by court before rendition of judgment as basis therefor, premature and irregular.

Mode of reviewing mandamus.

Cited in *Holden v. Haserodt*, 3 S. D. 4, holding that a judgment by a district judge a judge in his own circuit, granting a peremptory mandamus in another circuit, cannot be taken directly to the supreme court for review.

Effect of violation of criminal statute.

Cited in *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434, holding that a statutory provision making it criminal for the mortgagor to sell mortgaged chattels, but without punishing the buyer, does not prevent the title from passing to the purchaser if he did not aid the prohibited act.

2 DAK. 346, FRENCH v. LANCASTER, 47 N. W. 395.

Location of mining claim.

Cited in *Golden Terra Min. Co. v. Smith*, 2 Dak. 377, 11 N. W. 98; *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426,—

holding that title to mining ground within Great Sioux Reservation could not be acquired by acts of location or appropriation prior to February 28, 1877.

Cited in note in 7 L.R.A.(N.S.) 787, 788, on location of mining claim.

Judicial notice.

Cited in *Kreuger v. Schultz*, 6 N. D. 310, 70 N. W. 269, holding that courts will take judicial notice that lands within Indian country were so located and of the date when Indian right of occupancy was terminated by treaty.

Cited in notes in 89 Am. Dec. 690, on judicial notice; 4 L.R.A. 39, on judicial notice.

2 DAK. 347, NATION v. CAMERON, 11 N. W. 525.

Construction of pleading.

Cited in *Burke v. McDonald*, 2 Idaho, 339, 13 Pac. 351 (dissenting opinion), on ambiguities in pleading as being construed against pleader.

Cited in note in 9 N. D. 633, on pleading in actions for trover and conversion.

2 DAK. 365, NATIONAL BANK v. YANKTON COUNTY.

Length of legislative session.

Cited in *Cheyney v. Smith*, 3 Ariz. 143, 23 Pac. 680 (dissenting opinion), on sixty days for legislative session as meaning sixty consecutive days including Sundays.

Validity of territorial legislation.

Cited in *United States v. Jones*, 5 Utah, 552, 18 Pac. 233, holding that a territorial statute which grants to defendants jointly indicted the right to separate trials relates only to procedure, and does not curtail the jurisdiction of the court as fixed by the Federal statutes; *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386, holding valid a law imposing a gross-earnings tax, in the absence of an act of Congress annulling it, on the ground that power to pass such a law was delegated to the territorial legislature; *Utter v. Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 186, holding that Congress may validate bonds issued by a county which are void by reason of having been issued by the county in excess of its powers; *Stevenson v. Moody*, 2 Idaho, 260, 12 Pac. 902, holding that an act of the territorial legislature creating the office of assistant chief clerk to the legislature and fixing the amount of his salary violates U. S. Rev. Stat. § 1855, forbidding the enactment of any laws by which the officers of the legislature are paid any compensation other than that provided by the laws of the United States; *Hepworth v. Gardner*, 4 Utah, 439, 11 Pac. 566, holding that a territorial statute which deprives the plaintiff in an action in the territorial district court of the right to recover costs where his judgment does not exceed a stated amount, which costs he would have been entitled to had he sued in a justice's court, violates an act of Congress which gives the district court concurrent jurisdiction with justices of the peace; *Enright v. Grant*, 5 Utah, 334, 15 Pac. 268

where it was held that the provisions of the territorial code relating to supplementary proceedings are not exclusive so as to prevent a creditor from maintaining a suit in the nature of a creditor's bill, under U. S. Rev. Stat. § 1868, providing that the supreme court and district courts of every territory shall possess chancery as well as common-law jurisdiction, as the jurisdiction arising under such act of Congress cannot be abridged by the territory; *Brereton v. Miller*, 7 Utah, 426, 27 Pac. 81, where it was held that a territorial act declaring that there shall be but one action for the enforcement of any right secured by mortgage, and that the court may by its judgment direct a sale of mortgaged property, and if the proceeds are insufficient, enter a judgment for the deficiency, cannot abridge the chancery jurisdiction conferred by the organic act of Utah territory, so as to prevent the mortgagee from proceeding directly against the mortgagor to recover the amount of the debt secured without first foreclosing the mortgage; *People v. Daniels*, 6 Utah, 288, 5 L.R.A. 444, 22 Pac. 159, holding that under the act of Congress extending to territories power to legislate on all rightful subjects of legislation, the territorial power is limited to a reasonable and just exercise of the right, and an enactment is invalid where it attempts to extend the limits of a city so as to include ranches, and unoccupied lands 15 or 20 miles away, for the purpose of subjecting such lands to taxation; *Higbee v. Higbee*, 4 Utah, 19, 5 Pac. 693, holding that the granting of a divorce involves the exercise of judicial functions, and is not a proper subject for legislation under U. S. Rev. Stat. § 1851, extending the legislative power of territories to "all rightful subjects of legislation"; *Central Baptist Church v. Manchester*, 21 R. I. 357, 43 Atl. 845, holding that the legislature of a state can remedy a defective execution of powers of a municipal corporation which it creates; *Lincoln-Lucky & L. Min. Co. v. District Court*, 7 N. M. 486, 38 Pac. 590 (dissenting opinion), where the majority held that the act of the territorial legislature authorizing the removal of causes from the courts created by the territorial legislature to those created by Congress was invalid; *French v. Cox*, 6 Dak. 501, 528, Appx., holding that a territorial statute authorizing the governor to fill all vacancies in territorial offices is not in conflict with U. S. Rev. Stat. § 1858, authorizing the governor of any territory to fill a vacancy when it happens from resignation or death.

Qualified in Territory ex rel. *Smith v. Scott*, 3 Dak. 357, 20 N. W. 401, majority holding that an act of the territorial legislature creating a commission and empowering it to select a suitable location for the seat of government, is not an improper delegation of the power to fix the location of the capital vested by the organic act of the territory in the governor and legislative assembly.

Powers of Congress over territories.

Cited in *Re Baldwin*, 11 Sawy. 534, 27 Fed. 187, where it was said that the provisions of the U. S. Rev. Stat. § 5519, U. S. Comp. Stat. 1901, p. 3714, prescribing the punishment to be inflicted on persons conspiring for the purpose of depriving others of equal protection of the laws is valid so far as applicable to the territories, however it may be as regards its application to the people in the states, which latter question was the one

Dak. Rep.—3.

there involved; *Dunton v. Muth*, 45 Fed. 390, where it was said that while the United States circuit courts are at present confined to the states Congress has power to enlarge a circuit so as to include a territory; *People ex rel. Aspen M. & S. Co. v. Pitkin County Dist. Ct.* 11 Colo. 147, 17 Pac. 298, holding that the power of Congress to legislate for a territory ceases upon its admission into the Union as a sovereign state, when the right of local self-government passes to it; *Mackey v. Enzensperger*, 11 Utah, 154, 39 Pac. 546 (dissenting opinion), where the majority held that a statute of the territory of Utah permitting a verdict of the jury in civil cases upon the concurrence of nine or more members thereof does not conflict with the right to trial by jury as preserved by U. S. Const.; *Carter v. United States*, 1 Ind. Terr. 342, 37 S. W. 204, where it was held that Congress has the same power over the Indian tribes and the area occupied by them that it has over the territories; *Downes v. Parshall*, 3 Wyo. 425, 26 Pac. 994, where it was held that the power of Congress over the territories is absolute, and that it is not limited by the provision in the Federal Constitution granting Congress power to establish uniform laws on the subject of bankruptcy throughout the United States, so as to prevent it from authorizing a territory to enact a law of that character; *Ex parte Ortiz*, 100 Fed. 955, holding that the provisions of the Federal Constitution extend over the territories and all the domain of the United States including Porto Rico; *United States v. McMillan*, 165 U. S. 504, 41 L. ed. 805, 17 Sup. Ct. Rep. 398, holding that Congress in extending to the clerks of district courts of the territories the provisions of the statutes of the United States restricting both the sums of the fees to be received by the clerks and the maximum amount to be retained by them, thereby annulled the provisions of the territorial fee bill; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 764, holding that the act of U. S. March, 22, 1882, declaring that polygamists shall not be entitled to vote at any election in territories is a valid exercise of power by Congress, although it abridged the rights of electors acquired under previous laws; *Wenner v. Smith*, 4 Utah, 238, 9 Pac. 293, holding that the provisions of the Edmonds act making bigamists ineligible for election or appointment to any office in any territory of the United States were superior to the laws enacted by the territory of Utah; *Chapman v. Handley*, 7 Utah, 49, 24 Pac. 673, holding that the territorial act Utah, 1852, providing that illegitimate children and their mother inherit from the father, was annulled by the Federal anti-polygamy act, 1862, annulling all acts theretofore passed by the Utah legislature which establish, support, maintain, shield, or countenance polygamy; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 3, 34 L. ed. 481, 10 Sup. Ct. Rep. 803 (affirming 5 Utah, 361, 15 Pac. 473), holding that Congress has the power to revoke or annul the charter of the Church of Latter-Day Saints, acquired from the legislature of the territory of Utah; *Shively v. Bowlby*, 152 U. S. 48, 38 L. ed. 349, 14 Sup. Ct. Rep. 566, holding that Congress has the power to make grants of land below highwater mark of navigable rivers in the territories; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 622, holding that the provisions in the Federal Constitution relating to the right to trial by

jury apply to the territories of the United States; *Endleman v. United States*, 30 C. C. A. 186, 57 U. S. App. 6, 86 Fed. 456, holding that Congress may exclude intoxicating liquors from the territories; *Atlantic & P. R. Co. v. United States*, 76 Fed. 186, holding that Congress has the same power to regulate railroad charges or traffic in territories that a state has within its borders; *Kansas City S. R. Co. v. Arkansas Railroad Comrs.* 106 Fed. 353, holding that Congress has the exclusive power of regulating freight rates in territories, and that the statute of a state attempting to fix a rate of transportation from one point in a state to another, where a considerable part of the route of transportation lies through an adjoining territory, is as invalid as though the adjoining territory was a state.

What constitutes a territory of the United States.

Cited in *DeLima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 753, holding that Porto Rico became a territory of the United States by the ratification of the treaty of Paris, and subject to the control of Congress, and was not a foreign country within the meaning of the tariff laws of the United States; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 780, 788, holding that while Porto Rico by the treaty of cession became territory appurtenant to the United States, it did not become a part of it within the meaning of the provisions of the Federal Constitution requiring duties, imposts, and excises to be uniform throughout the United States.

2 DAK. 370, STEVENS v. GALE, 9 N. W. 99.

2 DAK. 372, GALLOWAY v. McLEAN, 9 N. W. 98.

Necessity for marking instructions as given or refused.

Cited in *Sutton v. Chicago & N. W. R. Co.* 14 S. D. 111, 84 N. W. 396, holding the modification of a correct instruction so as to incorrectly state the law, instead of marking it "refused," reversible error.

Distinguished in *State v. Hellekson*, 13 S. D. 242, 83 N. W. 254, holding court's failure to mark "refused" or "given" on requested instruction which was not changed not ground for reversal.

Sufficiency of exceptions to instructions.

Cited in *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723, holding that exception to "each of the instructions given . . . respectively" does not entitle appellant to review the general instructions given.

Cited in note in 99 Am. Dec. 124, 135, on instructions to jury and requisites to obtaining review.

Necessity for exceptions.

Cited in *Territory ex rel. Taylor v. Caffrey*, 8 Okla. 193, 57 Pac. 204, holding that the errors of a court in overruling a demurrer to the return or in rendering a judgment contrary to law will be corrected by the supreme court, although no exception was made thereto, when the said error is apparent upon the record proper, or the said judgment is upon its face contrary to law.

2 DAK. 374, GOLDEN TERRA MIN. CO. v. SMITH, 11 N. W. 97.**Location of mining claim.**

Cited in note in 7 L.R.A.(N.S.) 788, on location of mining claim.

2 DAK. 377, GOLDEN TERRA MIN. CO. v. SMITH, 11 N. W. 97.**Validity of mining location.**

Cited in *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428, holding location of mining claim of no effect where no discovery of ore has been made within its limits and outside of limits of other existing claim.

Cited in note in 7 L.R.A.(N.S.) 787, 789, on location of mining claim.

Requisites of record on appeal.

Cited in *St. Croix Lumber Co. v. Pennington*, 2 Dak. 467, 11 N. W. 497, holding that bill of exceptions or case lawfully settled signed and filed with the clerk before entry of judgment must be attached by the clerk to the judgment roll in proper order when it becomes a part thereof; *Fargo v. Palmer*, 4 Dak. 232, 29 N. W. 463, holding that abstract of transcript on appeal should contain only matters appearing in the record and should be a true, concise abridgment thereof, showing sufficient to permit of a complete understanding of the case and the facts relied on for reversal and also that all the necessary steps to perfect the appeal and present the errors complained of have been complied with.

Effect of loss or incompleteness of record.

Cited in note in 25 L.R.A.(N.S.) 863, on disposition of appeal where without fault of appellant record is lost or incomplete.

Immaterial findings as ground for reversal.

Cited in *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426, holding reversal not required by immaterial findings not bases of judgment supported by other sufficient findings.

2 DAK. 464, CAULFIELD v. BOGLE, 11 N. W. 511.**Sufficiency of assignments of error.**

Cited in *Franz Falk Brewing Co. v. Mielenz Bros.* 5 Dak. 136, 37 N. W. 728, holding insufficient assignment that court are neither "overruling and denying appellant's motion to set aside the verdict and for a new trial;" *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39, holding that assignment of error grouping several radically different questions alluded to in separate portions of charge, will not be considered on appeal; *Bush v. Northern P. R. Co.* 3 Dak. 444, 22 N. W. 508, holding assignments that the court erred in its judgment based on the verdict and in overruling the motion for new trial insufficient.

Conclusiveness of verdict or finding.

Cited in *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887, 17 Mor. Min. Rep. 59; *Phillip Best Brewing Co. v. Pillsbury & H. Elevator Co.* 5 Dak. 62, 37 N. W. 763,—holding that findings of fact by the court will not be disturbed on appeal in case of a substantial conflict in the evidence; *Franz Falk*

Brewing Co. v. Mielenz Bros. 5 Dak. 136, 37 N. W. 728, holding that a verdict on conflicting evidence will not be disturbed; *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1, holding that verdict resting on substantially conflicting evidence will not be disturbed on appeal; *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462, holding that finding by court will not be disturbed on appeal unless clearly against the preponderance of evidence; *Herbert v. Northern P. R. Co.* 3 Dak. 38, 13 N. W. 349, holding finding by jury on conflicting evidence as to plaintiff's contributory negligence will not be disturbed on appeal; *Pierce v. Manning*, 2 S. D. 517, 51 N. W. 332, holding sufficiency of evidence to support verdict or finding not reviewable on appeal unless presented to court below by motion for new trial.

Distinguished in *Finney v. Northern P. R. Co.* 3 Dak. 270, 16 N. W. 500, holding that a new trial should be granted for insufficiency of the evidence, where the evidence is insufficient granting it the greatest probative force to which it is entitled.

2 DAK. 467, SAUNT CROIX LUMBER CO. v. PENNINGTON, 11 N. W. 497.

Sufficiency of general objection to evidence.

Cited in *McCabe v. Deanoyers*, 20 S. D. 581, 108 N. W. 341, holding general objection to evidence insufficient unless it clearly appear that objection could not have been avoided even if specifically pointed out.

What transcript of evidence should contain.

Cited in *Tolman v. New Mexico & D. Mica Co.* 4 Dak. 4, 22 N. W. 505, holding that appellate court will not investigate a voluminous transcript of evidence where neither the abstract assignments of error nor bill of exceptions calls attention to particular portions thereof.

What constitutes the record on appeal.

Cited in *United States ex rel. Search v. Choctaw, O. & G. R. Co.* 3 Okla. 404, 41 Pac. 729, holding that an opinion of the trial judge together with the statements of fact contained therein, annexed to the petition in error and certified by the clerk, but without being submitted to the trial judge to be settled and signed, cannot be considered on error, although said judge had ordered that it be made a part of the record; *Fargo v. Palmer*, 4 Dak. 232, 29 N. W. 463, holding that no papers except those specifically enumerated by statute as constituting part of the judgment roll can be considered on appeal from the judgment alone though contained in appellant's abstract.

Time for excepting to instructions.

Cited in *Peterson v. Siglinger*, 3 S. D. 255, 52 N. W. 1060, holding that abstract must show upon appeal that the exceptions were taken at the proper time.

Criticized in *Uhe v. Chicago, M. & St. P. R. Co.* 4 S. D. 505, 57 N. W. 484, holding that there is no distinction as to time when exceptions may be taken between instructions given at request of counsel and those given by the judge on its own motion.

Mode of bringing up record.

Cited in *Sweet v. Myers*, 3 S. D. 324, 53 N. W. 187, holding that agreed statement of facts upon which an ordinary action at law is submitted must be brought into the record by a bill of exceptions or statement.

Necessity for reading instruction as requested.

Cited in *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 634, 67 N. W. 837, holding it error for trial judge to read instruction as an instruction requested by one of the parties in language substantially different from that requested.

When cause pending in court.

Cited in *Glaspell v. Northern P. R. Co.* 144 U. S. 211, 36 L. ed. 409, 12 Sup. Ct. Rep. 593, holding that a cause was not pending in the Dakota territory courts at the time North Dakota was admitted to the Union, so that it was transferred to the Federal court by force of the act to enable said admission, where after judgment the steps required by the laws of the territory for obtaining a new trial or taking an appeal had not been taken within the time specified by the territorial laws, nor were pending at the time of the admission of such state.

2 DAK. 483, SAINT PAUL & S. R. CO. v. COVELL, 11 N. W. 106.

2 DAK. 523, JONES v. MATTHIESON, 11 N. W. 109.

Accord and satisfaction by part payment.

Cited in note in 20 L.R.A. 811, on accord and satisfaction by part payment.

NOTES

ON THE

DAKOTA REPORTS.

CASES IN 3 DAK.

3 DAK. 1, WINONA & ST. P. R. CO. v. DEUEL COUNTY, 12 N. W. 561.

Exemption of railroads from taxation.

Cited in *Winona & St. P. R. Co. v. Watertown*, 1 S. D. 46, 44 N. W. 1072, holding that an exemption of the property of a railroad company from "all taxation" did not exempt it from assessments for local improvements; *Bennett v. Nichols*, 9 Ariz. 138, 80 Pac. 392, holding valid act granting railroads built without subsidies exemption from taxation for twenty years, and that rights under the act could not be affected by subsequent legislation.

3 DAK. 29, UNITED STATES v. LEIGHTON, 13 N. W. 347.

Admissibility of threats.

Cited in notes in 3 L.R.A.(N.S.) 524, on evidence of antecedent threats on trial for homicide; 61 Am. Dec. 53, on admissibility of evidence of threats by deceased on trial for murder.

3 DAK. 34, UNITED STATES v. BRAVE BEAR, 13 N. W. 565.

Jurisdiction of crimes against Indians.

Cited in note in 21 L.R.A. 169, on jurisdiction to punish crimes committed by or against Indians.

3 DAK. 38, HERBERT v. NORTHERN P. R. CO. 13 N. W. 349,
Affirmed in 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590.

Who are fellow servants.

Cited in *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L.R.A. 97, 26 Am. St.

Rep. 621, 48 N. W. 222, holding foreman of gang fellow servant of employee injured by former's failure to block a pile.

Cited in notes in 4 L.R.A. 795, 797, on fellow servants, who are; 54 L.R.A. 72, on vice principalship as determined with reference to the character of the act which caused the injury.

Duty and liability of master.

Cited in *Hardesty v. Largey Lumber Co.* 34 Mont. 151, 86 Pac. 29, holding certain sections of the civil code under the general title of "Obligations of the Employer" applicable to actions by employee for personal injuries; *Balhoff v. Michigan C. R. Co.* 106 Mich. 606, 65 N. W. 592, holding that a railroad company is liable as principal for the neglect of its sectionmen to provide a reasonably safe track, whereby a brakeman suffers injury, sectionmen and brakemen not being fellow servants; *Bennett v. Northern P. R. Co.* 2 N. D. 112, 13 L.R.A. 465, 49 N. W. 408, holding it duty of railroad company to inspect foreign cars before incorporating them into train.

Cited in notes in 98 Am. St. Rep. 301, on liability to servant for injuries due to defective machinery and appliances; 1 L.R.A. 699, on railroad; action by employee for injuries sustained by neglect of duty of employer; 41 L.R.A. 109, on knowledge as an element of an employer's liability to an injured servant.

Contributory negligence as a bar.

Cited in *Mares v. Northern P. R. Co.* 3 Dak. 336, 21 N. W. 5, holding that the want of care and caution of a person injured will not prevent a recovery unless it contributed proximately to the injury complained of.

Damages for causing death.

Cited in note in 2 L.R.A. 521, on damages for death caused by negligence.

3 DAK. 58, UNITED STATES v. KNOWLTON, 13 N. W. 573.

Jurisdiction of crimes against Indians.

Cited in note in 21 L.R.A. 169, on jurisdiction to punish crimes committed by or against Indians.

Prejudicial error in cross-examination.

Cited in note in 25 L.R.A. (N.S.) 684, on refusal of cross-examination on matters covered by examination in chief as ground for reversal or new trial.

3 DAK. 80, SMITH v. ST. PAUL F. & M. INS. CO. 13 N. W. 355.

Waiver of provision of policy.

Cited in *Continental Ins. Co. v. Chew*, 11 Ind. App. 330, 54 Am. St. Rep. 506, 38 N. E. 417, holding that when the company with knowledge of a loss receives an overdue premium, it waives a provision as to nonliability for loss while any part of the premium is overdue and unpaid; *McCluer v. Home Ins. Co.* 31 Mo. App. 62, holding that acceptance of payment of a premium note by the company's department managers, who are given power to waive and alter conditions in the policy after receipt of notice of damage by fire to the insured property, occurring after such note became due,

waives a provision in the policy that it shall be void while the premium note is overdue and unpaid; *St. Paul F. & M. Ins. Co. v. Cooper*, 25 Okla. 38, 105 Pac. 198, holding forfeiture waived by acceptance of cash premium by general agents of company, after default on premium note, and notice of loss.

Cited in notes in 9 L.R.A. 318, on fire insurance; forfeiture for non-payment of premium note; waiver of; 1 L.R.A. 256, on life insurance policy, waiver of forfeiture.

3 DAK. 85, UNITED STATES v. SPAULDING, 13 N. W. 357, 538.

Meaning of word "claim."

Cited in *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439, holding that word "claim" in quit claim deed includes title and ownership to real property when used in relation thereto.

3 DAK. 106, UNITED STATES v. CROW DOG, 14 N. W. 437, Reversed on habeas corpus in 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396.

Proof beyond reasonable doubt in trial for murder.

Cited in *State v. Yokum*, 11 S. D. 544, 79 N. W. 835, holding an instruction that the burden of proving that a homicide shown to have been committed by defendant was justifiable or excusable devolves upon him, unless the facts proved tend to show that the crime amounts to manslaughter only, or that defendant was justifiable or excusable, not objectionable as requiring proof beyond a reasonable doubt that the killing was justifiable.

Cited in note in 19 L.R.A.(N.S.) 489, 493, on applicability of rule of reasonable doubt to self-defense in homicide.

Disapproved in *State v. Hazlet*, 16 N. D. 426, 113 N. W. 374, holding that where state has established the fact of the killing, burden is upon defendant to show excuse or justification but only to the extent of creating a reasonable doubt.

3 DAK. 119, TERRITORY v. EGAN, 13 N. W. 568.

Change of venue or of judge.

Cited in *State v. Douglass*, 41 W. Va. 537, 23 S. E. 724, holding that good cause for a change of venue is not shown by affidavits containing mere expressions of opinion by residents of the immediate vicinity where the crime was committed, that a fair trial cannot be had in that jurisdiction; *State v. Chapman*, 1 S. D. 414, 10 L.R.A. 432, 47 N. W. 411, holding that defendant does not have an absolute right to have another judge called in on filing an affidavit setting forth absolutely that the judge is prejudiced; *State v. Winchester*, 18 N. D. 534, 122 N. W. 1111 (rereported in 19 N. D. 756), holding that fact that defendant as sheriff subpoenaed jury does not show abuse of discretion in denying change of venue; *Waterloo Gasoline Engine Co. v. O'Neil*, 19 N. D. 784, 124 N. W. 951, holding cause for change of venue not shown by affidavit containing mere conclusions as to prejudice of judge, without setting forth facts.

Distinguished in *State v. Palmer*, 4 S. D. 543, 57 N. W. 490, holding the provision of S. D. Laws 1891, for calling in another judge on an affidavit of bias or prejudice of the presiding judge, mandatory.

Imputation of malice in commission of murder.

Cited in *Carr v. State*, 23 Neb. 749, 37 N. W. 630, holding that malice is a mental condition on the part of the actor, supposed to exist at the time of the commission of the murder, and is imputed to the doing of an unlawful act intentionally without just cause or excuse; *State v. Tarlton*, 22 S. D. 495, 118 N. W. 706, holding one who, angry without cause, wantonly and without justification destroys another's property, guilty of "malicious injury or destruction of property."

Circumstantial evidence.

Cited in note in 97 Am. St. Rep. 774, on circumstantial evidence.

3 DAK. 132, UNITED STATES v. CAMERON, 13 N. W. 561.

Forgery or falsity.

Cited in *Territory v. Gutierrez*, 13 N. M. 312, 5 L.R.A.(N.S.) 375, 84 Pac. 525, holding that statute against "falsely making, altering, forging or counterfeiting" is a forgery statute and not applicable to a genuine instrument though statements made therein are untrue; *United States v. Moore*, 60 Fed. 738, holding that one who makes a false notarial certificate is not indictable under U. S. Rev. Stat. § 5421 (U. S. Comp. Stat. 1901, p. 3667), providing for the punishment of "every person who falsely makes, alters, forges, or counterfeits; or causes or procures to be falsely made, altered, forged, or counterfeited; or willingly aids or assists in the false making, altering, forging, or counterfeiting, any . . . certificate . . . for the purpose of" defrauding the United States; *United States v. Glaser*, 81 Fed. 566, holding that U. S. Rev. Stat. § 4746, U. S. Comp. Stat. 1901, p. 3279, regarding "any false or fraudulent affidavit concerning a claim for pension," does not include the attached notary's jurat containing false statements.

Cited in note in 5 L.R.A.(N.S.) 375, on making of false instrument as within statute against the false making of an instrument.

Liability of notaries.

Cited in note in 82 Am. St. Rep. 385, on liability of notaries.

3 DAK. 141, TALBOT v. PETTIGREW, 113 N. W. 576.

Definiteness of contract.

Cited in note in 53 L.R.A. 292, on effect on contract of leaving price indefinite.

Contracts by telegraph.

Cited in notes in 110 Am. St. Rep. 757, on contracts by telegraph; 50 L.R.A. 249, on telegrams as writings to make a contract within the statute of frauds.

3 DAK. 148, NICHOLS, S. & CO. v. BARNES, 14 N. W. 110.**Sufficiency of description in chattel mortgage.**

Cited in *Frick v. Fritz*, 115 Iowa, 438, 91 Am. St. Rep. 165, 88 N. W. 961, enforcing between the parties a mortgage of "two two-year old steers and eighteen yearlings, . . . being all of the property of the kind and description named now owned by me,"—parol evidence being admitted to show the species or kind of steers which the mortgage was intended to cover.

Conversion of mortgaged chattels.

Cited in *Brown v. James H. Campbell Co.* 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492, holding a commission merchant who, without knowledge of a chattel mortgage duly filed, sells the property for the mortgagor, liable to the mortgagee for conversion; *Phillip Best Brewing Co. v. Pillsbury & H. Elevator Co.* 5 Dak. 62, 37 N. W. 763, holding a warehouseman, who receives mortgaged wheat and mixes it with other wheat, shipping it out of the territory, liable to the mortgagee for its value.

Cited in note in 9 N. D. 630, on who may maintain trover.

Distinguished in *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434, holding a demand a condition precedent to an action for conversion by the mortgagee against a purchaser of the chattels with actual notice of the mortgage.

Sale or mortgage of future crops.

Cited in note in 23 L.R.A. 459, 461, 462, 471, on sale or mortgage of future crops.

3 DAK. 155, REES v. THE GENERAL TERRY, 13 N. W. 533.**Contract supporting maritime lien.**

Cited in note in 70 L.R.A. 408, 413, on what contracts will support maritime lien.

3 DAK. 168, WILLIAMS v. NORTHERN P. R. CO. 14 N. W. 97.**Negligence of railroad toward persons or animals.**

Cited in *Montgomery & E. R. Co. v. Stewart*, 91 Ala. 421, 8 So. 708, on liability of railroad company for injury to one who has by his own contributory negligence placed himself in a dangerous position, where injury would not have occurred but for act of trainmen in increasing speed, with knowledge of his danger; *Gay v. Fremont E. & M. V. R. Co.* 5 Dak. 514, holding verdict for plaintiff for killing of heifer unsustained by evidence showing every possible precaution taken to prevent injury after heifer was seen.

Cited in note in 1 L.R.A. 450, on injury to stock by railroad collision.

Contributory negligence as to animals injured on railroad track.

Cited in *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, holding that one who turns out a horse loose near a railroad track, without anything to prevent it from getting thereon, near the time when he knows a fast train passes the place, is not, as matter of law free from contribu-

tory negligence; *Johnson v. Stewart*, 62 Ark. 164, 34 S. W. 889, holding contributory negligence no defense to street railway company's liability for killing of horse, if its employees discovered dangerous position of horse in time to avoid injury.

Question for jury as to negligence.

Cited in *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.* 2 S. D. 17, 48 N. W. 310, holding question properly withdrawn from jury where evidence is undisputed and only one conclusion deducible therefrom; *Hormann v. Sherin*, 6 S. D. 82, 60 N. W. 145, holding defendant entitled to direction of verdict where plaintiff fails to offer evidence on material averments essential to recovery; *Bates v. Fremont, E. & M. V. R. Co.* 4 S. D. 394, 57 N. W. 72, holding that the question should be submitted to the jury if the facts are in dispute or are such that different impartial minds might fairly draw different conclusions therefrom.

3 DAK. 178, GARRETSON v. PURDY, 14 N. W. 100.

Negotiability of note.

Cited in *Hegeler v. Comstock*, 1 S. D. 138, 8 L.R.A. 393, 45 N. W. 331, holding negotiable, note providing for higher rate of interest if note is not paid when due; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473, holding non-negotiable, note containing provision that maker will pay all expenses of collecting note including reasonable attorney's fees; *Altman v. Rittershofer*, 68 Mich. 287, 13 Am. St. Rep. 341, 36 N. W. 74, holding that a written promise to pay a certain amount of money at a fixed date, with interest until paid, "and attorneys' fees," is not a negotiable promissory note, as it violates the rule of certainty prescribed for negotiability by the law merchant; *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, holding a note non-negotiable which adds to a promise to pay a specified amount an agreement to pay reasonable attorneys' fees in case of suit on the note, in violation of Civil Code, § 3992, requiring that a negotiable instrument shall contain no condition not certain of fulfillment, and Civil Code, § 3997, that a negotiable instrument must not contain any other contract than for the payment of a certain sum of money; *First Nat. Bank v. Larsen*, 60 Wis. 206, 50 Am. Rep. 365, 19 N. W. 67, holding notes non-negotiable because uncertain under the law merchant, when to promise to pay is added a stipulation that a 10 per cent attorneys' fee shall also be collectible if principal and interest are not paid when due and before suit brought; *Second Nat. Bank v. Basuier*, 12 C. C. A. 517, 27 U. S. App. 541, 65 Fed. 58, holding that under the same Dakota provision in force by enactment in South Dakota, a note drawn and payable in South Dakota "with exchange and costs of collection" is non-negotiable.

Cited in notes in 1 L.R.A. 547, on promissory note; stipulation in for attorney's fees or costs of suit; 3 L.R.A. 51, on promissory note; certainty as to payment; 125 Am. St. Rep. 207, on agreements and conditions destroying negotiability.

Cited as changed by statute in *Chandler v. Kennedy*, 8 S. D. 56, 65 N.

W. 439, holding negotiability of note not destroyed by stipulation for attorney's fees.

3 DAK. 184, CAMPBELL v. WAMBOLE, 13 N. W. 567.

3 DAK. 189, CALEDONIA GOLD MIN. CO. v. NOONAN, 14 N. W. 426, Affirmed in 121 U. S. 393, 30 L. ed. 1061.

Amendment of pleading.

Cited in *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518, holding certificate of trial judge that he intended to allow plaintiff's motion to amend reply, insufficient to bring amended reply before appellate court.

Sufficiency of objection to admission of evidence.

Cited in *McQueen v. Bank of Edgemont*, 20 S. D. 378, 107 N. W. 208, holding that objection will be disregarded on appeal unless specific; *State v. La Croix*, 8 S. D. 369, 66 N. W. 944, holding objection that testimony is immaterial and irrelevant too general for consideration on appeal; *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085, 17 A. & E. Ann. Cas. 213; *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341,—holding general objection insufficient where it does not clearly appear that objection could not have been obviated if specifically pointed out; *Kolka v. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558, holding that an objection as to evidence should state the exact point against the same or the defect claimed therein; *Pitts Agri. Works v. Young*, 6 S. D. 557, 62 N. W. 432, holding general objection to evidence of written lease insufficient to present specific objection of erroneous description of premises; *Bright v. Ecker*, 9 S. D. 449, 69 N. W. 824, holding exclusion in response to general objection of document which would be prima facie evidence of plaintiff's right to recover reversible error where objection might have been removed by introducing other evidence; *Tilton v. Flormann*, 22 S. D. 324, 117 N. W. 377, denying right on appeal to show that evidence was objectionable on another ground where specific objection was made at trial; *Tanderup v. Hansen*, 8 S. D. 375, 66 N. W. 1073, holding point that proper foundation was not laid for testimony of a witness as to testimony of deceased witness on former trial by showing that the latter was duly sworn and that the former could give the substance of his testimony on both direct and cross-examination not saved by mere objection to the testimony as incompetent, irrelevant, and immaterial; *First Nat. Exch. Bank v. Sherman*, 9 S. D. 492, 70 N. W. 647, holding objection to adequate depositions because no foundation is laid for their introduction and mingled with objections raising questions of authentication of deposition and competency, materiality and relevancy of the evidence contained therein insufficient to save point that none of the statutory reasons for nonproduction of the witnesses were shown; *Harrison v. State Bkg. & T. Co.* 15 S. D. 304, 89 N. W. 477, holding objection to admission against bank of sheriff's affidavit showing on foreclosure brought by person connected with the bank on the ground that evidence did not show that the latter acted for the bank in foreclosing the mortgage not saved by objection that the evidence was incompetent, irrelevant, and immaterial to the issues in the case; *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344, hold-

ing point that chattel mortgage was introduced without proof of execution not preserved by objection to its admission as incompetent, immaterial, and irrelevant and as conveying no reference to the disposition of the goods in controversy because not filed until after filing of plaintiff's mortgage.

Distinguished in *Bowdle v. Jencks*, 18 S. D. 80, 99 N. W. 98, holding general objection sufficient where it goes to the merits and which could not have been obviated though more specifically pointed out.

Objections first raised on appeal.

Cited in *Connor v. National Bank*, 7 S. D. 439, 64 N. W. 519, holding that objection that amendment allowed on trial was not actually made cannot be first raised on appeal; *Pierce v. Manning*, 2 S. D. 517, 51 N. W. 332, holding sufficiency of evidence to support verdict or finding not reviewable on appeal unless raised in court below by motion for new trial.

Sufficiency of evidence to support finding.

Cited in *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454, holding that finding based on parol evidence will not be disturbed on appeal unless error is clearly made to appear.

Pleading contracts.

Cited in note in 5 L.R.A. 774, on pleading contracts under the code.

Acquiring rights in Indian country.

Cited in *Deadwood v. Whittaker*, 12 S. D. 515, 81 N. W. 908, holding that one who attempted to locate a mining claim on an Indian reservation, and who received a patent after the treaty opening the reservation, had such an interest in the claim prior to the execution of the treaty as would uphold a dedication of a portion of it made by him for highway purposes.

Cited in note in 7 L.R.A. (N.S.) 787, 789, on location of mining claim.

Distinguished in *Scott v. Toomey*, 8 S. D. 639, 67 N. W. 838, holding that no legal rights could be acquired in the public domain in the Black Hills country prior to February 28, 1877, as up to that time settlers thereon were trespassers.

3 DAK. 205, TERRITORY EX REL. PETERSON v. HAUXHURST, 14 N. W. 432.

Remedy by quo warranto.

Cited in note in 3 L.R.A. 513, on remedy by ancient writ of quo warranto.

Vacancy in office at end of term.

Cited in *State ex rel. Lavin v. Bacon*, 14 S. D. 284, 85 N. W. 225, holding that office of member of board of charities and corrections becomes vacant at end of term where no successor has been appointed.

3 DAK. 217, NORTHERN P. R. CO. v. PERONTO, 14 N. W. 102, Affirmed in 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100.

Rights in public land.

Cited in *Graham v. Great Falls Water Power & Townsite Co.* 30 Mont.

393, 76 Pac. 808, holding that successful contestant of pre-emption entry obtains no right to the land as against the right of Congress to dispose thereof.

Distinguished in *Grandin v. LaBar*, 3 N. D. 446, 57 N. W. 241, holding title to lands within indemnity belt not vested in Northern Pacific Railroad Company on filing of map of definite location of road.

Right to recover back money paid for public land.

Cited in *Tyler v. Cass County*, 1 N. D. 369, 48 N. W. 232, holding that a purchaser of land granted to the Northern Pacific Railroad Company at a tax sale, which is void because the lands were not taxable, cannot recover back from the company the money paid by him.

3 DAK. 233, STAR WAGON CO. v. MATTHIESSEN, 14 N. W. 107.

Conflict of laws as to limitation of actions.

Cited in *McConnell v. Spicker*, 15 S. D. 98, 87 N. W. 574, holding questions arising on statute of limitations governed by law of forum.

Cited in notes in 6 L.R.A. (N.S.) 659, on law governing limitation of actions on contract; 48 L.R.A. 626, as to when statute of limitations will govern action in another state or country.

Burden of proving payment.

Cited in *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 A. & E. Ann. Cas. 516, holding burden on defendant to show payments made and not endorsed upon note.

When verdict should be directed for defendant.

Cited in *Bowman v. Eppinger*, 1 N. D. 21, 44 N. W. 1000, holding it duty of court to direct verdict for defendant where there is not sufficient evidence to authorize verdict for plaintiff; *McKeever v. Homestake Min. Co.* 10 S. D. 599, 74 N. W. 1053, holding verdict properly directed for defendant where evidence with all justifiable inferences is insufficient to support verdict for plaintiff; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747, holding motion to direct verdict for defendant because evidence is "insufficient to show or constitute a cause of action" insufficient in failing to point out specifically the grounds relied on.

3 DAK. 239, MOLINE PLOW CO. v. GILBERT, 15 N. W. 1, Affirmed in 119 U. S. 491, 30 L. ed. 476, 7 Sup. Ct. Rep. 305.

Duty as to giving instructions.

Cited in dissenting opinion in *Landis v. Fyles*, 18 N. D. 587, 120 N. W. 566, as to duty of court to charge upon every material point without request for more specific instructions.

Prejudicial error in refusing to submit question to jury.

Cited in *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39, holding the refusal to submit a material question for special finding not reversible error if the point on which such finding was asked is covered by the charge and the general verdict.

Conclusiveness of verdict on conflicting evidence.

Cited in *Finney v. Northern P. R. Co.* 3 Dak. 270, 16 N. W. 500, holding that verdict resting on substantially conflicting evidence will not be disturbed on appeal.

3 DAK. 256, BATES v. CALLENDER, 16 N. W. 506, Writ of error dismissed in 127 U. S. 781, 32 L. ed. 326.

Exemptions in partnership property.

Cited in *Lee v. Bradley Fertilizer Co.* 44 Fla. 787, 53 So. 456, holding that where partners have divided the firm property among each other in severalty, each may claim his exemption in the part thereof held by him as against firm creditors; *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069, holding that a fraudulent conveyance of partnership property by the firm does not estop the partners or their wives from claiming an exemption therein as against an attaching creditor.

Transfer of exempt property.

Cited in *Commercial State Bank v. Kendall*, 20 S. D. 314, 129 Am. St. Rep. 936, 106 N. W. 53, holding that where transfer of homestead by husband to wife was not intended in fraud of creditors in case of abandonment, it does not become so though husband later files on government land and is joined by his family.

Selection or claim of exemptions.

Distinguished in *Florida Loan & T. Co. v. Crabb*, 45 Fla. 306, 33 So. 523, holding that where debtor conceals certain property which remains so concealed, it will be considered as selected pro tanto for exemption.

Exemplary damages.

Cited in note in 28 Am. St. Rep. 870, on exemplary or punitive damages.

3 DAK. 270, FINNEY v. NORTHERN P. R. CO. 16 N. W. 500.

Conclusiveness of verdict.

Cited in *Franz Falk Brewing Co. v. Mielenz Bros.* 5 Dak. 136, 37 N. W. 728, holding verdict supported by some evidence on every issue of fact involved will not be disturbed on appeal.

Submission of issues to jury.

Cited in *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193, holding that great caution should be exercised in taking a controverted question from the jury; *Knapp v. Sioux Falls Nat. Bank*, 5 Dak. 378, 40 N. W. 587, holding verdict properly directed for defendant where evidence with all justifiable inferences is insufficient to support verdict for plaintiff; *Rauber v. Sundback*, 1 S. D. 268, 46 N. W. 927, holding fact legally in dispute so as to require submission to jury where its affirmation and denial are each supported by competent evidence of some probative force or such evidence as standing alone would naturally and logically lead reasonable minds to different conclusion as to existence or nonexistence of such facts.

Cited in note in 2 L.R.A. 341, on directing a verdict for defendant; power of court.

3 DAK. 284, MYRICK v. BILL, 17 N. W. 268.**Necessity for demand in action of claim and delivery.**

Cited in *Thompson v. Thompson*, 11 N. D. 208, 91 N. W. 44, holding instruction in action of claim and delivery that no recovery could be had unless demand was proven, erroneous where it appeared that demand would have been futile; *More v. Burger*, 15 N. D. 345, 107 N. W. 200, holding demand unnecessary before action of claim and delivery or conversion, where it appears that defendants hold under claim of right and demand would have been unavailing; *Consolidated Land & Irrig. Co. v. Hawley*, 7 S. D. 229, 63 N. W. 904, holding no demand necessary before bringing an action for conversion against a sheriff who denies plaintiff's title and right of possession, and asserts ownership in another; *Howard v. Braun*, 14 S. D. 579, 86 N. W. 635, holding claim and delivery maintainable by purchaser of merchandise against seller's agent in possession at time of sale though demand for property before commencing action was insufficient; *Hahn v. Sleepy Eye Mill. Co.* 21 S. D. 324, 112 N. W. 843, holding demand of possession unnecessary before suing for conversion of wheat upon which plaintiff had lien, where demand would have been wholly ineffectual.

What are fixtures.

Cited in *Edwards & B. Lumber Co. v. Murray Bank*, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765, holding that an engine remains personal property, although attached to the real estate, when both vendor and vendee have treated it as such by executing a chattel mortgage to secure the purchase price, and the rights of innocent third parties are not prejudiced; *Young v. Consolidated Implement Co.* 23 Utah, 586, 65 Pac. 720, holding that where parties to a lease of realty treated tenant's buildings as personal property with a right in the lessee to remove the same at the end of the term, the tenant does not lose title to said improvements because retained on the leasehold under a verbal extension and renewal of the said lease; *Mathews v. Hanson*, 19 N. D. 692, 124 N. W. 1116, holding that building will be treated as personalty where by agreement between parties it is made such.

Cited in notes in 19 L.R.A. 442, on effect of agreement to prevent fixtures from becoming a part of realty; 3 L.R.A. 34, on fixtures; test of what constitute.

Evidence in trover.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

Pleading inconsistent defenses.

Cited in note in 48 L.R.A. 207, on right to plead inconsistent defenses.

Admissions in pleadings.

Cited in *McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 99, holding that allegations of complaint clearly admitted in one defense need not be proved on trial though denied in another defense of same answer.

Adverse possession of homestead.

Cited in *Whittemore v. Cope*, 11 Utah, 344, 40 Pac. 256, holding that Dak. Rep.—4.

the character of the possession of a widow in her husband's homestead may be changed by a parol partition to which she and the heirs of the husband are parties, so as to make her possession adverse.

What exempt as homestead.

Cited in note in 70 Am. Dec. 346, on what may be exempt as homestead.

3 DAK. 292, CASSELMAN v. WINSHIP, 19 N. W. 412.

Actionable words in pleading.

Cited in note in 3 L.R.A. 417, on matters, though scandalous, charged in judicial proceedings, are not actionable libel.

3 DAK. 296, GRADY v. BAKER, 19 N. W. 417.

Necessity of change of possession in sale of chattels.

Referred to as leading case in *Love v. Hill*, 21 Okla. 347, 96 Pac. 623, holding sale void as against creditors where no change of possession was made except that bill of sale was recorded, which recited the sale and that seller should retain possession for a certain time.

Cited in *Swartzburg v. Dickerson*, 12 Okla. 566, 73 Pac. 282, holding actual and continued change of possession necessary to make sale valid as against creditors; *Shauer v. Alterton*, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442, holding that Dak. Civ. Code, § 2024, required not only an immediate change of possession, but one so open that the public would be apprised of it; *Howard v. Dwight*, 8 S. D. 398, 66 N. W. 935, holding that sale of stock of goods in store will be deemed fraudulent as against attaching creditors where purchaser did not take personal possession and same manager and clerks continued in charge and vendor's name remained on store window and in newspaper advertisements; *Walters v. Ratliff*, 10 Okla. 262, 61 Pac. 1070, holding that under Okla. Stat. 1893, § 2663, adopted from the Dakota statute, a vendee who exercises or claims no such possession of the property as to advise vendor's creditors of his ownership, until after they obtain an execution thereon, cannot then take such possession as will defeat the levy; *Shauer v. Alterton*, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442, holding it not error to leave it to the jury to determine whether under all the evidence there was such immediate delivery and such actual change of possession, under Dak. Civ. Code, § 2024, as to make the transfer valid against creditors.

3 DAK. 301, TERRITORY EX REL. GRAVES v. COLE, 19 N. W. 418.

Mandamus to public officer.

Cited in note in 1 L.R.A. 738, on mandamus to public officer.

Who may bring mandamus proceeding.

Cited in *State ex rel. Dakota Hail Asso. v. Carey*, 2 N. D. 36, 49 N. W. 164, holding mandamus to compel state insurance commissioner to publish annual statement of insurance company, designate newspaper to publish same, and issue certificates of authority to enable company's local agent to transact business, properly entitled in name of state on relation of such

company; *Windsor v. Polk County*, 115 Iowa, 738, 87 N. W. 704, holding that a party who has signed a proper statutory petition for the submission of the question of the erection of a court house to a vote of the electors is a party specially "aggrieved," within the meaning of Iowa Code, § 4345, entitling him thereunder to a mandamus to compel the board of commissioners to act upon the petition.

3 DAK. 307, LARSON v. GRAND FORKS, 19 N. W. 414.

Liability of city from injury from overhanging obstruction in street.

Cited in *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A.(N.S.) 146, 108 N. W. 1057, holding city liable for injury from nuisance permitted in street, being a wire strung across street for purpose of acrobatic performance; *Ludlow v. Fargo*, 3 N. D. 485, 57 N. W. 506, holding cities organized under general law liable in civil action to persons injured by negligent acts of persons acting for city in establishing streets and removing obstructions therefrom.

Cited in notes in 12 L.R.A.(N.S.) 724, on liability for falling of object suspended over street; 5 L.R.A. 144, on duty of municipality to keep streets in repair; 20 L.R.A.(N.S.) 518, 519, 583, 644, 696, 706, on liability of municipality for defects or obstructions in streets; 19 L.R.A.(N.S.) 517, on liability of municipality for permitting obstruction in street.

—Notice of defect.

Cited in *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532, on existence of obstruction in street for a period of time as charging city with constructive knowledge.

Contributory negligence as defense.

Cited in note in 4 L.R.A. 239, on contributory negligence as a defense.

Exemplary damages.

Cited in note in 28 Am. St. Rep. 877, on exemplary or punitive damages.

3 DAK. 315, RUSSELL v. WESTERN U. TELEG. CO. 19 N. W. 408.

Liability of telegraph company for mental anguish.

Cited in the following cases denying liability: *Newman v. Western U. Teleg. Co.* 54 Mo. App. 434; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345,—where the message involved read "Your child is dying;" *West v. Western U. Teleg. Co.* 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; *Western U. Teleg. Co. v. Wood*, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901,—where in each case the telegram announced either the fatal illness or death of the sendee's brother; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 64, 54 L.R.A. 846,

60 N. E. 674, 1080, where it announced the death of the sendee's grandmother; *Butner v. Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087, where it announced the death of the sendee's daughter; *Kester v. Western U. Teleg. Co.* 55 Fed. 603, where it announced the death of the sendee's father.

Cited in *Peay v. Western U. Teleg. Co.* 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965, a suit for breach of contract, holding that no recovery can be had for mental pain and anguish, unaccompanied by physical injury, resulting from negligent delay in delivering a telegram; *Burnett v. Western U. Teleg. Co.* 39 Mo. App. 599, holding that under Mo. Rev. Stat. 1879, § 883, making a telegraph company liable to such a penalty for neglect or refusal to transmit messages with impartiality and good faith, a telegraph company incurs the penalty of \$100 upon a failure without partiality or bad faith to transmit a message; *Western U. Teleg. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 92, holding damage not recoverable for mental anguish caused by failure to deliver telegram where no other ground for damages is set up; *Chase v. Western U. Teleg. Co.* 10 L.R.A. 464, 44 Fed. 554, holding that the receiver of a telegraphic message, the delivery of which has been negligently delayed by the telegraph company so as to prevent his reaching his brother-in-law's death bed, cannot recover for mental suffering alone, unaccompanied with other injury; in *Butner v. Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087, holding that nominal damages cannot be recovered on a suit in which the complaint claimed only damages for mental anguish, because of defendant's neglect to deliver a message announcing a death, without showing defendant's knowledge of any relationship, or for whose benefit the message was sent.

Cited in notes in 7 Am. St. Rep. 535, on mental anguish as element of damages; 10 Am. St. Rep. 788, on elements of damages in action against telegraph companies; 117 Am. St. Rep. 302, 306, on elements of damages recoverable for failure to transmit and deliver telegrams.

Disapproved in *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419, holding that mental distress or mental anxiety may be an element of recoverable damages in a suit for breach of contract by nondelivery of a telegraphic message to a physician reading, "Come first train to see my wife, very low," as a perusal of the message would naturally suggest such consequence as likely to ensue from nondelivery; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1, holding that damages can be recovered in any form of action for mental anxiety and suffering consequent upon the negligent nondelivery of a telegram as for the breach of a public duty unknown to the common law, the consequences of which were known to the defendant; *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883n, 11 S. E. 1044, holding that a recovery may be had for mental pain and suffering without other injury, resulting from delay in transmitting and delivering a telegram reading "Come in haste. Your wife is at the point of death," whereby plaintiff had been deprived of the

consolation of being with his wife during her last moments and attending her funeral, to his great pain, mental anguish, and distress.

Liability for nondelivery of telegram.

Cited in note in 30 L.R.A.(N.S.) 1137, on right of addressee of telegram to sue for delay in delivery.

3 DAK. 319, POWELL v. McKECHNIE, 19 N. W. 410.

Right of stoppage in transitu.

Cited in note in 3 L.R.A. 648, on right of stoppage in transitu.

Sufficiency of levy.

Cited in McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99, holding statutory requirements that copy of writ of attachment and notice shall be left with debtor or person holding attached property and incapable of manual delivery, not sufficiently complied with by swearing copy of writ and notice of justice of peace rendering judgment sought to be levied on and upon attorneys for judgment creditor and nonresident judgment debtor.

3 DAK. 325, TERRITORY EX REL. COUNTY COMRS. v. CAVANAUGH, 19 N. W. 413.

When mandamus lies.

Cited in State ex rel. Atty. Gen. v. District Ct. 13 N. D. 211, 100 N. W. 248, holding mandamus not proper remedy to secure removal of public officer where equally speedy and efficacious remedy is provided by statute; Taubman v. Aurora County, 14 S. D. 206, 84 N. W. 784, holding one filing affidavit with county commissioners setting forth facts alleging right to have his newspaper designated as an official newspaper, but not appealing from order refusing such designation not entitled to mandamus proceedings to enforce his right.

Cited in note in 98 Am. St. Rep. 865, on mandamus as proper remedy against public officers.

Right of county treasurer to commissions.

Cited in Sandager v. Walsh County, 6 Dak. 31, 50 N. W. 196, holding county treasurer not entitled to commissions on money received on sale by county commissioners of bonds for erection of public buildings, the proceeds being paid over to the treasurer; Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311, holding county treasurer not entitled to commissions or collection fees on proceeds of bonds delivered to him as such officer, under a statute entitling him to commissions on "moneys collected" by him.

3 DAK. 328, WOOD v. CUTHBERTSON, 21 N. W. 3.

Recovery back of usurious interest paid.

Cited in People's Bank v. Dalton, 2 Okla. 476, 37 Pac. 807, holding Okla. Laws 1893, chap. 16, art. 6, § 9, authorizing the recovery back of usurious interest paid in excess of 12 per cent per annum, the maximum legal rate, to be valid, and not contrary to public policy; Milton v.

Snow, 24 Okla. 780, 104 Pac. 40, holding that usury paid may be recovered in action against party taking, receiving, or retaining same.

Disapproved in *Wilson v. Selbie*, 7 S. D. 494, 64 N. W. 537, holding action for money had and received, maintainable to recover excess of interest over legal rate paid.

What constitutes usury.

Cited in note in 46 Am. St. Rep. 191, on what transactions are usurious.

3 DAK. 336, MARES v. NORTHERN P. R. CO. 31 N. W. 5, Affirmed in 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321.

Necessity for alleging and proving freedom from contributory negligence.

Cited in *Smith v. Chicago, M. & St. P. R. Co.* 4 S. D. 71, 55 N. W. 717; *Gram v. Northern P. R. Co.* 1 N. D. 252, 46 N. W. 972, holding a complaint for injuries by a fire originating on defendant railroad's right of way not fatally defective in failing to allege due care on the part of plaintiff.

Cited in notes in 116 Am. St. Rep. 116, on presumption of exercise of care; 33 L.R.A. (N.S.) 1174, 1201, on burden of proof as to contributory negligence.

Questions for jury.

Cited in *South Bend Toy Mfg. Co. v. Dakota M. & F. Ins. Co.* 2 S. D. 17, 48 N. W. 310, holding question properly withdrawn from jury where evidence is undisputed and only one conclusion deducible therefrom; *Bates v. Fremont, E. & M. V. R. Co.* 4 S. D. 394, 57 N. W. 72, holding that facts should be submitted to jury where they are in dispute or are such that, though undisputed, different impartial minds might fairly draw different conclusions therefrom; *Hormann v. Sherin*, 6 S. D. 82, 60 N. W. 145, holding defendant entitled to direction of verdict where plaintiff fails to offer evidence on material averments essential to recovery; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, holding it to be for jury where different conclusions might fairly be drawn from the facts adduced.

3 DAK. 345, HICKEY v. RICHARDS, 20 N. W. 428.

Validity of foreclosure by advertisement by assignee of mortgage.

Cited in *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85, holding foreclosure invalid where person in whose name foreclosure is made has no legal title to the mortgage because of insufficiency of description in assignment to him; *Langmvaack v. Keith*, 19 S. D. 358, 103 N. W. 210, holding invalid attempted foreclosure by assignee without recorded written assignment of the mortgage.

Cited in note in 8 L.R.A. 50, on power of sale in mortgage.

3 DAK. 349, TERRITORY EX REL. GRAMBURG v. NOWLIN, 20 N. W. 430.

Mandamus to compel official act.

Cited in *Farnham v. Colman*, 19 S. D. 342, 117 Am. St. Rep. 944, 1 L.R.A. (N.S.) 1135, 103 N. W. 161, 9 A. & E. Ann. Cas. 314, holding that mandamus will not lie to compel Justice of the Peace to punish witness for contempt; *Dillon v. Bare*, 60 W. Va. 483, 56 S. E. 390, holding that mandamus will not lie to control assessor in valuation of property.

3 DAK. 357, TERRITORY EX REL. SMITH v. SCOTT, 20 N. W. 401.

Delegation of power.

Cited in *Pueblo County v. Smith*, 22 Colo. 534, 33 L.R.A. 465, 45 Pac. 357, holding that a law authorizing county commissioners to ascertain the needs of precincts having requisite population to warrant the appointment of additional justices of the peace, as provided in the same law, does not attempt to delegate legislative powers; *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 So. 929, holding valid act conferring upon State Board of Education and State Board of Control power to determine where State University and State Female college shall be located; *Schweiker v. Husser*, 146 Ill. 399, 34 N. E. 1022, holding that the General Conference of a religious association, which by the laws of the association has power to appoint the time and place of its general conference may, after fixing the time, delegate to an executive board or commission power to select the place; *Soliah v. Cormack*, 17 N. D. 393, 117 N. W. 125, holding valid drainage act giving drainage board appointed by county commissioners, power to levy special assessments for drainage ditches; *Territory ex rel. Sandoval v. Albright*, 12 N. M. 293, 78 Pac. 204 (dissenting opinion), on power of legislature to delegate its power to appoint officers; *Brookings County v. Murphy*, 23 S. D. 311, 121 N. W. 793, holding act permitting certain counties to allow salary to county auditor not invalid as delegation of legislative power, when construed with reference to precedent provisions in same act.

Distinguished in *State ex rel. Rusk v. Budge*, 14 N. D. 532, 105 N. W. 724, holding invalid act providing for appointment of capitol commission to remodel capitol and to erect governor's residence, where act did not specify amount to be used for each nor time for their completion.

Length of legislative session.

Cited in *Cheyney v. Smith*, 3 Ariz. 143, 23 Pac. 680 (dissenting opinion), on legislative session as being limited to sixty consecutive days.

Power of Federal government over territories.

Cited in *Territory on Information of French v. Cox*, 6 Dak. 501, Appx., holding that the national government has sovereign power over all the territories.

3 DAK. 444, BUSH v. NORTHERN P. R. CO. 22 N. W. 506.**Assumption of facts in instruction.**

Cited in *Bolte v. Equitable Fire Asso.* 23 S. D. 240, 121 N. W. 773, holding charge which assumes facts established by undisputed evidence not objectionable.

Necessity and sufficiency of assignment of errors.

Cited in *Franz Falk Brewing Co. v. Mielenz Bros.* 5 Dak. 136, 37 N. W. 728, holding an assignment that the court erred in "overruling and denying appellant's motion to set aside his verdict and for a new trial" insufficient; *D. S. B. Johnston Land-Mortg. Co. v. Case*, 13 S. D. 28, 82 N. W. 90, holding that alleged error in denying a new trial cannot be considered on appeal, where the statement of facts or bill of exceptions used on the motion did not specify the particulars in which the evidence was insufficient or the errors of law occurring at the trial.

Necessity for exceptions.

Cited in *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 39, holding discretion of trial court in receiving general verdict not reviewable on appeal in absence of proper exception to discharge of the jury on failure to return answer to request for special finding.

3 DAK. 449, HOVEY v. EDMISON, 22 N. W. 594.**Validity of agreement to pay interest upon accrued interest.**

Followed in *Covington v. Fisher*, 22 Okla. 207, 97 Pac. 615; *Goodale v. Wallace*, 19 S. D. 405, 117 Am. St. Rep. 962, 103 N. W. 651, 9 A. & E. Ann. Cas. 545,—holding valid provision for payment of interest upon accrued interest on notes or other obligations.

Cited in note in 33 L.R.A.(N.S.) 301, on validity of agreement before interest due to pay interest on interest.

Stipulations as to interest.

Cited in *Rew v. Independent School Dist.* 125 Iowa, 28, 98 N. W. 802, holding that stipulated rate of interest continues after maturity but stipulation for semi-annual payment does not apply unless contract expressly so provides.

NOTES

ON THE

DAKOTA REPORTS.

CASES IN 4 DAK.

4 DAK. 1, PIERCE v. SPARKS, 22 N. W. 491, Affirmed in 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102.

Rights to public lands.

Cited in *Graham v. Great Falls Water Power & Townsite Co.* 30 Mont. 393, 76 Pac. 808, holding that successful contestant of pre-emption entry obtains no right in the land as against the right of Congress to dispose thereof as it may see fit.

4 DAK. 4, TOLMAN v. NEW MEXICO & D. MICA CO. 22 N. W. 505.

Right of corporation to purchase its own stock.

Distinguished in *Ophir Consol. Mines Co. v. Brynteson*, 74 C. C. A. 625, 143 Fed. 829, holding valid sale of stock by corporation with proviso that purchaser might return the stock within specified time and recover the price paid for it.

4 DAK. 13, BURDICK v. HAGGART, 23 N. W. 539.

Misconduct of counsel.

Cited in note in 100 Am. St. Rep. 695, on misconduct of counsel other than in argument.

4 DAK. 20, HAWKE v. DEFFERBACH, 23 N. W. 480, Affirmed in 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95.

Followed without discussion in *Pierce v. Sparks*, 4 Dak. 1, 22 N. W. 491.

Occupying claimant's right to recover for improvements.

Cited in *Richmond v. Ashcraft*, 137 Mo. App. 191, 117 S. W. 689, hold-

ing that occupying claimant cannot recover for improvements made in belief that his title was better than an adverse one of which he had notice.

Cited in note in 70 L.R.A. 805, on right of one who buys, or makes lawful entry on, public land, to crops and improvements placed thereon by another.

4 DAK. 42, HAWKE v. FLETCHER, 22 N. W. 592.

4 DAK. 46, WELLS v. EDMISON, 22 N. W. 497.

When judgment is a bar.

Cited in Newhall v. Hatch, 134 Cal. 269, 55 L.R.A. 673, 66 Pac. 266 (dissenting opinion), wherein the majority hold a judgment sustaining a demurrer to a complaint because the cause of action, alleged to have accrued upon a specified date, was barred by the statute of limitations, no bar to another suit based upon an additional promise to meet the same demand involved in the former suit, made within the statutory period.

4 DAK. 62, LLOYD v. POWERS, 22 N. W. 492.

Lessor's ownership of crops before division.

Cited in Consolidated Land & Irrig. Co. v. Hawley, 7 S. D. 229, 63 N. W. 904, holding legal title and control of crops in lessor until lessee's covenants are fulfilled or crops divided under contract containing certain covenants by lessee and agreement that ownership, title and possession of crops shall remain in lessor until division thereof; Angell v. Egger, 6 N. D. 391, 71 N. W. 547, holding it competent for parties to a contract for cultivation of land to stipulate that the legal title to the crops shall remain in the owner until a division by him; Sanford v. Modine, 51 Neb. 728, 71 N. W. 740, holding that one working land under a contract by which the owner was to hold all the crops until he realized a specified amount, when he was to turn over the balance to the former, might make a disposition of the crops criminal in its nature.

Pleading in trover.

Cited in note in 9 N. D. 632, on pleading in actions for trover and conversion.

4 DAK. 67, HOLT v. COLTON, 22 N. W. 495.

Escrows.

Cited in note in 130 Am. St. Rep. 959, on escrows.

4 DAK. 69, STAMM v. COATES, 22 N. W. 593.

Waiver of oral instructions.

Cited in Frye v. Ferguson, 6 S. D. 392, 61 N. W. 161, holding objection that instructions were given orally not available when first raised on appeal.

4 DAK. 72, UNITED STATES v. ROBINSON, 23 N. W. 90.

What constitutes subornation of perjury.

Cited in note in 25 L.R.A. (N.S.) 121, on immaterial testimony as basis for charge of subornation of perjury.

4 DAK. 78, TERRITORY EX REL. HIGGINS v. STEELE, 23 N. W. 91.

Stating object of session in call.

Cited in Emmons County v. First Nat. Bank, 9 N. D. 583, 84 N. W. 379, holding that the object of a special session of the county commissioners must be stated in the call with reasonable certainty, and the business done at such session confined to the object stated in the call.

4 DAK. 92, J. I. CASE THRESHING MACH. CO. v. VENNUM, 23 N. W. 563.

Waiver of warranty of threshing machine.

Cited in Murphy v. Russell, 8 Idaho, 133, 67 Pac. 421, holding right to recover on warranty waived by use for six days without notice of defects, where contract provided that such use should be conclusive evidence that it was accepted and satisfactory; Kingman v. Watson, 97 Wis. 596, 73 N. W. 438, holding that where a threshing outfit is sold under a warranty providing that, if it shall fail to fill the warranty within ten days after first use, written notice is to be given the vendor stating wherein it fails, and that continued possession or use after said ten days shall be conclusive evidence that the warranty is fulfilled to vendee's satisfaction, the vendee loses his right to reject the machinery by retaining and using it for his own benefit long after it becomes absolutely certain that the warranty is not fulfilled, even though the limitation of the trial period to ten days has been waived.

Distinguished in Minnesota Thresher Mfg. Co. v. Hanson, 3 N. D. 81, 54 N. W. 311, holding that breach of warranty as to condition at time of purchase, may be set up as defense in action for purchase price though defect was not discovered until machine had been used for some time.

4 DAK. 98, OSTLAND v. PORTER, 25 N. W. 731.

Waiver of objection to evidence.

Cited in Gale v. Shillock, 4 Dak. 182, 29 N. W. 661, holding objection to evidence waived where objecting party introduces evidence to the same point.

4 DAK. 107, MURPHY v. MURPHY, 25 N. W. 806.**4 DAK. 110, DUGGAN v. DAVEY, 26 N. W. 887, 17 MOR. MIN. REP. 59, Appeal dismissed in 131 U. S. 433, 33 L. ed. 217, 9 Sup. Ct. Rep. 797.**

Mining claims — Rights of owner.

Cited in Doe v. Waterloo Min. Co. 54 Fed. 935, holding that owner of

mining claim has right to everything beneath its surface except as to vein or lode which apexes within limits of claim owned by another; *Parrot Silver & Copper Co. v. Heinze*, 25 Mont. 139, 53 L.R.A. 491, 87 Am. St. Rep. 386, 64 Pac. 326, holding that a grant of mineral land under U. S. Rev. Stat. § 2322 (U. S. Comp. Stat. 1901, p. 1425), confers all the rights of a common-law grant, with the addition of the right to follow the ledge upon its dip between the vertical planes of the parallel end lines when it extends beyond the side lines, but subject to the right of another locator to follow his vein upon its course downward within said grant.

Cited in notes in 53 L.R.A. 504, on the right to follow a vein or lode on its dip beyond the surface lines of the location; 58 Am. St. Rep. 273, on what included in patents for mineral lands.

— **Discovery.**

Cited in *Book v. Justice Min. Co.* 58 Fed. 106, 17 Mor. Min. Rep. 617, on what constitutes discovery of a vein or lode.

— **Presumption and burden of proof.**

Cited in *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540, 18 Mor. Min. Rep. 113, holding that owner of mining claim alleging rights within boundaries of another claim, must show by preponderance of evidence that vein apexing in his claim extends into the other; *Wakeman v. Norton*, 24 Colo. 192, 49 Pac. 283, holding the locator of a mining claim entitled to the presumption of ownership of all minerals within his surface boundaries, until another's extralateral right of following a vein into said claim is shown to exist by one who seeks to avail thereof; *Carson City Gold & Silver Min. Co. v. North Star Min. Co.* 28 C. C. A. 333, 48 U. S. App. 724, 83 Fed. 658, holding that, in an action of trespass against one claiming to exercise extralateral mining rights within the surface lines of plaintiff's patented claim, the burden is upon the defendant to show, by a preponderance of evidence, that the ore extracted from beneath plaintiff's claim belonged to a lode or vein the apex of which is within the surface lines of its own patented ground.

Order for inspection of mine.

Cited in *State ex rel. Anaconda Copper Min. Co. v. Second Judicial Dist. Ct.* 26 Mont. 396, 68 Pac. 570, 69 Pac. 103, holding that order for inspection of a mine will not be granted, in the absence of statutory authority, except in aid of the rights of parties which are being adjudicated in a pending action by which the court has acquired jurisdiction of the parties and the property in controversy.

4 DAK. 145, EDMISON v. ASLESEN, 27 N. W. 82.

Statutory duty of landlord to keep leased premises in repair.

Followed in *Tucker v. Bennett*, 15 Okla. 187, 81 Pac. 423, holding landlord not bound to put in fit condition for use, and to keep in repair, second story of store building rented for use as a printing office.

Cited in *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307, holding statute

requiring lessor to put premises in fit condition for use and repair subsequent defects not applicable to business property.

Cited in note in 95 Am. Dec. 119, on covenants by landlord to repair.

4 DAK. 149, SAMUEL CUPPLES WOODEN WARE CO. v. JENSEN, 27 N. W. 206, 28 N. W. 193.

Power of court to strike out verified denial as sham.

Cited in *Green v. Hughitt School Twp.* 5 S. D. 452, 59 N. W. 224, holding that court cannot strike out as sham a verified answer containing a general denial; *Gjerstadengen v. Hartzel*, 8 N. D. 424, 79 N. W. 872, holding that denial of execution of deeds and passage of title thereby cannot be stricken out as sham upon affidavits proving execution; *Loranger v. Big Missouri Min. Co.* 6 S. D. 478, 61 N. W. 686, holding verified unqualified denial of material facts of character which defendant may deny raises issue of fact and ordinarily will not be stricken out as sham; *King v. Waite*, 10 S. D. 1, 70 N. W. 1056, holding that verified answer denying material allegations of complaint in action at law cannot be stricken out as sham though defendant makes admissions in affidavit on motion inconsistent with answer.

Cited in note in 113 Am. St. Rep. 646, on sham pleadings.

Reasons for decision.

Cited in *Fideler v. Norton*, 4 Dak. 258, 32 N. W. 57 (dissenting opinion), quoting "it is to be regretted that the court should have contented itself with the mere declaration of the rule which it announces."

4 DAK. 162, ST. PAUL F. & M. INS. CO. v. HANSON, 28 N. W. 193.

Jurisdiction of amount in district court.

Cited in *St. Paul F. & M. Ins. Co. v. Coleman*, 6 Dak. 459, 6 L.R.A. 87, 43 N. W. 693, holding that district court has jurisdiction in matters involving less than \$50.00 but if recovery is less plaintiff is not entitled to costs.

4 DAK. 163, THOMPSON v. SCHUSTER, 28 N. W. 858.

Nonprejudicial errors.

Cited in *Mattes v. Engel*, 15 S. D. 330, 89 N. W. 651, holding that appellant cannot complain because verdict was for less amount than other party was entitled to.

4 DAK. 167, FIRST NAT. BANK v. COMFORT, 28 N. W. 855.

Effect of secret trust in sale of chattels.

Cited in *Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014, holding sale fraudulent as to other creditors where made to one creditor by absolute bill of sale but with secret oral understanding as to use of proceeds.

Distinguished in *Lane v. Starr*, 1 S. D. 107, 45 N. W. 212, holding mortgage of stock of merchandise not prima facie fraudulent as to creditors

though mortgagor was to remain in possession with power to sell the stocks for purpose of paying the debt.

Errors reviewable on appeal.

Cited in *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353, holding that assignment that evidence is insufficient to support the verdict cannot be considered on appeal in absence of motion for new trial in court below.

Necessity of notice of motion for new trial.

Cited in *Mac Gregor v. Pierce*, 17 S. D. 51, 95 N. W. 281, holding notice to adverse party of intention to move for new trial essential before such motion can be heard.

4 DAK. 173, TERRITORY v. MILLER, 29 N. W. 7.

Proceedings under plea of guilty.

Cited in *State v. Johnson*, 21 Okla. 40, 22 L.R.A. (N.S.) 463, 96 Pac. 26, 1 Okla. Crim. Rep. 154, holding that conviction for murder pursuant to plea of guilty, without any evidence as to sanity of accused and without cautioning him as to effect of such plea, is irregular.

Statutes affecting punishments.

Cited in *State v. Rooney*, 12 N. D. 144, 95 N. W. 513, holding valid statute changing place of inflicting death sentence, and extending time between sentence and execution, as applied to one execution of one convicted prior to its passage.

4 DAK. 182, GALE v. SHILLOCK, 29 N. W. 661, Affirmed in 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674.

Necessity for recording seal on instrument.

Cited in *Summer v. Mitchell*, 29 Fla. 179, 14 L.R.A. (N.S.) 815, 3 Am. St. Rep. 106, 10 So. 562, holding record of acknowledgment of deed sufficient though no seal was shown thereon, where it indicated by its language the seal was used.

Waiver of objection to evidence.

Cited in *State v. Hope*, 100 Mo. 347, 8 L.R.A. (N.S.) 608, 13 S. W. 490, on objection to evidence being waived where objecting party introduces evidence on the same point.

Possession as notice.

Cited in notes in 104 Am. St. Rep. 339, on effect of possession of real property as notice; 13 L.R.A. (N.S.) 85, on possession of land as notice of title.

4 DAK. 196, GALE v. FRAZIER, 30 N. W. 138, Affirmed in 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674.

Right to intervene.

Cited in *Faricy v. St. Paul Invest. & Sav. Soc.* 110 Minn. 311, 125 N. W. 676, holding that one who has such an interest in the action that he would necessarily be affected thereby may be permitted to intervene espec-

ially where another action is thereby avoided; *McClurg v. State Bindery Co.* 3 S. D. 362, 44 Am. St. Rep. 799, 53 N. W. 428, holding that assignee for benefit of creditors has no right to intervene to defend personal action against his assignor.

Cited in note in 123 Am. St. Rep. 286, 291, 295, on intervention.

4 DAK. 210, ROBERTS v. HAGGART, 29 N. W. 656.

Jurisdiction over case after term.

Distinguished in *Territory v. Christensen*, 4 Dak. 410, 31 N. W. 847, holding that clerical omissions and errors in record of criminal case may be corrected by amendment after the term.

4 DAK. 213, STAR v. MAHAN, 30 N. W. 169.

4 DAK. 213, REA v. THE ECLIPSE, 30 N. W. 159, Affirmed in 125 U. S. 599, 34 L. ed. 269, 10 Sup. Ct. Rep. 873; Later phases of same case in 1 N. D. 455, 43 N. W. 354; 1 N. D. 475, 43 N. W. 361; 2 N. D. 57, 49 N. W. 419; 3 N. D. 365, 56 N. W. 133; 5 N. D. 196, 31 L.R.A. 238, 65 N. W. 701.

Admiralty cases in territorial courts.

Cited in *Braithwaite v. Jordan*, 5 N. D. 196, 31 L.R.A. 238, holding that admiralty cases in the territorial courts are governed by the laws and rules applicable to other civil suits.

Cited in note in 66 L.R.A. 236, on admiralty jurisdiction of contracts.

4 DAK. 232, FARGO v. PALMER, 29 N. W. 463.

4 DAK. 240, THOMPSON v. WEBBER, 29 N. W. 671.

Exemplary damages for abuse of process.

Cited in note in 29 L.R.A.(N.S.) 276, on exemplary damages in action for malicious prosecution or abuse of process in suing out attachment for collection of debt only.

4 DAK. 245, CURTIS v. DINNEEN, 30 N. W. 148.

Liability of master for acts of servant.

Cited in *Oakland City Agri. & Industrial Soc. v. Bingham*, 4 Ind. App. 545, 31 N. E. 383, holding agricultural society not liable for acts of gate keeper outside scope of his employment even under allegation of failure to exercise care in selection of such servant; *Kincade v. Chicago, M. & St. P. R. Co.* 107 Iowa, 682, 78 N. W. 698, holding a railroad company not liable for the personal injuries of a section hand pushed off a hand car while returning from work, by another employee in attempting to avoid a blow struck by a third, as the servant inflicting the injury was not at the time acting within the scope of his employment.

Cited in notes in 54 Am. St. Rep. 87, on acts of servant for which master is not responsible; 27 L.R.A. 196, on master's civil responsibility for the wrongful or negligent act of his servant or agent towards one who has no

claim upon the master by reason of a contract incipient or perfected; 4 L.R.A.(N.S.) 486, on liability for malicious act of servant when master owes special duty to party injured.

— Innkeeper for servant's assault.

Cited in *Clancy v. Barker*, 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 161, holding innkeeper not liable for willful and negligent acts of servants outside the scope of their employment; *Clancy v. Barker*, 71 Neb. 83, 69 L.R.A. 642, 115 Am. St. Rep. 559, 103 N. W. 446, 8 A. & E. Ann. Cas. 682 (dissenting opinion), on liability of innkeeper to his guests.

Cited in note in 69 L.R.A. 643, on liability of innkeeper for injury to guest by servant; 12 L.R.A.(N.S.) 1156, on liability of inn or restaurant keeper for assault by servant upon patron.

— Husband or wife for each other.

Cited in *Radke v. Schlundt*, 30 Ind. App. 213, 65 N. E. 770, holding husband not liable where wife caused personal injury to the plaintiff through her negligence in driving horse and wagon in returning from marketing butter, eggs and other produce.

Cited in notes in 131 Am. St. Rep. 159, on liability of married woman for torts; 14 L.R.A.(N.S.) 1006, on effect of married women's acts upon husband's liability for wife's torts.

Necessity for proving servant's position as alleged.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Adams*, 25 Ind. App. 164, 56 N. E. 101, holding that, in an action against a railroad company to recover for damage resulting from the negligent act of a brakeman, the allegations of the complaint indicating the nature of the servant's employment, and showing that the negligence occurred while the servant was engaged in his employment as such, or was acting within the line or scope of his employment, are allegations of material facts, which must be proved.

4 DAK. 258, FIDELER v. NORTON, 30 N. W. 128, 32 N. W. 57.

To whom statute of frauds is available.

Cited in *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding recovery by purchaser, of part of proceeds of resale of tree claim retained by agent authorized to prove up claim and sell same not prevented by invalidity of sale of such claim to him under statute of frauds.

Cited in note in 127 Am. St. Rep. 768, on persons to whom statute of frauds is available.

Who is a trustee.

Cited in *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725, 113 N. W. 618, holding procuring mortgage as preference from bankrupt, a trustee.

4 DAK. 287, LUKE v. GRIGGS, 30 N. W. 170.**Extent of authority of agent for sale of land.**

Cited in *Fuller v. Samuels*, 137 Ill. App. 536; *Wiggins v. Markham*, 131 Iowa, 102, 108 N. W. 113,—holding that agent for sale of land has no power to cancel contract of sale when made.

4 DAK. 290, ROBINSON v. MCKINNEY, 29 N. W. 658.**Penalties for usury.**

Cited in *Grove v. Great Northern Loan Co.* 17 N. D. 352, 116 N. W. 345, holding that penalties are only such as are prescribed by statute; *Milton v. Snow*, 24 Okla. 780, 104 Pac. 40, holding usury paid recoverable in action against party taking, or retaining same.

—To whom available.

Disapproved in *Northwestern Mortg. Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W. 648, holding usury in mortgage not available as defense in action by purchaser under foreclosure proceedings by advertisement to recover possession from mortgagor.

4 DAK. 295, NEILSVILLE BANK v. TUTHILL, 30 N. W. 154.**4 DAK. 308, TERRITORY EX REL. GRAY v. DISTRICT CT. 30 N. W. 145.****4 DAK. 315, MULLIGAN v. NORTHERN P. R. CO. 29 N. W. 659.****4 DAK. 319, KENNEDY v. FALDE, 29 N. W. 667.****Surety's right to require creditor to proceed against principal.**

Cited in *Bailey Loan Co. v. Seward*, 9 S. D. 326, 69 N. W. 58, holding that demand by surety on creditor to proceed against principal or pursue other remedy to lighten surety's burden must be specific and definite.

Cited in note in 115 Am. St. Rep. 94, on duty owed by creditor to surety.

Sufficiency of exceptions to instructions to jury.

Cited in *Pease v. Magill*, 17 N. D. 166, 115 N. W. 260, holding exception to charge to jury insufficient where particular portion objected to is not pointed out; *Banbury v. Sherin*, 4 S. D. 88, 55 N. W. 723, holding that general instructions to jury will not be reviewed under exception "to each of the instructions given by the court to the jury, respectively."

Necessity for exception.

Cited in *South Dakota C. R. Co. v. Smith*, 22 S. D. 210, 116 N. W. 1120, holding that exception to instruction must be taken at trial to be available on appeal.

Dak. Rep.—5.

4 DAK. 328, BILL v. KLAUS, 30 N. W. 171.

4 DAK. 329, FULLER & J. MFG. CO. v. FOSTER, 30 N. W. 166.

Foreign corporation — Right to do business in the state.

Cited in Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544, holding that statute governing right of foreign corporation to do business in the state does not make void and unenforceable contracts entered into without complying with such statute; Iowa Falls Mfg. Co. v. Farrar, 19 S. D. 632, 104 N. W. 449, on right of foreign corporation not doing business in the state, to bring action in its court.

— What constitutes "doing business."

Cited in Underwood Typewriter Co. v. Piggott, 60 W. Va. 532, 55 S. E. 664, holding that foreign corporation selling goods in the state through orders taken by its agents and salesmen is not "doing business" within the state and may sue therein without complying with statute governing right to do business; Kirven v. Virginia-Carolina Chemical Co. 76 C. C. A. 172, 145 Fed. 238, 7 A. & E. Ann. Cas. 219, on taking notes for goods sold outside the state and bring action thereon as not constituting "doing business."

4 DAK. 336, FORBES v. DRISCOLL, 31 N. W. 633.

Jurisdiction of state court over public land contests.

Cited in Merriam v. Bachioni, 112 Cal. 191, 44 Pac. 481, holding that a judgment of ouster obtained in a state court by a homesteader against a pre-emptioner on public lands, pending a contest in the United States Land Office, will not operate as an estoppel upon the latter, and cause a patent afterwards issued to the latter by the Land Office, to inure to the former's benefit; Vantongeren v. Heffernan, 5 Dak. 180, 38 N. W. 52, holding that state courts have no jurisdiction to determine conflicting claims to land arising under pre-emption laws; Columbia Canal Co. v. Benham. 47 Wash. 249, 125 Am. St. Rep. 901, 91 Pac. 961, holding that state court has no jurisdiction over conflicting claim to public land while contest is still pending before land department; Sproat v. Durland, 2 Okla. 24, 35 Pac. 886 (dissenting opinion), on same point.

Distinguished in Wood v. Murray, 85 Iowa, 505, 52 N. W. 356, holding that state court may protect possession of pre-emptor against adverse claimant pending decision by land department; Reservation State Bank v. Holst, 17 S. D. 240, 70 L.R.A. 799, 95 N. W. 931, holding that where homestead entry is accepted by land department, state court will protect homesteader in his possession.

Authority of commissioner of land office.

Cited in Swigart v. Walker, 49 Kan. 104, 30 Pac. 162, holding commissioner of general land office authorized before issuance of patent, to correct any in preceding steps in disposition of land.

Title to public land.

Cited in Graham v. Great Falls Water Power & Townsite Co. 30 Mont.

393, 76 Pac. 808, holding that successful contestant of pre-emption entry obtains no title as against right of Congress to dispose of the land.

Distinguished in *Olson v. Huntamer*, 6 S. D. 336, 61 N. W. 479, holding timber culture entryman filing on public land previously unoccupied entitled as against third persons to possession of all the land which will come to him under his patent.

4 DAK. 360, WILLIAMS v. NETH, 31 N. W. 630.

Effect of appearance by unauthorized attorney.

Cited in *McEachern v. Brackett*, 8 Wash. 655, 40 Am. St. Rep. 922, 36 Pac. 690, holding judgment against party not served with process, but in whose behalf an unauthorized attorney appears, void even as against innocent third party.

4 DAK. 367, YOUNG v. HARRIS, 32 N. W. 97.

Rights of transferee from insolvent.

Cited in *Kansas Moline Plow Co. v. Sherman*, 3 Okla. 204, 32 L.R.A. 33, 41 Pac. 623, holding that the transferee of property from an insolvent debtor holds subject to creditors' rights, where, at or before the transfer, he has notice of such facts and circumstances as would arouse the suspicion of an ordinarily prudent man, and cause him to make such inquiry as to the purpose of the transfer as would disclose the fraudulent intent of the maker, although he has no actual notice of such intent.

4 DAK. 376, WILSON v. RUSSELL, 31 N. W. 645.

Acts of undersheriff as those of sheriff.

Cited in *Morrissey v. Dean*, 97 Wis. 302, 72 N. W. 873, holding that the acts of an under sheriff relating to and following a sale of land under mortgage foreclosure proceedings must be regarded as the official acts of the sheriff, under Wis. Rev. Stat. § 3528, providing that the sale shall be made by the person appointed for that purpose in the mortgage, if any, or by the sheriff, under sheriff, or deputy sheriff, although the notice of said sale designated the sheriff as the party making the sale.

Sufficiency of acknowledgment.

Cited in *Timber v. Desparois*, 18 S. D. 587, 101 N. W. 879, holding certificate of married woman's acknowledgment to deed sufficient though "separate" was used therein in place of "private" as provided in statute.

Record of unacknowledged instrument as notice.

Cited in *Cannon v. Deming*, 3 S. D. 421, 53 N. W. 863, holding that instrument recorded without acknowledgment as prescribed by statute for recording instruments it is not constructive notice to any one.

4 DAK. 397, PORTER v. PARKER, 33 N. W. 70.

4 DAK. 402, BROWN COUNTY v. ABERDEEN, 31 N. W. 735.

4 DAK. 410, TERRITORY v. CHRISTENSEN, 31 N. W. 847.**Power of court to amend record.**

Cited in *Territory v. Clayton*, 8 Mont. 1, 19 Pac. 293, holding that court has power to amend record in criminal case at subsequent term, so as to make it conform to the truth, even though a different judge is there presiding; *Van Cise v. Merchant's Nat. Bank*, 4 Dak. 485, 33 N. W. 897, on power of court over records, orders and judgments before jurisdictional control of the case has been lost.

4 DAK. 425, FARMER v. COBBAN, 29 N. W. 12, Writ of error dismissed in 131 U. S. 435, 33 L. ed. 223.**Assignment for benefit of creditors — Sufficiency of affidavit.**

Distinguished in *Landauer v. Conklin*, 3 S. D. 462, 54 N. W. 322, holding affidavit sufficient where it complied with language of statute except that "just" was omitted in phrase "just and true" in statute.

— Attachment of property.

Cited in *Hockaday v. Drye*, 7 Okla. 288, 54 Pac. 475, holding that assignment cannot be defeated by levy of attachment after execution of assignment but before time for making inventory has expired; *David Bradley & Co. v. Bailey*, 95 Iowa, 745, 64 N. W. 758, holding assigned property subject to attachment where it is made to appear that assignment is void.

4 DAK. 430, PECK v. PHILLIPS, 34 N. W. 65.**Service of notice of appeal upon clerk of court.**

Cited in *Valley City Land & Irrig. Co. v. Schone*, 2 S. D. 344, 50 N. W. 356, holding that filing notice of appeal in office of clerk of court is not sufficient as service of the notice upon him.

Jurisdiction by agreement.

Cited in *Bright v. Juhl*, 16 S. D. 440, 93 N. W. 648, on jurisdiction to grant new trial as not being conferrable upon court by stipulation of counsel after time to appeal has expired.

4 DAK. 433, BATEMAN v. BACKUS, 34 N. W. 66.**Priority between attachment of execution and unrecorded conveyance.**

Cited in *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308, holding that deed executed prior to but recorded after notice of lis pendens in attachment suit takes precedence over the attachment; *Kohn v. Lapham*, 13 S. D. 78, 82 N. W. 408, holding real estate mortgage executed before but recorded after commencement of attachment suit and filing of notice of pendency superior to attaching creditor's lien; *Roblin v. Palmer*, 9 S. D. 36, 67 N. W. 949, holding title acquired on unrecorded deed superior to that obtained by purchaser at sale on execution against grantor.

Sufficiency of complaint.

Cited in *Hale v. Grigsby*, 12 S. D. 198, 80 N. W. 199, holding complaint in an action to remove a cloud from plaintiff's title, not insufficient for

failure to allege that defendant claims an estate or interest in the land adverse to plaintiff, where such fact clearly appears from the facts stated.

4 DAK. 438, KEITH v. HAGGART, 33 N. W. 465.

Measure of damages for seizure of mortgaged property without paying mortgage debt.

Cited in *Rocheleau v. Boyle*, 12 Mont. 590, 31 Pac. 533, holding that where sheriff seizes mortgaged property under execution against mortgagor without paying mortgagee amount of debt, is the value of the property but not to exceed amount of the debt.

Right to levy on mortgaged chattels without paying debt.

Cited in *Moore v. Calvert*, 8 Okla. 358, 58 Pac. 627, holding that the interest of the mortgagor, where the mortgagee is in possession for the purpose of foreclosure, cannot be reached by execution or attachment; but the remedy is by garnishment, or proceedings in aid of execution to reach any surplus that may remain in the hands of the mortgagee after satisfaction of his interest; *Coughran v. Sundback*, 9 S. D. 483, 70 N. W. 644, holding sheriff seizing mortgaged chattels under execution without paying or tendering mortgage debt a trespasser ab initio as against mortgagor.

4 DAK. 454, NORTH STAR BOOT & S. CO. v. BRAITHWAITE, 34 N. W. 68.

Effect of excessive verdict.

Cited in *First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646, holding erroneous judgment for an amount given by jury in excess of amount claimed in pleading, and that could not be amended after verdict so as to make amount asked correspond to verdict.

4 DAK. 455, UNITED STATES v. WOOD, 33 N. W. 59.

Cross-examination of witness in criminal case.

Cited in *State v. Kent*, 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, holding that an accused who testifies in his own behalf is subject to the same latitude of cross-examination as other witnesses; *State v. Phelps*, 5 S. D. 488, 59 N. W. 471, holding that defendant in criminal case who takes stand in his own behalf, may be cross-examined as to matters tending to impeach his moral character and affect his credibility.

Evidence of unchastity of witness.

Distinguished in *State v. Smith*, 18 S. D. 341, 100 N. W. 740, holding inadmissible, in prosecution for rape of female under age of consent, evidence of prior intercourse by her with other men, or evidence that she had a venereal disease.

4 DAK. 474, SPENCER v. SULLY COUNTY, 33 N. W. 97.

Appeal from decisions of county commissioners.

Cited in *Pierre Waterworks Co. v. Hughes*, 5 Dak. 145, 37 N. W. 733, holding that appeal lies from decision of board of county commissioners refusing to reduce an assessment; *Champion v. Minnehaha County*, 5 Dak.

416, 41 N. W. 739, holding that appeal does not lie from action of county commissioners in calling election under local option law.

— **Action after failure to appeal.**

Cited in *Campbell County v. Overby*, 20 S. D. 640, 108 N. W. 247, holding that county may recover money paid upon illegal claim allowed by commissioners, though it did not appeal from such allowance.

Power of legislature to confer judicial power.

Cited in *Christy v. Kingfisher*, 13 Okla. 585, 76 Pac. 135, holding that legislature cannot confer judicial power upon any person or body not given such power under the organic act; *Bardrick v. Dillon*, 7 Okla. 535, 54 Pac. 785, holding that under the organic act of Oklahoma (Okla. Stat. 1893, p. 42) vesting the entire judicial power of the territory in specified courts, the territorial legislature cannot confer judicial powers upon any boards, officers or tribunals; *Howe v. Dunlap*, 12 Okla. 467, 72 Pac. 895 (dissenting opinion), on same point.

When mandamus lies.

Cited in *Howard v. Burns*, 14 S. D. 383, 85 N. W. 920, holding mandamus the proper remedy where county commissioners refuse to order a warrant for the state's attorney's salary on the ground that he is ineligible.

Distinguished in *Taubman v. Aurora County*, 14 S. D. 206, 84 N. W. 784, holding that the owner of a newspaper entitled to be designated as an official newspaper cannot maintain mandamus proceedings to enforce his rights, as his remedy is by appeal.

4 DAK. 481, KIRKPATRICK v. DAKOTA C. R. CO. 33 N. W. 103.

4 DAK. 485, VAN CISE v. MERCHANTS' NAT. BANK. 33 N. W. 897.

Validity of transfer of stock.

Cited in *National Bank v. Western P. R. Co.* 157 Cal. 573, 27 L.R.A. (N.S.) 987, 108 Pac. 676, holding that sale and transfer of stock is valid against attachment against seller, though transfer has not been made on books of corporation; *State Bkg. & T. Co. v. Taylor*, 25 S. D. 577, 29 L.R.A. (N.S.) 523, 127 N. W. 590, holding unregistered pledge of stock, valid against subsequent attachment against stockholder by creditor without notice.

Cited in note in 67 L.R.A. 678, on validity of pledge or other transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers.

Property subject to execution under statute.

Cited in *McLaughlin v. Alexander*, 2 S. D. 226, 49 N. W. 99, holding that a judgment is subject to levy and sale under execution.

4 DAK. 506, McCORMACK v. PHILLIPS, 34 N. W. 39.

Effect of stipulations.

Cited in *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 73 N. E. 824,

holding that stipulations of parties or of counsel relating to trial of their case, will be enforced unless unreasonable or contrary to public policy.

Special findings—Effect of failure to make.

Cited in *Reid v. Rhode Island Co.* 28 R. I. 321, 67 Atl. 328; *Hawley v. Bond*, 20 S. D. 215, 105 N. W. 464,—holding that court may enter judgment upon general verdict though special question submitted to jury is not answered where answer thereto could not affect the verdict.

—Waiver.

Cited in *Reams v. McAlpine*, 2 Alaska, 165, holding right to special findings waived where attorney was present when verdict was rendered and did not object to failure to answer special questions submitted.

Error in instructions to jury.

Cited in *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 857, holding that reversal will not be granted for erroneous statement of the law in isolated sentence in instruction where as a whole it states the law correctly.

Enforcement of mechanic's liens.

Cited in *Rosina v. Trowbridge*, 20 Nev. 105, 17 Pac. 751, holding that sale under mechanic's lien affects only defendant's interest in the property; *Erickson v. Russ*, 21 N. D. 208, 32 L.R.A.(N.S.) 1072, 129 N. W. 1025, on statute governing remedy for enforcement of mechanics' lien.

—Judgment on.

Cited in *Volker-Scowcroft Lumber Co. v. Vance*, 36 Utah, 348, 24 L.R.A.(N.S.) 321, 103 Pac. 970, holding that in action to enforce mechanic's lien plaintiff may obtain personal judgment against defendant though the lien fail.

—Different buildings.

Cited in *Granquist v. Western Tube Co.* 240 Ill. 132, 88 N. E. 468, on when mechanic's lien may be enforced as to part only of the premises upon which the work was done.

Effect of filing excessive mechanic's lien.

Cited in note in 29 L.R.A.(N.S.) 306, 317, on effect of filing excessive mechanics' lien.

4 DAK. 549, EDWARDS v. FARGO & S. R. CO. 33 N. W. 100.

Compensation of corporate officers.

Cited in note in 136 Am. St. Rep. 923, on right of corporate officers to compensation for services rendered.

Competency of witness to value.

Cited in *McCormick Harvesting Mach. Co. v. Davis*, 61 Neb. 406, 85 N. W. 390, holding that one who testifies that he has kept and boarded a team is competent to testify as to value of such board and keep, without further foundation being laid.

NOTES

ON THE

DAKOTA REPORTS.

CASES IN 5 DAK.

5 DAK. 1, HANNAHER v. ST. PAUL, M. & M. R. CO. 37 N. W. 722.

Liability of railroad company—For loss by fire.

Cited in *White v. Chicago, M. & St. P. R. Co.* 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146, holding railroad company not liable for loss by fire set by locomotive if it has used best and most approved appliances on its engines and is free from negligence; *Pielke v. Chicago, M. & St. P. R. Co.* 5 Dak. 444, 41 N. W. 669, holding railroad company not liable for injury by fire because a previous fire had been set by its locomotive unless the latter fire was the proximate cause of the former.

—For injuries by surface water.

Cited in *Missouri P. R. Co. v. Renfro*, 52 Kan. 237, 39 Am. St. Rep. 344, 34 Pac. 802, holding a railway company not liable to a landowner for injuries from surface water which flows through ditches which are the mere incidents of or necessary to the proper construction of the railroad.

5 DAK. 28, NICHOLS v. BRUNS, 37 N. W. 752.

What constitutes a ratification.

Cited in *Extension Gold Min. & Mill. Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198, holding unauthorized contract by secretary to pay broker for selling land of corporation, not ratified by sale to purchaser found by the broker and presidents for such sale without knowledge of the agreement; *School Dist. No. 61 v. Alderson*, 6 Dak. 145, 41 N. W. 466, holding that a school district does not ratify an act of its treasurer in excess of his authority, in obtaining a note from his predecessor for an amount which the latter was behind in his accounts, by accepting such note without knowledge of the facts; *J. I. Case Threshing Mach. Co. v. Eichinger*, 15

S. D. 530, 91 N. W. 82, holding a vendee's right to recover for the loss of the use of a threshing machine, forming part of the purchase price of a new machine, by reason of his delivery thereof sometime before the arrival of the latter, upon the agent's representation that the latter was shipped and would arrive in a couple of days, is for the court, and not the jury; *First Nat. Bank v. Foote*, 12 Utah, 157, 42 Pac. 205, holding that a payee does not by taking a promissory note, apparently complete on its face, for which he parts with full value, thereby ratify or become responsible for the representations of one maker to his comakers, that it was not to be delivered until signed by a specified person.

Necessity for motion for new trial.

Cited in *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434, holding motion for new trial not necessary to secure review of ruling on motion to direct verdict.

5 DAK. 36, FARREN v. BUFFALO COUNTY, 37 N. W. 756.

5 DAK. 45, LANGNESS v. PETTIGREW, 37 N. W. 758.

Grant of water power.

Cited in note in 67 L.R.A. 386, on grant of water power.

5 DAK. 54, NATIONAL TUBE-WORKS CO. v. CHAMBERLAIN, 37 N. W. 761.

Liability of municipal corporation on contract.

Cited in *McGuire v. Rapid City*, 6 Dak. 346, 5 L.R.A. 752, 43 N. W. 706, denying right of city to shield itself in action on contract behind manner in which it was made and retain its benefits without tendering at least reasonable compensation therefor; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271, holding that the same rules govern a municipality's business transaction in procuring the construction of waterworks and the use of water for itself and its inhabitants, as would govern those of private individuals and corporations.

Cited in note in 61 L.R.A. 46, on establishment and regulation of municipal water supply.

— For improvements made without ordinance.

Cited in *Kerker v. Bocher*, 20 Okla. 729, 95 Pac. 981, holding abutting owners estopped to question validity of assessment for street improvement though no ordinance was passed authorizing it, where notice was properly given and no objection was raised while work was being done; *Martin v. Oskaloosa*, 126 Iowa, 680, 102 N. W. 529, 3 A. & E. Ann. Cas. 651, on resolution as being as effective as an ordinance, where statute simply provides that council shall act without stating how.

— On warrants.

Cited in *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002, holding a school township not liable

on warrants given for the services of a teacher who did not hold a certificate of qualification.

Distinguished in *Livingston v. School Dist. No. 7*, 9 S. D. 345, 69 N. W. 15, holding the provision of Dak. act February 21, 1879, against school districts issuing bonds in denominations of more than \$500 a limitation on the power conferred, and a bond of a larger denomination invalid, although the total amount of the loan does not exceed the authorized limit.

Correcting record to show facts as to passage of ordinance.

Cited in *Columbus Waterworks Co. v. Columbus*, 46 Kan. 606, 26 Pac. 1046, holding that mandamus will lie to compel correction of city record nunc pro tunc to show facts concerning passage of ordinance, regularly passed and valid on its face.

Sufficiency of judgment without conclusions of law.

Cited in *Northwestern Elevator Co. v. Lee*, 15 S. D. 114, 87 N. W. 581, upholding a judgment which, after reciting the appearance of the parties and the making of a motion to dismiss for want of sufficient evidence, recites the hearing of counsel on the motion and the making of certain findings of fact, and thereupon renders its judgment, although under Dak. Comp. Laws, § 5068, it is the duty of the court to make separate findings of fact and conclusions of law.

5 DAK. 62, PHILLIP BEST BREWING CO. v. PILLSBURY & H. ELEVATOR CO. 37 N. W. 763.

Conclusiveness of findings.

Cited in *Smith v. Tosini*, 1 S. D. 632, 48 N. W. 299, holding that findings by court will not be disturbed on appeal unless clearly against weight of evidence; *Paddock v. Balgord*, 2 S. D. 100, 48 N. W. 840, holding that findings by court or referee will not be disturbed on appeal if supported by any substantial evidence; *Cannon v. Deming*, 3 S. D. 421, 53 N. W. 863, holding that appellate court will not weigh conflicting evidence.

Conversion of mortgaged chattels.

Cited in *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434, holding that a chattel mortgage cannot, without first making a demand, maintain an action for conversion against a purchaser of the mortgaged chattels, even though he had notice of the mortgage; *Brown v. James H. Campbell Co.* 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492, holding a purchaser of property independent of a valid chattel mortgage thereon properly filed, under which the mortgagee was in law the owner and had an absolute right to the possession and control thereof, liable to the mortgagee as for a conversion of the property.

Demand as prerequisite to trover.

Cited in *Hahn v. Sleepy Eye Mill. Co.* 21 S. D. 324, 112 N. W. 843, holding demand unnecessary before suing for conversion of wheat upon which plaintiff had lien where demand would be wholly ineffectual.

Pleading and evidence in trover.

Cited in notes in 9 N. D. 632, on pleading in actions for trover and conversion; 9 N. D. 634, on evidence in actions for trover and conversion.

5 DAK. 69, VOLKMAN v. CHICAGO, ST. P. M. & O. R. CO. 37 N. W. 731.**Presumptions as to negligence.**

Cited in *Savage v. Rhode Island Co.* 28 R. I. 391, 67 Atl. 633, holding presumption of due care and of ignorance of extraordinary risk not applicable where there is direct evidence on the question; *Los Angeles Traction Co. v. Conneally*, 69 C. C. A. 92, 136 Fed. 104, holding same as to presumption of due care in crossing railroad track; *Dickey v. Northern P. R. Co.* 19 Wash. 350, 53 Pac. 347, holding that a presumption of negligence in operating a train whereby stock is killed is overcome by a finding that the train was running at a lawful rate and had the customary appliances, and that the stock when seen by the engineer, or when they might with due care on his part have been seen, were so close that the train could not be stopped in time to avoid striking the stock; *Eddy v. Lafayette*, 1 C. C. A. 432, 4 U. S. App. 243, 49 Fed. 798, holding that, in the absence of statute, the law will not presume, and the jury is not authorized to infer, negligence from the mere fact that stock was killed by a railroad train.

Cited in note in 15 L.R.A. 40, on presumption of negligence from occurrence of accidents.

Distinguished in *Smith v. Chicago, M. & St. P. R. Co.* 4 S. D. 71, 55 N. W. 717, holding evidence of setting of two other fires about the same time by engine causing destruction of plaintiff's property not necessarily overcome by evidence of proper equipment and management.

Question for jury as to negligence of railroad company.

Cited in *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, holding question whether one turning horse loose near track without anything to prevent it from getting thereon at time fast train is about due, is free from such contributory negligence as will prevent recovery, for jury; *Smith v. Northern P. R. Co.* 3 N. D. 17, 53 N. W. 173, holding mere fact that fire set by locomotive started 118 feet from track, insufficient to warrant submission of negligence to jury in absence of any evidence that it is an unusual occurrence or inconsistent with the exercise of due care; *Huber v. Chicago, M. & St. P. R. Co.* 6 Dak. 392, 43 N. W. 819, holding that a recovery cannot be had against a railroad company for injury to animals on its track, where it is conclusively proved that the company was not negligent.

5 DAK. 78, STUTSMAN COUNTY v. MANSFIELD, 37 N. W. 304.**Sufficiency of pleading against objection to evidence.**

Cited in *Jenkinson v. Vermillion*, 3 S. D. 238, 52 N. W. 1066, holding practice of pleading to merits encouraging opposite party to prepare for trial and then interposing objection to sufficiency of pleading one which

should be discouraged; *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915, holding that great latitude will be indulged to sustain complaint first assailed on trial as insufficient to permit introduction of evidence; *First Nat. Bank v. Buttery*, 17 S. D. 320, 16 L.R.A. (N.S.) 878, 116 N. W. 341, 17 A. & E. Ann. Cas. 52; *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536,—holding that where sufficiency of complaint is first questioned by objection to introduction of evidence, it will be very liberally construed in favor of its sufficiency; *Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169, 3 A. & E. Ann. Cas. 847, on same point; *Nerger v. Equitable Fire Asso.* 20 S. D. 419, 107 N. W. 531, holding that party not demurring to complaint cannot obtain reversal on ground that his objection to the introduction of any evidence was overruled.

5 DAK. 90, WHITING v. CHICAGO, M. & ST. P. R. CO. 37 N. W. 222.

5 DAK. 97, CADY v. CHICAGO, M. & ST. P. R. CO. 37 N. W. 221.

5 DAK. 100, SARLES v. SHARLOW, 37 N. W. 748.

Contracts not to be performed within year within statute of frauds.

Cited in *Grand Forks Lumber Co. v. McClure Logging Co.* 103 Minn. 471, 115 N. W. 406, holding contract to be within statute where it appeared on its face that it was not to be performed within a year, though no express time of performance was stated; *First Presby. Church v. Swanson*, 100 Ill. App. 39, holding an oral building contract executed December 10, 1897, to be performed by the completion of the building on or before March 1, 1899, not within the Statute of Frauds, as it may be performed within one year.

Cited in note in 138 Am. St. Rep. 595, 601, on agreements not to be performed within a year.

Filing of mechanic's lien.

Cited in *Wisconsin Trust Co. v. Robinson & C. Co.* 15 C. C. A. 668, 32 U. S. App. 435, 68 Fed. 778, holding that lienor's failure to file account and claim of lien within ninety days for completion of contract does not subordinate the lien to a mortgage made and filed within such period; *Reynolds v. Manhattan Trust Co.* 27 C. C. A. 620, 55 U. S. App. 96, 83 Fed. 593, holding that under Neb. Consol. Stat. § 2171, a lien exists as against a mortgagee whose rights accrued after the subcontractor began work, although a statement or notice of the lien was never filed; *Wortman v. Kienschmidt*, 12 Mont. 316, 30 Pac. 280, holding that filing of mechanic's lien which lienor considers defective, does not invalidate lien for same subject matter subsequently filed by him; *Lindley v. McGlauffin*, 58 Wash. 636, 109 Pac. 118, holding limitation of action to foreclose mechanic's lien, where second lien was filed to correct error in first, dates from filing of last notice.

5 DAK. 110, SAWYER v. RECTOR, 37 N. W. 741.

5 DAK. 129, POLK v. MINNEHAHA COUNTY, 37 N. W. 93.

Right to change salary of public officer.

Cited in *Stone v. Pryor*, 103 Ky. 645, 45 S. W. 1053, 1136, holding that the provision of Ky. Const. 1891, § 235, that the salaries of public officers shall not be changed during the term for which they were elected does not prevent a judge of the court of appeals created by said Constitution from receiving the salary provided under said Constitution for such officer, although he is holding over from the old court of appeals for a period equal to that of the unexpired term for which he was elected, and said salary is larger than that to which he was entitled while judge of the old court.

Meaning of "fix."

Cited in *Gist v. Rackliffe-Gibson Constr. Co.* 224 Mo. 369, 123 S. W. 921, on meaning of word "fix."

5 DAK. 136, FRANZ FALK BREWING CO. v. MIELENZ BROS. 37 N. W. 728.

Assignment of error.

Cited in *Hedlun v. Holy Terror Min. Co.* 16 S. D. 261, 92 N. W. 31, holding that assignment of error which merely specifies the paragraph of the charge to the jury objected to will not be considered where it fails to indicate in what respect it is erroneous.

Sufficiency of evidence on appeal.

Cited in *Jeansch v. Lewis*, 1 S. D. 609, 48 N. W. 128; *Cannon v. Deming*, 3 S. D. 421, 53 N. W. 863; *Weiss v. Evans*, 13 S. D. 185, 82 N. W. 388,—holding that appellate court will not weigh conflicting evidence; *Bedow v. Tonkin*, 5 S. D. 432, 50 N. W. 222; *Brown v. McCaul*, 6 S. D. 16, 60 N. W. 151; *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192,—holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; *Dickinson v. Hahn*, 23 S. D. 65, 119 N. W. 1034, holding that verdict on conflicting evidence will not be reviewed further than to determine whether it was based upon legal evidence; *Bennett v. Chicago, M. & St. P. R. Co.* 8 S. D. 394, 66 N. W. 934, holding that verdict for plaintiff in action for stock killed by railway train will not be disturbed on appeal where evidence as to circumstances of killing on which question of defendant's negligence depended is conflicting; *Charles E. Bryant & Co. v. Arnold*, 19 S. D. 106, 102 N. W. 303, holding that court will only inquire whether there is sufficient evidence to sustain the verdict, if all favorable evidence be taken as true; *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646, holding that action of trial court in granting or refusing new trial will not be disturbed unless for manifest abuse of discretion.

5 DAK. 145, PIERRE WATERWORKS CO. v. HUGHES COUNTY, 37 N. W. 733.

Remedy for review of action of county commissioners.

Cited in *State ex rel. Dollard v. Hughes County*, 1 S. D. 292, 10 L.R.A.

588, 46 N. W. 1127, holding the remedy by appeal from the unauthorized act of county commissioners of an organized county in establishing election precincts in unorganized counties attached thereto inadequate so as to prevent a review of such act by certiorari; *Taubman v. Aurora County*, 14 S. D. 206, 84 N. W. 784, holding that mandamus will not lie to compel county commissioners to designate a specified newspaper as an official paper of the county, the remedy by appeal being adequate; *Nalle v. Austin*, 23 Tex. Civ. App. 595, 56 S. W. 954, holding that a constitutional provision authorizing the legislature by local or general law to increase, diminish, or change the civil and criminal jurisdiction of county courts, authorizes it to confer jurisdiction upon such a court over appeals from decisions of a municipal board of equalization; *Champion v. Minnehaha County*, 5 Dak. 416, 41 N. W. 739, holding that certiorari will lie to review action of county commissioners in calling election under local option law, as power exercised by them in such case is not judicial nor semijudicial.

5 DAK. 167, MYRICK v. BILL, 37 N. W. 369.

Title necessary to homestead exemption.

Cited in *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245, holding equitable title with possession and occupancy sufficient upon which to base a homestead exemption; *Hoy v. Anderson*, 39 Neb. 386, 42 Am. St. Rep. 591, 58 N. W. 125, holding any interest in land, coupled with the requisite occupancy by a debtor and his family, sufficient to support a homestead exemption under Neb. Comp. Stat. chap. 36, §§ 1-3, which does not limit the right of homestead to any particular estate in the land.

Validity of mortgage on homestead.

Cited in *Roby v. Bismarck Nat. Bank*, 4 N. D. 156, 50 Am. St. Rep. 633, 59 N. W. 719, holding valid, mortgage on homestead executed by married woman and contemporaneously with deed to her delivered to vendor who had previously contracted with husband for sale of land retaining legal title as security for unpaid purchase price.

Cited in notes in 12 Am. St. Rep. 683; 95 Am. St. Rep. 911,—on effect of conveyance or encumbrance of homestead by one spouse only.

5 DAK. 172, THOMPSON v. MCKEE, 37 N. W. 367.

Authority of bank officer.

Cited in *State Bank v. Forsyth*, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914, holding party bound by note signed at request of cashier and with his assurance that signer would never be called upon to pay it; *Mead v. Pettigrew*, 11 S. D. 529, 78 N. W. 945, holding maker of note to bank for stock issued to him not released from liability to creditors of bank by president's unauthorized agreement that he should not be called on to pay.

Cited in note in 28 L.R.A.(N.S.) 502, 504, on power of officer to bind bank by agreement that liability of party to commercial paper shall not be enforced.

Want of consideration as defense to note.

Cited in *State Bank v. Forsyth*, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914, holding want of consideration for promissory note valid defense to action thereon against maker by one to whom it was delivered.

Parol evidence as to writing.

Cited in *Washabaugh v. Hall*, 4 S. D. 168, 56 N. W. 82, holding parol evidence inadmissible to show that one was not bound by certain instrument acknowledging receipt of given amount in payment of designated interest in land providing he should perfect title within specified time.

— Note.

Cited in *Western Pub. House v. Murdick*, 4 S. D. 207, 21 L.R.A. 671, 56 N. W. 120, holding parol evidence inadmissible that parties apparently liable individually on face of instrument intended to bind themselves as school directors only; *Stebbins v. Lardner*, 2 S. D. 127, 48 N. W. 847, holding evidence of cashier's agreement with indorsors of note held by bank to apply in payment funds received by him as trustee with consent of beneficiaries admissible; *Kulenkamp v. Groff*, 71 Mich. 675, 1 L.R.A. 594, 15 Am. St. Rep. 283, 40 N. W. 57, holding oral proof of an unperformed agreement not to hold the signer of a note to its payment, in plain contradiction of the terms of the note, inadmissible to destroy his liability upon the note.

5 DAK. 180, VANTONGEREN v. HEFFERNAN, 38 N. W. 52.**Public lands.**

Cited in *Gould v. Tucker*, 18 S. D. 281, 100 N. W. 427, on legal title remaining in the United States until patent issues under Timber Culture act.

— Burden of proving settlement.

Cited in *Duncan v. Newcomer*, 9 S. D. 375, 69 N. W. 580, holding that homestead settler must prove to satisfaction of register and receiver her actual settlement and actual and continuous residence, improvement and cultivation of the land, for at least six months preceding date of proof.

— Jurisdiction of state courts.

Cited in *Columbia Canal Co.* 47 Wash. 249, 125 Am. St. Rep. 901, 91 Pac. 961, holding that state court has no jurisdiction over controversy between claimants to public land under public land laws while contest is still undecided by land department.

— Conclusiveness of decision of Land Department.

Cited in *Parsons v. Ventzke*, 4 N. D. 452, 50 Am. St. Rep. 669, 61 N. W. 1036; *Forman v. Healey*, 19 N. D. 116, 121 N. W. 1122,—holding decision of land department on matters of fact involved in cancellation of entry binding on courts if parties interested had opportunity to be heard; *Orchard v. Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635, holding the decision of local land officers under U. S. Rev. Stat. § 2263 (U. S. Comp. Stat. 1901, p. 1379), requiring that proof as to the settlement and improvement of public land shall be made to their

satisfaction agreeably to such rules as may be prescribed by the Secretary of the Interior, subject to appeal and review by the Commissioner of the General Land Office and by the Secretary of the Interior.

Meaning of general supervision.

Cited in *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478, 93 Pac. 924, holding that "general supervision" given to tax commissioners by statute is not limited to advice and suggestions only.

5 DAK. 234, UNITED STATES v. GUNTHER, 38 N. W. 79.

Mayhem.

Cited in note in 65 Am. St. Rep. 774, on mayhem.

5 DAK. 244, TERRITORY v. KEYES, 38 N. W. 440.

Nonconsent in statutory rape.

Cited in *Gibbs v. People*, 36 Colo. 452, 85 Pac. 425; *Schang v. State*, 43 Fla. 561, 31 So. 346; *Liescher v. State*, 69 Neb. 395, 95 N. W. 870, 5 A. & E. Ann. Cas. 351; *Ross v. State*, 16 Wyo. 285, 93 Pac. 299,—holding consent of female immaterial in prosecution for assault with intent to commit rape upon female under age of consent; *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *George v. State*, 61 Neb. 669, 85 N. W. 840; *State v. Carnagy*, 106 Iowa, 483, 76 N. W. 805,—holding assault with intent to commit a rape upon a girl under the age of consent punishable although she consented; *Croomes v. State*, 40 Tex. Crim. Rep. 672, 51 S. W. 924, 53 S. W. 882, holding an attempt to rape a child under the age of consent, where some physical force is shown, and the evidence also shows that the defendant has the ulterior purpose to have carnal knowledge, an assault with intent to rape, although she consented.

Disapproved in *Hardin v. State*, 39 Tex. Crim. Rep. 426, 46 S. W. 803, holding that consent of a female under fifteen years of age prevents assault with intent to rape.

Attempt to rape.

Cited in *State v. Fujita*, 20 N. D. 555, 129 N. W. 380, holding that attempt to have carnal knowledge of girl under age of consent warrants conviction of assault with intent to commit rape.

Incapacity as defense in assault to rape.

Distinguished in *State v. Fisk*, 15 N. D. 589, 108 N. W. 485, 11 A. & E. Ann. Cas. 1061, holding that minor under 14 years of age cannot be found guilty of assault with intent to commit rape.

Evidence in prosecution for rape.

Cited in *Bannen v. State*, 115 Wis. 317, 91 N. W. 107, holding admissible in prosecution for rape, evidence of complaint made thereof by prosecuting witness shortly thereafter, and of statements made by her at that time.

Dak. Rep.—6.

5 DAK. 259, GARDNER v. FARGO BD. OF EDU. 38 N. W. 433.

What constitutes "residence."

Cited in McDowell v. Friedman Bros. Shoe Co. 135 Mo. App. 276, 115 S. W. 1028, holding residence not lost by party leaving state with family with intent to return as soon as daughter's health was restored sufficiently to permit it; Winchester Bd. of Edu. v. Foster, 116 Ky. 484, 76 S. W. 354, 3 A. & E. Ann. Cas. 692, holding minor, residing with uncle who was not the guardian of, nor had any control over him, not a resident where his parents resided at another place; Barnard School Dist. v. Matherly, 84 Mo. App. 140, holding that coming temporarily within a school district to reside during the scholastic year for the purpose of sending one's children to the school of that district does not constitute the bona fide residence requisite to obtain the school privileges of a resident; State ex rel. Vale v. Superior School Dist. 55 Neb. 317, 75 N. W. 855, holding that one who owns a farm which has been his domicile for many years does not change his legal residence to a neighboring city by moving, for several years, his family and some of his furniture to the city in the fall for the purpose of educating his children, and not to gain a new home, returning to the farm with his family and children at the end of the school year.

Cited in note in 26 L.R.A. 582, on what constitutes residence entitling children to the privileges of the public schools.

5 DAK. 267, PATTEE v. CHICAGO, M. & ST. P. R. CO. 38 N. W. 435.

Presumption of negligence.

Cited in note in 113 Am. St. Rep. 1020, on presumption of negligence from happening of accident causing personal injuries.

Distinguished in Smith v. Chicago, M. & St. P. R. Co. 4 S. D. 71, 55 N. W. 717, holding evidence of setting of two other fires about the same time by engine causing destruction of plaintiff's property not necessarily overcome by evidence of proper equipment and management.

5 DAK. 275, TERRITORY EX REL. TRAVELERS' INS. CO. v. THIRD JUDICIAL DIST. JUDGES, 38 N. W. 439.

Mandamus to compel court to act.

Cited in State ex rel. McGovern v. Williams, 136 Wis. 1, 20 L.R.A. (N.S.) 941, 116 N. W. 225, holding that mandamus will lie to compel inferior court to take jurisdiction and proceed to trial of cause of which it has jurisdiction; State ex rel. Colcord v. Young, 31 Fla. 594, 19 L.R.A. 636, 34 Am. St. Rep. 41, 12 So. 675, holding mandamus the proper remedy to compel a judge, who has incorrectly decided that he is disqualified, to take jurisdiction of a case.

Venue in foreclosure proceeding.

Cited in McDonald v. Second Nat. Bank, 106 Iowa, 517, 76 N. W. 1011, holding that a defendant waives his right to have an action to foreclose a mortgage and to cut off the equity of redemption tried in the county in which the subject-matter is situated, under Iowa Code, § 3504, providing

that if an action is brought in a wrong county, it may there be prosecuted to the termination, where he fails to demand a change of place of trial to the proper county.

5 DAK. 277, RICHARDSON v. INDEPENDENT SCHOOL DIST. NO. 1, 38 N. W. 553.

5 DAK. 282, MADISON NAT. BANK v. FARMERS, 40 N. W. 345.

When replevin lies.

Distinguished in *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96, holding it not essential to the maintenance of replevin against an attaching sheriff by a mortgagee in peaceable possession of the mortgaged chattels, that there shall have been a default.

Litigating value of plaintiff's interest in replevin.

Cited in *Fletcher Bros. v. Nelson*, 6 N. D. 94, 69 N. W. 53, holding it proper in claim and delivery between parties to chattel mortgage to litigate value of plaintiff's interest.

Cited in notes in 9 N. D. 633, on pleading in actions for trover and conversion; 9 N. D. 634, on evidence in actions for trover and conversion.

5 DAK. 286, FIRST NAT. BANK v. DICKSON, 40 N. W. 351.

Evidence and damages in trover.

Cited in notes in 9 N. D. 634, on evidence in actions for trover and conversion; 9 N. D. 636, on damages in actions for trover and conversion.

5 DAK. 294, McMILLAN v. PHILLIPS, 40 N. W. 349.

Personal judgment against owner in favor of subcontractor.

Cited in note in 14 L.R.A.(N.S.) 1036, on right of subcontractor or materialman to personal judgment against owner.

5 DAK. 298, HOLLENBECK v. PRIOR, 40 N. W. 347.

Right to specific performance of contract.

Cited in *Cusenbary v. Latimer*, 28 Tex. Civ. App. 218, 67 S. W. 187, on sufficiency of description of land to make contract enforceable by specific performance; *Johnson v. Plotner*, 15 S. D. 154, 87 N. W. 926, holding parol agreement for sale of land contemplating that vendor shall convey upon the payment of part of purchase price and execution by purchaser of such security for deferred payments as may be agreed upon, too indefinite and uncertain to be specifically enforceable.

5 DAK. 305, BOSTWICK v. KNIGHT, 40 N. W. 344.

What orders are appealable.

Cited in *Greeley v. Winsor*, 1 S. D. 618, 48 N. W. 214, holding Dakota Organic Act allowing appeals in all cases from "final decisions" not violated by act authorizing appeals from order sustaining or overruling a demurrer; *Holden v. Haserodt*, 2 S. D. 220, 49 N. W. 97, holding not ap-

pealable, order allowing peremptory writ of mandamus made by judge without limits of his own circuit in an action in another circuit on account of the absence of the judge of the latter; *Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co.* 2 S. D. 546, 51 N. W. 342, holding not appealable, order for injunction granted by circuit judge within his circuit upon return of an order to show cause returnable before himself and concluding with the words "done at chambers," reciting that "the judge of said court having considered the return" and concluding with the words "done at chambers."

5 DAK. 308, BOSS v. NORTHERN P. R. CO. 40 N. W. 590, Later appeal in 2 N. D. 128, 49 N. W. 655.

When relation of master and servant exists.

Cited in note in 12 L.R.A.(N.S.) 857, on existence of relationship where servant goes on master's premises at other than hours of actual labor.

Negligence as question for jury.

Cited in *McCabe v. Montana C. R. Co.* 30 Mont. 323, 76 Pac. 701, holding question of negligence to be for jury where railroad employee was struck by switch near track of which he had no knowledge.

Liability for negligent injury.

Cited in notes in 7 L.R.A. 133, on damages for injuries caused by negligence; 8 L.R.A. 82, on liability for injuries produced by negligence.

Assumption of risk by employee.

Cited in *Boss v. Northern P. R. Co.* 2 N. D. 128, 33 Am. St. Rep. 756, 49 N. W. 655, holding risk arising from erection and maintenance of switch stand and target so as sometimes to come in contact with passing trains not assumed by railroad employee.

5 DAK. 313, BERTELSON v. CHICAGO, M. & ST. P. R. CO. 40 N. W. 531.

Liability of railroad company for injury.

Cited in note in 19 L.R.A.(N.S.) 559, on liability of railroad for injuries to one not an employee by closing gap between standing cars at point other than highway crossing.

—For negligent failure to give warning at railroad crossing.

Cited in *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254, holding that failure to ring bell or blow whistle at crossing cannot be held to be cause of injury to one attempting to cross track where he has full knowledge of the approach of a train before attempting to cross.

5 DAK. 324, YERKES v. HADLEY, 2 L.R.A. 363, 40 N. W. 340.

Contracts by and estoppel of married woman.

Cited in notes in 57 Am. St. Rep. 173, on estoppel of married women; 8 L.R.A. 407, on married women incapable to contract as surety; 22 L.R.A. 781, on effect of covenant of married women and their estoppel by deed or mortgage.

5 DAK. 335, TAYLOR v. BROWN, 40 N. W. 525, Affirmed in 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549.

Indian allotments.

Cited in *Goodrum v. Buffalo*, 89 C. C. A. 525, 162 Fed. 817, holding that neither allottee nor his heirs can alien the land during time alienation is prohibited by statute; *Laughton v. Nadeau*, 75 Fed. 789, holding that the mere fact that a patent to a member of the tribe of Pottawatomie Indians contains on its face no limitation against alienation does not make a purchaser from one who obtains such patent by falsely representing the patentee as dead, and who institutes guardianship proceedings in a state probate court by which the land is transferred to him, a bona fide purchaser; *Eells v. Ross*, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417, holding the reservation of lands in an Indian reservation not revoked by the mere allotment of such lands in severalty and making the Indians citizens; *Renfrow v. United States*, 3 Okla. 161, 41 Pac. 88, holding an Indian under the charge of an Indian agent not released from his legal restrictions as such Indian by receiving an allotment of land and becoming a naturalized citizen under the laws of the United States, so as to authorize a sale of intoxicating liquor to him.

— Computation of time of restraint.

Cited in *Baker v. Hammett*, 23 Okla. 480, 100 Pac. 1114, holding that where alienation of land was forbidden before the expiration of five years from date of approval of act, the date of approval is counted as the first day; *Budds v. Frey*, 104 Minn. 481, 117 N. W. 158, 15 A. & E. Ann. Cas. 24, holding that "from" in "from and after" a certain date must be construed according to the sense and intent shown by the context.

Cited in notes in 49 L.R.A. 196, 199, 200, on rule as to first and last days in computation of time; 78 Am. St. Rep. 372, 375; 6 L.R.A. 541; 11 L.R.A. 724,—on computation of time.

— Rights under.

Cited in *Frazee v. Spokane County*, 29 Wash. 278, 69 Pac. 779, holding Indian, entitled to patent to land under an act of Congress, entitled to all the protection given by that act, though his deed by mistake was given as under another act.

Adverse possession of public property.

Cited in note in 76 Am. St. Rep. 484, on adverse possession of public property.

What constitutes color of title.

Cited in note in 88 Am. St. Rep. 718, on color of title.

Distinguished in *Schrimscher v. Stockton*, 183 U. S. 290, 46 L. ed. 203, 22 Sup. Ct. Rep. 107, holding that a deed executed by an incompetent Indian patentee under the treaty of January 31, 1855, valid upon its face, containing covenants both of warranty and against encumbrances,—constitutes color of title in the grantees who paid value therefor and had no notice of defect in grantor's title, although the patent provided that the land should never be sold or conveyed by grantee without the consent of the Secretary of the Interior.

5 DAK. 351, TERRITORY v. WEBSTER, 40 N. W. 535.**Regulation of sale of intoxicating liquors.**

Cited in *Dinuzzo v. State*, 85 Neb. 351, 29 L.R.A.(N.S.) 417, 123 N. W. 309, holding valid act limiting sales of intoxicating liquors to the time from 7 A. M. to 8 P. M.; *Dinuzzo v. State*, 85 Neb. 351, 29 L.R.A.(N.S.) 417, 123 N. W. 309, holding restriction of time when intoxicating liquors may be sold within legislative control.

5 DAK. 356, NORTHERN P. R. CO. v. RAYMOND, 1 L.R.A. 732, 2 INTERS. COM. REP. 321, 40 N. W. 538.**Taxation of corporations.**

Cited in note in 57 L.R.A. 59, 65, on taxation of corporate franchises in the United States.

Distinguished in *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386, holding tax on gross earnings derived from local business only and not tax on interstate operations of railroad companies imposed by Dakota gross earnings law of 1883.

5 DAK. 374, HARRIS v. WATKINS, 40 N. W. 536.**Default judgment by justice of the peace.**

Cited in *Mouser v. Palmer*, 2 S. D. 466, 50 N. W. 967, holding judgment by default by justice of peace not shown so as to require dismissal of appeal therefrom by justice's return showing appearance by both parties and examination of witnesses without stating for whom they were sworn.

Necessity for filing-mark.

Cited in *State v. Rozum*, 8 N. D. 548, 80 N. W. 477, holding a filing mark unnecessary on depositions filed by the state's attorney with a complaint made on information and belief.

5 DAK. 378, KNAPP v. SIOUX FALLS NAT. BANK, 40 N. W. 587.**When verdict properly directed.**

Cited in *McKeever v. Homestake Min. Co.* 10 S. D. 599, 74 N. W. 1053, holding verdict properly directed for defendant where evidence with all justifiable inferences is insufficient to support verdict for plaintiff.

5 DAK. 397, TERRITORY EX REL. McMAHON v. O'CONNOR, 3 L.R.A. 355, 41 N. W. 746.

Followed without special discussion in *Minnehaha County v. Champion*, 5 Dak. 433, 41 N. W. 754.

Powers of territorial legislature.

Cited in *Nixon v. Reid*, 8 S. D. 507, 32 L.R.A. 315, 67 N. W. 57, holding the power to grant ferry franchises peculiarly within the province of state and territorial legislation.

Validity of local option laws.

Cited in *State ex rel. Clothers v. Barber*, 19 S. D. 11, 101 N. W. 1078;

Re O'Brien, 29 Mont. 530, 75 Pac. 196, 1 A. & E. Ann. Cas. 373,—holding constitutional local option liquor law; State ex rel. Witter v. Forkner, 94 Iowa, 1, 28 L.R.A. 206, 62 N. W. 772, holding the Iowa "Muley law," permitting the establishment of a liquor saloon in a community when a specified portion of the citizens thereof shall consent thereto, not a delegation of legislative power to such citizens, as the law itself was complete and valid at its enactment and, at most, only the limits of its operation remain to be determined; Champion v. Minnehaha County, 5 Dak. 416, 41 N. W. 739, holding the action of county commissioners in calling an election under the local option law reviewable by certiorari, the exercise of power by the commissioners in such case not being judicial nor quasi judicial.

Cited in notes in 7 L.R.A. 296, on right of state to prohibit manufacture and sale of spirituous liquors; 114 Am. St. Rep. 324, 325, on constitutionality of local option laws; 1 L.R.A.(N.S.) 483, on local option law as unconstitutional delegation of power; 15 L.R.A.(N.S.) 922, on constitutional right to prohibit sale of intoxicants.

Repeal of license law.

Cited in Territory v. Pratt, 6 Dak. 483, 43 N. W. 711, holding general law of 1879 prescribing penalties for selling liquor without license not repealed by adoption of local option law of 1887; State ex rel. Ohlquist v. Swan, 1 N. D. 5, 44 N. W. 492, holding that the previously existing license law of 1879 was not repealed by the provision, which was not self-executing, of N. D. Const. art. 20, against the manufacture in or importing into the state intoxicating liquors for sale or gift.

Presumption in favor of regularity of proceedings.

Cited in Markham v. Anamosa, 122 Iowa, 689, 98 N. W. 493, holding void ordinance adopted without record of yeas and nays vote where statute specifically requires yeas and nays vote to be taken and recorded.

Passage of statute.

Cited in Ritchie v. Richards, 14 Utah, 345, 47 Pac. 670 (dissenting opinion), wherein the majority held that when a statute has been duly signed, approved, and deposited in the office of the secretary of state, it is to be conclusively presumed that all constitutional requisites were complied with in its enactment.

Cited in notes in 11 L.R.A. 492, on passage of bill through legislature; 23 L.R.A. 347, on conclusiveness of enrolled bill.

5 DAK. 416, CHAMPION v. MINNEHAHA COUNTY, 41 N. W. 739.

Review of discretionary action.

Cited in Phenix Ins. Co. v. Perkins, 19 S. D. 59, 101 N. W. 1110, holding that order refusing temporary injunction may be reviewed on appeal where the order shows on its face that it was not based upon discretion; State v. Van Nice, 7 S. D. 104, 63 N. W. 537, holding that refusal of the trial court to exercise its discretion on application for permission to withdraw plea of not guilty for purpose of presenting motion to set aside indict-

ment on erroneous ground of absence of discretion will be corrected on appeal if substantial injury results.

When certiorari lies.

Cited in *State ex rel. Narveson v. McIntosh*, 95 Minn. 243, 103 N. W. 1017, holding that certiorari will not be granted to determine if ballots in village license election were properly counted.

When mandamus lies.

Cited in *State ex rel. Evans v. Theard*, 48 La. Ann. 926, 20 So. 286, holding an application to the Louisiana supreme court for a writ of mandamus to compel the reinstatement of a case on the docket of the district court a proper remedy for the dismissal of a case from his docket by a civil trial judge under an erroneous impression that a former judgment by the supreme court prevented him from proceeding further in the matter, although he will not be directed as to the particular course to be pursued by him; *State ex rel. Klotter v. New Orleans Police Bd.* 51 La. Ann. 747, 25 So. 637, holding that mandamus will lie to compel a municipal board to proceed to a new trial of a proceeding in which a person is charged with infractions of its rules and regulations, where it has attempted without authority to set aside an order by it granting a new trial.

When writ of review will be granted.

Cited in *State ex rel. Buck v. Ravalli County*, 21 Mont. 469, 59 Pac. 939, holding that the act of a municipal board under Mont. Pol. Code, §§ 4157, 4158, in determining how many electors signed a petition for a county seat removal and whether they were equal in number to a majority of all the votes cast at the last preceding general election, is a judicial function within Mont. Pol. Code, § 1941, authorizing a writ of review when any inferior tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction.

What orders are appealable.

Cited in *Daley v. Forsythe*, 9 S. D. 34, 67 N. W. 948, holding appealable, order denying motion for order fixing time within which motion may be made for new trial on ground of newly discovered evidence.

5 DAK. 433, MINNEHAHA COUNTY v. CHAMPION, 41 N. W. 754.

Effect of local option law.

Cited in *Snearely v. State*, 40 Tex. Crim. Rep. 507, 52 S. W. 547, 53 S. W. 696 (dissenting opinion), majority holding the tax imposed by Texas act 25th legislature, art. 5060a, upon parties who sell liquor under the provisions of the local-option law, not in violation of the local-option law itself as a tax upon a prohibited occupation.

Cited in note in 32 L.R.A.(N.S.) 534, on local option law as affecting charter power of municipality to regulate liquor traffic.

5 DAK. 444, PIELKE v. CHICAGO, M. & ST. P. R. CO. 41 N. W. 669, Later appeal in 6 Dak. 444, 43 N. W. 813.

Proximate cause.

Referred to as leading case in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, on what constitutes proximate cause; *Loiseau v. Arp*, 21 S. D. 566, 14 L.R.A. (N.S.) 855, 130 Am. St. Rep. 741, 114 N. W. 701, holding permitting colts at large in highway not proximate cause of injury to colt in adjoining pasture caused by its attempt to get into the highway.

5 DAK. 463, HARTWELL v. NORTHERN PACIFIC EXP. CO. 3 L.R.A. 342, 41 N. W. 732.

Liability of carrier generally.

Cited in notes in 6 L.R.A. 849, on liability of carrier of freight for loss of goods; 7 L.R.A. 216, on liability of common carriers for loss of goods; 11 L.R.A. 616, on defense in action for loss by carrier; act of God as an excuse.

Distinguished in *Hazel v. Chicago, M. & St. P. R. Co.* 82 Iowa, 477, 48 N. W. 926, holding a carrier expressly authorized by §§ 1261, 1263, to make a special contract limiting its liability.

Stipulation to limit carrier's liability.

Cited in *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L.R.A. 81, 49 Am. St. Rep. 898, 59 N. W. 945, sustaining carrier's right to limit liability by express contract signed by the parties except as to gross negligence, fraud or wilful wrong; *Hanson v. Great Northern R. Co.* 18 N. D. 324, 138 Am. St. Rep. 768, 121 N. W. 78, holding that contract limiting carrier's liability for negligence, fraud or wilful wrong will not be enforced; *Kirby v. Western U. Teleg. Co.* 4 S. D. 105, 30 L.R.A. 612, 40 Am. St. Rep. 765n, 55 N. W. 759, holding that agreement restricting carrier's liability can only be manifest by signature of passenger, consignee or other person employing carrier.

Annotation cited in *Ingram v. Weir*, 166 Fed. 328, on validity of stipulation that action for damage to goods transported must be brought within a certain time.

Cited in notes in 10 L.R.A. 420; 12 L.R.A. 800,—on limitation of carrier's liability by contract; 88 Am. St. Rep. 132, on limitation of carrier's liability in bills of lading; 17 L.R.A. (N.S.) 634, on validity of stipulation requiring notice within specified time, as applied to loss due to carrier's negligence.

Carrier's right to make rules and regulations.

Cited in *Kirby v. Western U. Teleg. Co.* 7 S. D. 623, 30 L.R.A. 621, 65 N. W. 37, sustaining carrier's right to make reasonable rules and regulations to protect its interests and permit safe and convenient transaction of business.

5 DAK. 477, SUESSENBACH v. FIRST NAT. BANK, 41 N. W. 662,
Appeal dismissed in 149 U. S. 787, 37 L. ed. 958, 13 Sup. Ct.
Rep. 1052.

Rights in mining claims generally.

Cited in *South End Min. Co. v. Tinney*, 22 Nev. 19, 35 Pac. 89, holding the owner of a mining location in such privity with the government title to the land that he can contest the patent thereof to another and assert his rights; *McCarthy v. Speed*, 12 S. D. 7, 50 L.R.A. 190, 80 N. W. 135, holding that an appeal from a judgment for defendants in an action to establish a right to an interest in a mining claim will not be dismissed on the ground that all the land in controversy has, since the appeal was taken, been conveyed by defendants, if notice of the pendency of the action was properly filed; *Cobban v. Meagher*, 42 Mont. 399, 118 Pac. 290, holding unpatented mining claim "property" subject to taxation.

Cited in note in 4 L.R.A.(N.S.) 920, on descent of unpatented mining claim.

Rights of co-owners of mining claim.

Cited in *Stevens v. Grand Central Min. Co.* 67 C. C. A. 284, 133 Fed. 28, holding that co-owner of mining claim who re-locates it in his own name holds it in trust for his co-owners.

Cited in note in 4 L.R.A.(N.S.) 1127, on duty and right of excluded co-owner to file adverse or protest against application for mining patent.

Who is a trustee.

Cited in *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725, 113 N. W. 618, holding person procuring mortgage as preference from bankrupt, a trustee.

Mode of trying equitable defense.

Cited in *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5, 75 Pac. 242, holding issues of fact raised by the traverse of an answer presenting an equitable counterclaim in an action to recover damages for breach of contract, triable to the court without a jury; *South End Min. Co. v. Tinney*, 22 Nev. 19, 35 Pac. 89, holding that a defendant in ejectment may set up an equitable defense, which is to be tried in the same manner and upon the same principles that would apply to an original bill brought for the same purpose.

5 DAK. 505, DORSEY v. HALL, 41 N. W. 471.

When execution sale may be set aside on motion.

Cited in *McCarthy v. Speed*, 16 S. D. 584, 94 N. W. 411, holding that execution sale will not be set aside on motion, as to purchasers not party to the suit, where the judgment and execution are regular; *Froelich v. Aylward*, 11 S. D. 635, 80 N. W. 131, holding that levy on homestead under authority of federal or state laws will be set aside on motion, only for errors and irregularities in the writ itself.

Mode of determining nature of property.

Cited in *Cable v. Magpie Gold Min. Co.* 22 S. D. 566, 119 N. W. 174,

holding that motion to quash levy does not lie for purpose of determining whether property is real or personal.

5 DAK. 508, WHITE v. CHICAGO, M. & ST. P. R. CO. 41 N. W. 730.

Change of trial judge.

Cited in *State v. Palmer*, 4 S. D. 543, 57 N. W. 490, holding the provisions of Dak. Comp. Laws, § 7312, as amended, for calling in another judge on affidavit of bias or prejudice of the presiding judge mandatory.

Appealable order.

Followed in *Robertson Lumber Co. v. Jones*, 13 N. D. 112, 99 N. W. 1082, holding appealable, order granting change of venue in civil case.

Cited in *Greeley v. Winsor*, 1 S. D. 618, 48 N. W. 214, holding Dakota Organic Act allowing appeals in all cases from "final decisions" not violated by act authorizing appeals from order sustaining or overruling a demurrer; *Greeley v. Winsor*, 2 S. D. 361, 50 N. W. 630, holding appealable, order allowing plaintiff to serve amended complaint made after entry and satisfaction of judgment dismissing complaint and for costs without vacating or setting aside the judgment; *Russell v. Whitcomb*, 14 S. D. 426, 85 N. W. 860, holding order appointing referee to hear and determine all the issues, appealable.

Construction of adopted statute.

Cited in *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, holding legislative body, in adopting statute of another state, presumed to have adopted construction there given; *Murphy v. Nelson*, 19 S. D. 197, 102 N. W. 691, holding that where statute is adopted from another state, the construction placed upon it by the courts of that state are presumed to be adopted with it.

5 DAK. 514, GAY v. FREMONT, E. & M. VALLEY R. CO. 41 N. W. 757.

5 DAK. 517, SONGSTAD v. BURLINGTON, C. R. & N. R. CO. 41 N. W. 755.

Assumption of risk by employee.

Cited in *Christienson v. Rio Grande Western R. Co.* 27 Utah, 132, 101 Am. St. Rep. 945, 74 Pac. 876, holding that employee in gravel pit, familiar with the work and its dangers, assumes the risk of injury from cave in; *Union P. D. & G. R. Co. v. Patterson*, 4 Colo. App. 575, 36 Pac. 913, holding an employer not liable for injury to an employee, when neither party deemed danger possible and all the knowledge of actual conditions was with the employee; *Allen v. Logan City*, 10 Utah, 279, 37 Pac. 496, holding that a laborer voluntarily working under a gravel bank, undermining the same for the purpose of causing it to fall, assumes the dangers of his employment.

Cited in note in 48 L.R.A. 765, on servants' right of action for injuries received in obeying a direct command.

5 DAK. 523, ELLIOT v. CHICAGO, M. & ST. P. R. CO. 3 L.R.A. 363, 41 N. W. 758, Affirmed in 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85.

Who are fellow servants.

Cited in *Ell v. Northern P. R. Co.* 1 N. D. 336, 12 L.R.A. 97, 26 Ani. St. Rep. 621, 48 N. W. 222, holding foreman of gang fellow servant of employee injured by former's failure to block a pile; *Northern P. R. Co. v. Hogan*, 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102, holding brakeman and conductor not fellow servants; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983, holding common laborer in railroad employ working under section boss on culvert on line of road, fellow servant of engineer and conductor operating passenger train; *Headline v. Great Northern R. Co.* 113 Minn. 74, 128 N. W. 1115, holding employee of railroad company, riding to or from work, free of charge, as stipulated for in contract of service, an employee; *Atchison, T. & S. F. R. Co. v. Martin*, 7 N. M. 158, 34 Pac. 536, holding a section hand a fellow servant with his section boss while the latter is watching for approaching trains, and also with the conductor and engineer of a work train which runs into the hand car on which the section hand is riding; *Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 380, 48 L.R.A. 399, 77 Am. St. Rep. 721, 55 S. W. 108, holding a fireman, an engineer, and a conductor fellow servants in operating a train.

Cited in notes in 51 L.R.A. 618, on vice-principalship considered with reference to the superior rank of a negligent servant; 4 L.R.A. 151, 173; 5 L.R.A. 735; 18 L.R.A. 796,—on who are fellow-servants; 50 L.R.A. 432, 433, on what servants are deemed to be in the same common employment, apart from statutes, where no questions as to vice-principalship arise; 46 L.R.A. 361, on when a conductor is deemed to be a coservant of other railway employees.

What constitutes contributory negligence.

Cited in *Hardesty v. Largey Lumber Co.* 34 Mont. 151, 86 Pac. 29, holding code sections on obligations of employer applicable in action for personal injury to employee.

— On railroad track.

Cited in *Dyerson v. Union P. R. Co.* 74 Kan. 528, 7 L.R.A.(N.S.) 132, 87 Pac. 680, 11 A. & E. Ann. Cas. 207, holding one employed on or near track not relieved from duty to watch for approaching trains, where he was not required to cross track at any particular time or place; *Blount v. Grand Trunk R. Co.* 9 C. C. A. 526, 530, 22 U. S. App. 129, 61 Fed. 375, 379, holding that a pedestrian is not exonerated from the charge of contributory negligence, in attempting to cross a track without discovering the approach of a train in full view, by the fact that the company had, by its failure to lower its gates at the crossing, invited him to cross; *Kirtley v. Chicago, M. & St. P. R. Co.* 65 Fed. 386, holding that one run over and killed while walking on a track is guilty of contributory negligence, and a verdict must be directed in favor of the defendant, where he had not looked or listened for approaching trains; *Kansas City, Ft.*

S. & M. R. Co. v. Cook, 28 L.R.A. 181, 13 C. C. A. 364, 31 U. S. App. 277, 66 Fed. 115, holding the same with regard to one walking along a track through a railroad yard filled with tracks, on which engines and cars are constantly passing and repassing; Graven v. McLeod, 35 C. C. A. 47, 92 Fed. 846 (overruling decision on former appeal in 19 C. C. A. 616, 43 U. S. App. 129, 73 Fed. 627), holding passenger not guilty of contributory negligence in stepping from an electric train at a station and crossing a track in front of an approaching train, without looking and listening. Cahill v. Chicago, M. & St. P. R. Co. 20 C. C. A. 184, 46 U. S. App. 85, 74 Fed. 285, holding that one attempting to cross railroad track without first looking or listening, where there is no obstruction to the view, is guilty of contributory negligence; St. Louis & S. F. R. Co. v. Whittle, 20 C. C. A. 196, 40 U. S. App. 23, 74 Fed. 296, holding that a person is guilty of contributory negligence in stepping from a station platform onto a railroad track and walking thereon towards a standing train, when it is too dark to see when such train, which is liable to move, begins to move, or in which direction it is moving; Pyle v. Clark, 75 Fed. 644, holding that a traveler is guilty of contributory negligence in not looking and listening before attempting to cross a railroad; Chesapeake & O. R. Co. v. Steele, 29 C. C. A. 81, 54 U. S. App. 550, 84 Fed. 93, which was an action to recover for injuries suffered at a railroad crossing, but not applied; Kansas & T. Coal Co. v. Reid, 29 C. C. A. 475, 57 U. S. App. 464, 85 Fed. 914, holding that an employee, in running in front of an approaching car for the purpose of starting an engine to aid in loading it, without looking towards it to observe its distance from him, is guilty of contributory negligence; Grand Trunk R. Co. v. Baird, 36 C. C. A. 574, 94 Fed. 946, holding a railroad employee guilty of contributory negligence in walking between railroad tracks with his back towards the direction from which he knows a train is due on one of the tracks, and then crossing that track without looking or listening; Stowell v. Erie R. Co. 39 C. C. A. 145, 98 Fed. 520, holding that one driving across a railroad track immediately after the passing of a train, without waiting for it to have passed along so as to enable her to have seen whether the adjoining track was clear, was guilty of contributory negligence; Neiminger v. Cowan, 42 C. C. A. 20, 101 Fed. 787, holding one attempting to drive across a railroad track on the side of the street that, by reason of adjoining buildings, obscures his view of the track, is guilty of contributory negligence unless he stops and looks for approaching trains before doing so; McCann v. Chicago, M. & St. P. R. Co. 44 C. C. A. 566, 105 Fed. 480, holding that a person is guilty of contributory negligence, where, in waiting for an approaching train, he stands between the track on which such train is to approach and an adjoining track on which he knows that another train will be due at the same time; Chattanooga R. & S. R. Co. v. Downs, 45 C. C. A. 511, 106 Fed. 641, holding one guilty of contributory negligence in stepping from a platform in front of an express office near a railroad station on to a track, without looking to see if a train was coming; Warner v. Baltimore & O. R. Co. 7 App. D.

C. 79, holding that a passenger or intending passenger, in passing from the station to his train is bound to look for approaching trains before crossing the tracks, unless, by some action of the carrier, he is reasonably induced to believe that there is no occasion for so doing; but reversed in 168 U. S. 344, 42 L. ed. 496, 18 Sup. Ct. Rep. 68; *Keefe v. Chicago & N. W. R. Co.* 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503, holding that a railroad employee at work on the tracks in a railroad yard where cars are frequently passing is guilty of contributory negligence in standing on a track without watching for approaching engines or cars; *Omaha & R. Valley R. Co.* 48 Neb. 627, 67 N. W. 599, holding that one driving on to a railroad track without first looking for an approaching train was guilty of contributory negligence, even though the train which struck him was past due, and he assumed that it had already gone by; *Loring v. Kansas City, Ft. S. & M. R. Co.* 128 Mo. 349, 31 S. W. 6, holding a railroad employee at work in a switch yard guilty of contributory negligence, in stepping upon a track without looking for an approaching train, where his daily experience teaches him that a train or an engine may pass at any moment; *Mixsell v. New York, N. H. & H. R. Co.* 22 Misc. 73, 49 N. Y. Supp. 413, holding that one killed by an express train passing by a railroad station at a rapid rate of speed, while he was crossing the tracks for the purpose of taking another train, was guilty of contributory negligence, where, knowing that it was time for the express train to pass, he crossed its track while his vision was obscured by steam and vapor so as to prevent his seeing the approaching train; *Wabash R. Co. v. Skiles*, 64 Ohio St. 458, 60 N. E. 576, holding that a railroad employee in a railroad yard is guilty of contributory negligence in going upon a track in front of an advancing engine, in the performance of his work, without looking or listening; *St. Louis & S. F. R. Co. v. Bennett*, 16 C. C. A. 300, 32 U. S. App. 621, 69 Fed. 525, holding that persons engaged in unloading lumber from a spur track running between two platforms, by means of a tramway placed across the track from one platform to the other, without the knowledge of the railroad company or its representatives, are guilty of contributory negligence in not placing sentinels in position to give notice of danger.

Distinguished in *Warner v. Baltimore & O. R. Co.* 168 U. S. 344, 42 L. ed. 496, 18 Sup. Ct. Rep. 68, holding that the negligence of a person in crossing a railroad track from a station platform to a standing train which he is about to take, when another train is coming which he does not see, is a question for the jury; *Cincinnati, N. O. & T. P. R. Co. v. Farra*, 13 C. C. A. 602, 31 U. S. App. 306, 66 Fed. 496, holding that it was for the jury to say whether a woman encumbered with a small child and a baby was guilty of contributory negligence in attempting to drive across a railroad track, without first stopping to see if trains were approaching, where she did look and listen while driving across, and to have stopped would have been idle, unless she had left the carriage and walked some distance; *McGhee v. White*, 13 C. C. A. 608, 31 U. S. App. 366, 66 Fed. 502, holding that whether or not one driving across a track without looking for an ap-

proaching train is guilty of contributory negligence is for the jury, where a train had passed over the crossing on the same track on which he was struck, not more than a minute and a half prior thereto, as it could not be said, as matter of law, that he was not justified in presuming that one train would not follow another at so close a distance; *Graven v. MacLeod*, 35 C. C. A. 47, 92 Fed. 846, holding that a passenger is not necessarily guilty of contributory negligence, in leaving a train at a station on the side opposite to the station platform and attempting to cross a track without looking or listening for approaching trains, where the company had impliedly invited passengers to alight on either side; *Tobey v. Burlington, C. R. & N. R. Co.* 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761 (dissenting opinion), holding that a railroad employee was not guilty of contributory negligence, as a matter of law, where he was injured by being struck by kicked cars coming on a track on to which he had stepped from a parallel track which he was repairing, for the purpose of allowing an engine to pass.

NOTES

ON THE

DAKOTA REPORTS.

CASES IN 6 DAK.

6 DAK. 1, WALLACE v. STUTSMAN COUNTY, 50 N. W. 332,
Reversed in 142 U. S. 293, 35 L. ed. 1018.

6 DAK. 5, YERKES v. McHENRY, 50 N. W. 485.

Time to apply for relief from judgment.

Cited in *State ex rel. Wolfertman v. Spokane County* Super. Ct. 3 Wash. 591, 36 Pac. 443, expressing the opinion, without actually deciding, that the supreme court should, where a proper case is presented, grant permission to a party after the rendition of a judgment on appeal and the lapse of the statutory period of one year to institute a proceeding in the lower court to review and modify the decree of the supreme court; *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199, holding application for relief from judgment because of mistake, surprise, inadvertence, or excusable neglect, too late unless it affirmatively appears that application was made within year after notice of entry.

6 DAK. 8, TERRITORY v. CROZIER, 50 N. W. 124.

What constitutes wilful and malicious injury to animals.

Cited in *People v. Jones*, 149 Ill. App. 65, holding malice against owner not an essential element of the offense; *State v. Coleman*, 29 Utah, 417, 82 Pac. 465, holding malice implied from the intentional poisoning of a dog belonging to another.

Cited in note in 128 Am. St. R. 166, on malicious mischief.

6 DAK. 10, SCHUSTER v. THOMPSON, 50 N. W. 125.

6 DAK. 14, KARR v. CHICAGO & N. W. R. CO. 50 N. W. 125.
Dak. Rep.—7. 97

6 DAK. 16, SAMES v. SPAWN, 50 N. W. 195.

6 DAK. 17, PURCELL v. BOOTH, 50 N. W. 196.

Jurisdiction of justice of the peace.

Cited in *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695, on question whether justice of the peace has jurisdiction where amount claimed with statutory penalty and interest exceeds the statutory limit.

6 DAK. 21, HODGDON v. DAVIS, 50 N. W. 478.

6 DAK. 27, TERRITORY v. McPHERSON, 50 N. W. 351.

Repeal of statute.

Distinguished in *State ex rel. Power v. Power*, 5 S. D. 627, 59 N. W. 1090, holding the special charter and special school act of an incorporated city repealed by the general school law, where a fulfilment of the legislative intention clearly necessitates the same.

6 DAK. 31, SANDAGER v. WALSH COUNTY, 50 N. W. 196.

Right of county treasurer to commissions.

Cited in *Stoner v. Keith County*, 48 Neb. 287, 67 N. W. 311, holding county treasurer not entitled to commissions or collection fees on proceeds of bonds delivered to him as such officer, under a statute entitling him to commissions on "moneys collected" by him.

6 DAK. 32, BOUTON v. HAGGART, 50 N. W. 197.

Sale or mortgage of future crops.

Cited in note in 23 L.R.A. 466, on sale or mortgage of future crops.

6 DAK. 35, FISK v. STONE, 50 N. W. 125.

Contract of guaranty.

Cited in *William Deering & Co. v. Mortell*, 21 S. D. 159, 16 L.R.A. (N.S.) 352, 110 N. W. 86, holding offer of guaranty not binding on guarantors without notice of acceptance.

Cited in note in 16 L.R.A. (N.S.) 356, 380, on necessity for notice of acceptance to bind guarantor.

6 DAK. 39, TERRITORY v. CASS COUNTY, 50 N. W. 479.

6 DAK. 42, McMAHON v. PLUMMER. 50 N. W. 480.

6 DAK. 45, RAYMOND v. SPICER, 50 N. W. 399.

Mode of bringing up record.

Cited in *Sweet v. Myers*, 3 S. D. 324, 53 N. W. 187, holding that agreed statement of facts upon which an ordinary action at law is submitted must be brought into the record by a bill of exceptions or statement.

6 DAK. 46, TERRITORY v. GODFREY, 50 N. W. 481.

Witnesses not named in indorsement on indictment.

Followed in *State v. Cambron*, 20 S. D. 282, 105 N. W. 241, holding it not error to permit witness, whose name does not appear on the indictment, to testify.

Cited in *State v. Matejonsky*, 22 S. D. 30, 115 N. W. 96, holding accused not entitled to notice previous to trial, of all witnesses that state may call; *State v. Church*, 6 S. D. 89, 60 N. W. 143, sustaining right of state to use on trial other witnesses than those examined before grand jury; *State v. Boughner*, 5 S. D. 461, 59 N. W. 736, holding that persons whose names are not indorsed upon indictment may be examined as witnesses for state.

Evidence in prosecution for assault with intent to commit rape.

Cited in *State v. Washington*, 104 La. 57, 28 So. 904, holding admissible evidence of complaint made by prosecuting witness shortly after the occurrence.

Admissibility of declarations of infant.

Cited in note in 65 L.R.A. 319, on admissibility of declarations of infant too young to be sworn as witness.

6 DAK. 49, PERRY v. BEAUPRE, 50 N. W. 400.

Pleading in trover.

Cited in note in 9 N. D. 632, on pleading in actions for trover and conversion.

6 DAK. 54, PECK v. LEVINGER, 50 N. W. 481.**6 DAK. 64, LANDER v. PROPPER, 50 N. W. 400.**

Evidence and damages in trover.

Cited in notes in 9 N. D. 634, on evidence in actions for trover and conversion; 9 N. D. 536, on damages in actions for trover and conversion.

6 DAK. 67, LYON v. INSURANCE CO. 50 N. W. 483.

Waiver of condition in policy by agent.

Cited in *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A. (N.S.) 539, 127 N. W. 837, holding incorrect statements in application for insurance filled in by agent, binding on company when insured gave correct statement of facts; *Vesey v. Commercial Union Assur. Co.* 18 S. D. 632, 101 N. W. 1074, holding insurer bound by knowledge of agent as to existence of mortgages on the property at time policy was issued; *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding erroneous statements filled in application by agent on ground and with means of knowing all facts material to risk, binding on company; *Fosmark v. Equitable Fire Asso.* 23 S. D. 102, 120 N. W. 777, holding solicitor employed by recording agent of insurance company, clothed with authority to waive condition of policy concerning encumbrances.

Cited in note in 13 L.R.A.(N.S.) 846, on effect of nonwaiver agreement on conditions existing at inception of policy.

Authority of general agent of insurance company.

Cited in *Harding v. Norwich Union F. Ins. Soc.* 10 S. D. 64, 71 N. W. 755, sustaining authority of general agent of insurance company to appoint a solicitor.

Who is a general agent of insurance company.

Cited in *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.* 3 S. D. 205, 52 N. W. 866, holding one authorized to solicit and contract for insurance and issue and renew policies in specified locality a general agent.

6 DAK. 70, JUDSON v. BULEN, 50 N. W. 484.

Undertaking on appeal from justice court.

Distinguished in *Brickner v. Sporleder*, 3 Okla. 561, 41 Pac. 726, holding undertaking with two or more sureties essential as condition precedent to appeal from justice court.

Explained in *Barber v. Johnson*, 4 S. D. 528, 57 N. W. 225, holding affidavits of sureties as to qualifications appended to undertaking on appeal from justice of peace at time of execution not sufficient justification.

6 DAK. 71, STURR v. BECK, 50 N. W. 486, Affirmed in 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350.

Prior appropriation of water.

Cited in *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. 135, holding that one locating water rights prior to another settlement on lands has priority in water rights.

Cited in note in 30 L.R.A. 672, on right of prior appropriation of water.

When homesteader's rights attach.

Cited in *Lone Tree Ditch Co. v. Cyclone Ditch Co.* 15 S. D. 519, 91 N. W. 352, holding that the homesteader's right attaches at the date of his actual settlement upon the land or at least from the filing of his declaratory statement.

6 DAK. 78, HENRY v. DEAN, 50 N. W. 487.

Review of sufficiency of evidence.

Cited in *Regan v. Whittaker*, 14 S. D. 373, 85 N. W. 863, holding that supreme court will not review the evidence where a motion for new trial for insufficiency of evidence was made on the minutes of the court or on a bill of exceptions and the notice of intention or bill of exceptions does not specify as to insufficiency.

6 DAK. 79, RUDOLPH v. NORTH, 50 N. W. 487.

6 DAK. 83, WARDER v. PATTERSON, 50 N. W. 484.

Setting aside default judgment.

Cited in *Olson v. Sargent County*, 15 N. D. 146, 107 N. W. 43, holding

that default judgment may be set aside without any terms or costs to plaintiff.

6 DAK. 85, TERRITORY v. JONES, 50 N. W. 528.

6 DAK. 86, SPRAGUE v. FREMONT, E. & M. VALLEY R. CO. 50 N. W. 617.

Liability for trespasses by animals.

Cited in notes in 22 L.R.A. 55, on liability of owner for trespass of cattle; 81 Am. St. Rep. 447, on liability of owners of stock herded or ranging on lands of another without lawful fence.

6 DAK. 91, RATHBONE v. COE, 50 N. W. 620.

Bar of limitations.

Cited in note in 95 Am. St. Rep. 661, on effect of bar of statute of limitations.

Conflict of laws as to limitations of actions.

Cited in note in 48 L.R.A. 630, as to when statute of limitations will govern action in another state or country.

6 DAK. 94, ADAMS v. SMITH, 50 N. W. 720.

Amendment of pleading after remand.

Cited in Evans v. Hughes County, 4 S. D. 33, 54 N. W. 1049, holding that supreme court may on remitting a case direct trial court to amend pleading; Greely v. McCoy, 3 S. D. 624, 54 N. W. 659, holding that appellate court may, on sustaining a demurrer to the complaint grant plaintiff leave to amend.

6 DAK. 102, EVANS v. HUGHES COUNTY, 50 N. W. 720, Later appeal in 3 S. D. 244, 52 N. W. 1062.

Grant of ferry license.

Cited in Nixon v. Reid, 8 S. D. 507, 32 L.R.A. 315, 67 N. W. 57, holding provision of Dakota statute for granting ferry licenses not within prohibition against granting private charters or special privileges.

6 DAK. 105, GOSSAGE v. PENNINGTON COUNTY, 50 N. W. 618.

6 DAK. 107, O'NEILL v. MURRY, 50 N. W. 619.

Parol testimony as to writing.

Cited in Flynn v. Holmes, 145 Mich. 606, 11 L.R.A.(N.S.) 207, 108 N. W. 685, holding parol evidence admissible to show that deed absolute on its face was in fact given as security for money, and legal title did not pass; Meyer v. Davenport Elevator Co. 12 S. D. 172, 80 N. W. 189, holding parol evidence admissible to show that purported lease was intended to operate as mortgage to secure payment of debt.

6 DAK. 113, SIOUX FALLS NAT. BANK v. FIRST NAT. BANK,
50 N. W. 829, Reversed in 150 U. S. 231, 37 L. ed. 1063, 14
Sup. Ct. Rep. 94.

Who may appeal.

Cited in note in 119 Am. St. Rep. 746, on right to appeal as a party interested or injured.

Right of bank to purchase stock of other corporation.

Cited in *Tourtelot v. Whithed*, 9 N. D. 467, 84 N. W. 8, denying right of either party to set up invalidity, on ground of ultra vires, of executed contract by national bank to purchase stock of another corporation.

6 DAK. 119, OBERN v. GILBERT, 50 N. W. 620.

Right to release from satisfied mortgage.

Cited in *Whipple v. Lee*, 58 Wash. 253, 108 Pac. 601, holding that payment of mortgage on land entitles any party interested to demand release.

**6 DAK. 123, LUCIE v. AMERICAN MORTG. & INVEST. CO. 50
N. W. 621.**

Revival of mortgage after payment.

Cited in note in 27 L.R.A.(N.S.) 120, on effect of assignment of mortgage with consent of mortgagor after payment of original debt.

6 DAK. 124, McKAY v. SHOTWELL, 50 N. W. 622.

Validity of chattel mortgage.

Cited in *Ayers, W. & R. Co. v. Sundback*, 5 S. D. 31, 58 N. W. 4, holding mortgage on stock of goods not presumptively fraudulent because of provision for keeping it up to its value at time mortgage was given; *F. Meyer Boot & Shoe Co. v. Shenkberg*, 11 S. D. 620, 80 N. W. 126, holding mortgagor's retention of chattels under agreement to sell same and apply balance after replenishing stock and supplying own needs to payment of debt not per se evidence of actual fraud.

Cited in notes in 109 Am. St. Rep. 518, on mortgage of property to be subsequently acquired; 18 L.R.A. 607, 613, on effect upon the validity of a mortgage of merchandise of a provision or agreement giving the mortgagor the possession with power of sale.

6 DAK. 128, TERRITORY v. ELY, 50 N. W. 623.

Necessity for calling subscribing witness.

Cited in note in 35 L.R.A. 350, on necessity of calling subscribing witnesses to prove attested instruments.

Obtaining property by false pretenses.

Cited in note in 25 Am. St. Rep. 383, on obtaining goods or money by false pretenses.

6 DAK. 131, TERRITORY v. KING, 50 N. W. 623.

Instructions as to agreeing on verdict.

Cited in *State v. Hobbs*, 62 Kan. 612, 64 Pac. 73, holding that it is not

reversible error in a felony case for the court to say to a jury before it for further instructions, after having been out over night: "Now, I hope you will go back, and that in a spirit of conciliation and a desire to arrive at a just and proper verdict, whatever in your consciences you think it may be, and with regard to the law and the evidence, you will carefully consider the instructions of the court, and carefully consider the evidence, and if possible harmonize your differences; that is, if you can harmonize them in accordance with the law and the evidence and in a spirit of conciliation carefully consider that matter,"—when he then distinctly stated to the jury that he did not design or desire to give them any additional instructions, cautioned them to remember that the written instructions were their sole guide, that anything that may have been said to the contrary was not intended, it being presumed that the jury gave heed to this final statement.

Separation of jury.

Cited in note in 103 Am. St. Rep. 169, on effect of separation of jury.

Evidence to impeach verdict.

Cited in *Edward Thompson Co. v. Gunderson*, 10 S. D. 42, 71 N. W. 764, holding testimony of jurors inadmissible to support motion for new trial on ground of misconduct of jury or one or more of jurors; *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117, 1 A. & E. Ann. Cas. 268, 12 Am. Crim. Rep. 619, holding affidavits of jurors inadmissible to impeach their verdict.

6 DAK. 136, FIRST NAT. BANK v. NORTH, 41 N. W. 736, 50 N. W. 621.

Admissions of agent as evidence.

Cited in *Short v. Northern P. Elevator Co.* 1 N. D. 159, 45 N. W. 706, holding an admission or declaration of an agent admissible against the principal only when made during the continuance of the agency as to a transaction then pending; *Gillespie v. First Nat. Bank*, 20 Okla. 768, 95 Pac. 220; *Glingaman v. Fish & H. Co.* 19 S. D. 139, 102 N. W. 601,—holding inadmissible against principal, admissions by agent made after completion of transaction out of which controversy arose; *La Rue v. St. Anthony & D. Elevator Co.* 3 S. D. 637, 54 N. W. 806, holding declarations of agent of elevator company inadmissible to prove the party from whom wheat was purchased the parties delivering same and number of bushels delivered when made after mingling of such wheat with other wheat in the elevator.

Cited in note in 131 Am. St. Rep. 335, on declarations and acts of agents.

Distinguished in *Plymouth County Bank v. Gilman*, 3 S. D. 170, 44 Am. St. Rep. 782, 52 N. W. 869, holding cashier's statement to pledgeor of note and mortgage while they were still uncollected in bank that failure to collect was bank's fault and neglect inadmissible as a mere expression of his opinion as to bank's conduct.

Taxable costs for stenographer's fees.

Cited in *Pettis v. Green River Asphalt Co.* 71 Neb. 513, 101 N. W. 333,

holding expense of obtaining transcript of evidence for settling bill of exceptions taxable as costs to unsuccessful party upon final termination of case.

6 DAK. 145, SCHOOL DIST. NO. 61 v. ALDERSON, 41 N. W. 466.

Defense of compounding felony.

Cited in *Cass County Bank v. Bricker*, 34 Neb. 516, 33 Am. St. Rep. 649, 52 N. W. 575, holding that in order to establish the defense of compounding a felony, it must appear that there was an agreement not to prosecute the case or to suppress evidence tending to prove it.

Cited in note in 16 L.R.A.(N.S.) 971, on validity of contract to pay existing indebtedness, or value of property or money feloniously obtained, upon consideration of stifling prosecution.

Clear proof of illegality of note.

Cited in *Yowell v. Walker*, 118 La. 28, 42 So. 635, holding that illegality of consideration as defense to liability on promissory note must be established by clear proof.

6 DAK. 160, GULL RIVER LUMBER CO. v. KEEFE, 41 N. W. 743.

Right to jury trial.

Cited in *Avery Mfg. Co. v. Crumb*, 14 N. D. 57, 103 N. W. 410, holding jury trial not matter of right in action to foreclose mortgage where other mortgagees and lien holders are made parties; *Hathorne v. Panama Park*, 44 Fla. 194, 103 Am. St. Rep. 138, 32 So. 812, holding same in equitable action to foreclose mechanic's lien.

Waiver of mechanic's lien.

Cited in *Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846, on effect of a stipulation in a building contract with the original contractor that no lien should exist or be claimed for any labor or materials furnished by him or any others employed by him, upon the statutory lien of a subcontractor for labor and materials.

Who may attack validity of lien.

Distinguished in *Jarvis v. State Bank*, 22 Colo. 309, 55 Am. St. Rep. 129, 45 Pac. 505, holding that the purchaser at a sale under a trust deed containing a clause covering subsequently acquired property is in a position to question and attack the validity of statutory liens accruing after the recording of the trust deed.

Right to redeem from foreclosure sale.

Cited in *American Bkg. & T. Co. v. Lynch*, 10 S. D. 410, 73 N. W. 906, holding that the holder of a mortgage subsequent to a mechanic's lien may redeem the property after a sale on foreclosure of such lien.

Validity of contract by foreign corporation.

Cited in *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544, holding contracts by a foreign corporation before filing a copy of its charter and appointment of an agent to receive service of process not invalid for that reason; *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931, holding that

an assignee of a foreign corporation need not show compliance with the statutory conditions for transaction of business within the state in order to validate the acts of his assignor.

Pleading conclusion of law.

Cited in *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518, holding allegation that claim was barred by statute of limitations insufficient without stating facts constituting such bar; *Kinney v. Brotherhood of American Yeoman*, 15 N. D. 21, 106 N. W. 44, on effect of pleading surplusage.

Evidence admissible under pleading.

Cited in *Lyon v. Plankinton Bank*, 15 S. D. 400, 89 N. W. 1017, holding that without a reply, evidence of the fraud vitiating a prior deed is admissible in an action to quiet title to property purchased at an execution sale and where such fraudulent deed is introduced in the answer, but without a counterclaim.

6 DAK. 170, MURRY v. BURRIS, 42 N. W. 25.

When action for forcible entry and detainer maintainable.

Cited in *Torrey v. Berke*, 11 S. D. 155, 76 N. W. 302, holding action of forcible entry and detainer not maintainable by one not in possession at time of alleged wrongful entry against one entering into peaceful possession under contract of purchase with actual occupant and holder of title.

Cited in note in 121 Am. St. Rep. 405, on right to civil action for forcible entry and detainer.

Issues in forcible entry and detainer.

Cited in *Fifer v. Fifer*, 13 N. D. 20, 99 N. W. 763, on litigating title to land in action of forcible entry and detainer under statute.

Jurisdiction of justice of the peace.

Cited in *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401, holding that the district court has no original jurisdiction to hear and determine actions of forcible detainer.

6 DAK. 186, FARRIS v. VANNIER, 3 L.R.A. 713, 42 N. W. 31.

Use of moneys collected as taxes.

Cited in *State ex rel. Reno v. Boyd*, 27 Nev. 249, 74 Pac. 654, holding invalid act providing for division of license money collected by city between state, county and city where collected; *Gay v. Thomas*, 5 Okla. 1, 19, 46 Pac. 578, holding that a tax on personalty located on an Indian reservation for the benefit of the county to which it is attached for judicial purposes is not a taking of private property for private use, since the persons liable for the tax receive a benefit directly or indirectly from the governmental institutions they are thus called upon to support; *McOlelland v. State ex rel. Speer*, 138 Ind. 321, 37 N. W. 1089, holding that upon the loss of state funds turned over to a school trustee as a public officer for tuition to the common schools of a political division of the state, the legislature cannot impose upon the taxpayers of that division the burden of making good such loss.

Validity of tax.

Cited in *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386, sustaining Dakota gross earnings law.

Where property in unorganized county taxable.

Cited in *Dupree v. Stanley County*, 8 S. D. 30, 65 N. W. 428, holding that nearest county organized county may assess and levy for certain general purposes taxes in unorganized county not named in statute annexing unorganized counties to organized counties.

Distinguished in *Meade County v. Hoehn*, 12 S. D. 468, 81 N. W. 886, holding personal property in unorganized county belonging to persons residing in organized county taxable in latter county for all purposes.

Power to exempt from taxation.

Cited in note in 19 L.R.A. 79, on power of a state legislature to exempt from taxation.

Improper classification by statutes.

Cited in *Frontier Land & Cattle Co. v. Baldwin*, 3 Wyo. 764, 31 Pac. 403, holding that Wyo. Rev. Stat. § 3845, providing for a certain assessment of all personalty brought or driven into the territory, except goods brought by a merchant to replenish and keep up his stock to the amount at which it was originally assessed, is not an unlawful discrimination in taxing different kinds of property against cattlemen in favor of merchants, within U. S. Rev. Stat. § 1925, owing to the difference of circumstances in the two kinds of business.

Cited in note in 7 L.R.A. 194, on classification of cities by statute.

6 DAK. 215, ST. CROIX LUMBER CO. v. MITCHELL, 50 N. W. 624, Reaffirmed on later appeal in 4 S. D. 487, 57 N. W. 236.

6 DAK. 217, DODGE v. FURBER, 50 N. W. 831.

6 DAK. 220, WALLACE v. SWAN, 50 N. W. 624.

Exempt character of proceeds of exempt property.

Cited in note in 19 L.R.A. 39, on how far proceeds of exempt property retain the exempt character.

6 DAK. 222, DEAN v. FIRST NAT. BANK, 50 N. W. 831.

Parol evidence as to writing.

Cited in *Washabaugh v. Hall*, 4 S. D. 168, 56 N. W. 82, holding parol evidence inadmissible to show that one was not bound by certain instrument acknowledging receipt of given amount in payment of designated interest in land providing he should perfect title within specified time.

Distinguished in *Jewett v. Sundback*, 5 S. D. 111, 58 N. W. 20, sustaining right of creditors claiming adversely to written instrument to show by parol facts tending to prove that it was fraudulent and void as to them.

6 DAK. 226, TERRITORY EX REL. DISTRICT ATTORNEY v. ARMSTRONG, 50 N. W. 832.

Validity of action of de facto municipal corporation.

Cited in *Coler & Co. v. Dwight School Twp.* 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587, holding that bonds issued by a school district organized by the county superintendent in accordance with Dak. Laws 1879, chap. 14, in which district officers were elected and exercised their functions, are not void for failure to comply with the statutory provisions as to the organization of such district.

Who may maintain quo warranto.

Cited in note in 21 L.R.A. (N.S.) 688, as to who may maintain quo warranto to test validity of organization of municipal corporation or political subdivision of state.

6 DAK. 231, EDMISON v. HANCOCK, 50 N. W. 122.

6 DAK. 234, TERRITORY v. COLLINS, 50 N. W. 122.

Argument of counsel as ground for reversal.

Cited in *State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709, holding that in order to bring the language in the closing argument of a prosecuting attorney before the appellate court for review, it is necessary for the defendant to request and secure a ruling of the court thereon and properly save an exception to such ruling in a bill of exceptions; *State v. Holburn*, 23 S. D. 209, 121 N. W. 100, holding that error cannot be predicated on remarks of counsel unless ruling is asked as to propriety thereof or for instruction that jury disregard same.

Cited in note in 46 L.R.A. 646, on reversal of conviction because of unfair or irrelevant argument or statements of facts by prosecuting attorney.

6 DAK. 236, NORTHERN P. R. CO. v. JACKMAN, 50 N. W. 123.

Parties to condemnation proceedings.

Cited in *Davidson v. Texas & N. O. R. Co.* 29 Tex. Civ. App. 54, 67 S. W. 1093, holding that railroad seeking to condemn land may join as defendants all who assert any claim to the land, but question as to who has title must be settled in another proceeding.

6 DAK. 238, RODGERS v. McCOY, 44 N. W. 990.

Violation of commerce clause of constitution.

Cited in notes in 27 Am. St. Rep. 563, on state regulation of interstate commerce; 46 L. ed. U. S. 785, on peddlers and drummers as related to interstate commerce; 19 L.R.A. (N.S.) 299, on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause.

6 DAK. 239, REICHERT v. SIMONS, 42 N. W. 657.

6 DAK. 243, KRONEBUSCH v. RAUMIN, 42 N. W. 656.

Statutory penalty for failure to release mortgage.

Cited in *Caves v. Bartek*, 85 Neb. 511, 123 N. W. 1031, holding mortgagee not liable for failure to release chattel mortgage where part of payment tendered consists of a claim against him the validity of which he disputes.

6 DAK. 248, CAPITAL BANK v. SCHOOL DIST. NO. 85, 42 N. W. 774.

Powers of school district board and ratification of their acts.

Cited in *Maher v. State ex rel. Allen*, 32 Neb. 354, 49 N. W. 436, holding that when a building committee has performed duties devolving upon the school board by Neb. Comp. Stat. chap. 79, § 6, subd. 5, and the school district subsequently discharged the committee and placed their duties in the hands of the board, where the law placed it, the district has completely ratified and adopted the committee's acts.

Distinguished in *Capital Bank v. School Dist. No. 53*, 1 N. D. 479, 48 N. W. 363, denying power of school district board to build schoolhouse or issue warrants in payment where no authority for construction had been given by inhabitants of district at a district meeting.

6 DAK. 255, FARMERS' & M. NAT. BANK v. SCHOOL DIST. NO. 53, 42 N. W. 767.

Power of municipal corporation.

Extended in *Capital Bank v. School Dist. No. 53*, 1 N. D. 479, 48 N. W. 363, holding void, contract by inhabitants of school district at district meeting to build schoolhouse for amount nearly equal to one-third of assessed valuation of district.

Cited in *Scott v. Laporte*, 162 Ind. 34, 69 N. E. 675, on maxim "*expressio unius est exclusio alterius*" as applied to grants of power to municipal corporations.

Liability on school warrant or bond.

Cited in *Capital Bank v. School Dist. No. 53*, 1 N. D. 479, 48 N. W. 363, denying power of school district board to build schoolhouse or issue warrants in payment where no authority for construction had been given by inhabitants of district at a district meeting; *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002, holding warrant issued in payment of services of teacher having no legal certificate of qualification void in hands of innocent purchaser for value; *Flagg v. School Dist. No. 70*, 4 N. D. 30, 25 L.R.A. 363, 53 N. W. 499, holding that school bonds issued to fund debts for which void school warrants have been given are not void in the hands of an innocent purchaser for cash; *Capital Bank v. School Dist. No. 26*, 11 C. C. A. 514, 27 U. S. App. 479, 63 Fed. 938, holding that warrants were utterly void for want of power in the school district to execute the contract and draw the warrants, when the maximum yearly tax was scarcely adequate to pay one half of the annual interest thereon; *Edinburg Ameri-*

can Land & Mortg. Co. v. Mitchell, 1 S. D. 593, 48 N. W. 131 (dissenting opinion), majority holding that in an action on school warrants valid on their face plaintiff does not have the burden of proving that the account was presented and allowed at a district meeting.

6 DAK. 265, FELDENHEIMER v. TRESSEL, 43 N. W. 94.

Right to maintain creditor's action.

Cited in South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co. 4 S. D. 173, 56 N. W. 98, holding that right of judgment creditors to bring creditor's action against corporation passes to receiver of corporation upon his appointment; F. Meyer Boot & Shoe Co. v. Shenkberg Co. 11 S. D. 620, 80 N. W. 126, sustaining judgment creditor's right to maintain bill in equity to reach judgment debtor's personal property in hands of third person; Mississippi Mills v. Cohn, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75, holding that creditors' bills to subject the property of the defendant fraudulently conveyed to the payment of judgments against him and to remove a fraudulent judgment as a cloud upon the title of the debtor are within the jurisdiction of the Federal courts in equity; Monroe v. Reid, 46 Neb. 316, 64 N. W. 983; Matlock v. Babb, 31 Or. 516, 49 Pac. 873, holding that proceedings in aid of execution were not intended to be substituted for actions in the nature of creditors' bills, as they furnish an incomplete remedy; Sabin v. Anderson, 31 Or. 487, 495, 49 Pac. 870, holding that the legislature did not intend, by providing for attachment and garnishment at law, to supersede the jurisdiction to uncover assets when transferred in fraud of creditors, and to compel an accounting, as the latter remedy is more effectual.

Cited in note in 63 L.R.A. 692, 694, on equitable remedy to subject choses in action to judgment after return of no property found.

Directions by appellate court on remitting case.

Cited in Evans v. Hughes County, 4 S. D. 33, 54 N. W. 1049, holding that supreme court may on remitting a case direct trial court to amend pleading.

6 DAK. 273, BROWN v. FORBES, 43 N. W. 93.

Proof under general denial.

Cited in Cunningham v. Springer, 13 N. M. 259, 82 Pac. 232, on burden of proof as being upon plaintiff to establish every material issue, where answer is general denial or answer is such as to contain no admissions.

6 DAK. 275, FIRST NAT. BANK v. HONEYMAN, 42 N. W. 771.

6 DAK. 284, THOMPSON v. SCHAETZEL, 42 N. W. 765.

Pleading and damages in trover.

Cited in notes in 9 N. D. 633, on pleading in actions for trover and conversion; 9 N. D. 636, on damages in actions for trover and conversion.

6 DAK. 289, OSWALD v. McCAULEY, 42 N. W. 769.

Character of estate to constitute homestead.

Cited in *First Nat. Bank v. Lamont*, 5 N. D. 393, 67 N. W. 145, raising, but not deciding, the question whether or not a tenant in common of a leasehold interest in land may have a homestead right therein; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730, 54 N. W. 551, holding that an undivided interest in real estate accompanied by exclusive occupancy will support the homestead claim as against creditors of the claimant, under the Nebraska statute which does not specify or define the interest necessary to support the claim.

6 DAK. 294, UNITED STATES v. CARPENTER, 50 N. W. 123.**6 DAK. 300, TERRITORY v. ANDERSON, 50 N. W. 124.**

Sufficiency of indictment for larceny.

Cited in *Flohr v. Territory*, 14 Okla. 477, 78 Pac. 565, holding sufficient indictment for larceny setting out that property was taken by fraud and stealth without setting out facts constituting the fraud; *State v. Halpin*, 16 S. D. 170, 91 N. W. 605, holding sufficient against motion in arrest of judgment, indictment charging that defendant "did unlawfully and feloniously and by stealth, steal, take and carry away" certain property.

6 DAK. 301, FIRST NAT. BANK v. DICKSON, 50 N. W. 124.

Title to check deposited in bank.

Cited in note in 7 L.R.A.(N.S.) 698, on title of bank to check on another, credited to depositor.

6 DAK. 304, PLYMOUTH COUNTY BANK v. GILMAN, 50 N. W. 194, Later appeals in 3 S. D. 170, 52 N. W. 189, which is affirmed on rehearing in 4 S. D. 265, 56 N. W. 892; 9 S. D. 278, 62 Am. St. Rep. 868, 68 N. W. 735.

Liability for failure to enforce note pledged as collateral security.

Cited in *Scott v. First Nat. Bank*, 5 Ind. Terr. 292, 68 L.R.A. 488, 82 S. W. 751, holding bank liable to pledgor of note as collateral security, where it failed to exercise reasonable diligence to collect the note.

Cited in note in 32 Am. St. Rep. 719, on collateral securities.

6 DAK. 306, BUTTZ v. COLTON, 43 N. W. 717.**6 DAK. 322, VAN DUSEN v. FRIDLEY, 43 N. W. 703.**

Meaning of word "also."

Cited in *Du Pont v. Du Bos*, 52 S. C. 244, 29 S. E. 665, holding that a bequest of a house and lot to A. and the lawful heirs of her body, and "also" an equal share of all the testator's lands, negroes, etc., creates a fee conditional in such lands, negroes, etc., as well as in the house and lot.

6 DAK. 332, DARTMOUTH SAV. BANK v. SCHOOL DIST. NO. 6 & 31, 43 N. W. 822.

Validity of municipal bonds.

Cited in *Livingston v. School Dist. No. 7*, 9 S. D. 345, 69 N. W. 15, holding dealer in municipal bonds referring to statute bound to take notice of all its requirements including one as to maximum denomination of bond.

Distinguished in *Color v. Rhoda School Twp.* 6 S. D. 640, 63 N. W. 158, holding school district bonds voted by majority of electors present and voting at special meeting and containing recital of their regularity in issuance not invalid because question of bonding was submitted without written petition of majority of voters as required by statute.

Disapproved in *Coler & Co. v. Dwight School Twp.* 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587, holding school bonds not void after failure to comply with statutory provisions regulating organization of district as to matters going to superintendent's jurisdiction to organize district.

Estoppel to question validity of action taken.

Distinguished in *State ex rel. Dry Run Twp. v. Dry Run Artesian Well Assessment Board*, 1 S. D. 62, 45 N. W. 38, holding that the legality of the establishment of an artesian well cannot be questioned, where notice of certiorari to review the proceedings establishing it was not given within the time prescribed by statute.

Proceedings to change boundaries of school districts.

Cited in *School Dist. No. 44 v. Turner*, 13 Okla. 71, 73 Pac. 952, holding petition duly signed by sufficient number of residents essential to power of superintendent to change boundaries of district; *Peth v. Martin*, 31 Wash. 1, 71 Pac. 549, on authority of directors of school district to call election for consolidation of districts as depending upon written petition therefor.

6 DAK. 346, McGUIRE v. RAPID CITY, 5 L.R.A. 752, 43 N. W. 706.

Power of city as to public improvements.

Cited in *Kramer v. Los Angeles*, 147 Cal. 668, 82 Pac. 334, holding that under general power to construct and maintain streets a city may adopt and construct drainage system to carry off storm waters from certain sections.

—City engineer or architect as judge of performance.

Cited in *Martindale v. Rochester*, 171 Ind. 250, 86 N. E. 321, on power of city council to delegate to city engineer authority to conclusively pass upon quantity and quality of material to be used in public improvement; *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583, holding the appraisalment of an architect appointed to appraise any alterations from the original plans and specifications conclusive as to their value in the absence of fraud or collusion; *Baker v. La Moure*, 21 N. D. 140, 129 N. W. 464, holding that under code approval of city engineer is necessary before assessment for sewer can be levied against individual property.

Cited in note in 23 L.R.A.(N.S.) 317, on conclusiveness, as between municipality and contractor for public improvement, of decision of engineer or other empowered officers.

Effect of promise to give satisfaction.

Cited in note in 17 L.R.A. 212, on promise to give full satisfaction, subject to judgment of promisee.

6 DAK. 357, GRAND FORKS NAT. BANK v. MINNEAPOLIS & N. ELEVATOR CO. 43 N. W. 806.

Mortgage of property not yet in possession of mortgagor.

Cited in *Garrison v. Street & H. Furniture & Carpet Co.* 21 Okla. 643, 129 Am. St. Rep. 799, 97 Pac. 978, holding that mortgage upon after acquired property, attaches at moment mortgagor obtains title, without any further act of either party.

Cited in note in 109 Am. St. Rep. 521, on mortgage of property to be subsequently acquired.

— Future crops.

Cited in *Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401; *Payne v. McCormick Harvesting Mach. Co.* 11 Okla. 318, 66 Pac. 287,—holding valid chattel mortgage of crops to be grown in the future; *Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401, holding that a sublease of land is subject to the lien of an existing chattel mortgage of the crop to be grown thereon; *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809, holding that valid mortgage may be made on unplanted crop which will attach thereto as a lien as soon as it comes into existence by mortgagor's agency; *Savings Bank v. Canfield*, 12 S. D. 330, 81 N. W. 630, holding that mortgage by lessee of $\frac{1}{3}$ of crop for coming season passes no title where his contract with lessor provides that title and possession of entire crop shall remain in latter and that $\frac{1}{3}$ of crop after deducting all indebtedness to lessor shall be turned over to lessee and latter owed lessor at close of season more than value of crop; *Merchants' Nat. Bank v. Mann*, 2 N. D. 456, 51 N. W. 946, holding mortgage on all crops to be grown on specified land during specified years "and for each and every succeeding year" until full payment of debt secured, not void as to crop raised a year subsequent to those specified; *Iverson v. Soo Elevator Co.* 22 S. D. 638, 119 N. W. 1006, holding mortgage on future crops valid though executed before land was leased by mortgagee.

Requisites to bill of sale or chattel mortgage generally.

Cited in *Walter A. Wood Mowing & Reaping Mach. Co. v. Lee*, 4 S. D. 495, 57 N. W. 238, holding unattested chattel mortgage valid as between parties and subsequent purchasers and incumbrancers with actual notice.

Cited in note in 5 Eng. Rul. Cas. 138, on requisites to validity of bill of sale.

Who may maintain trover.

Cited in note in 9 N. D. 630, on who may maintain trover.

6 DAK. 371, BEACH v. BEACH, 43 N. W. 701.**Grounds for setting aside default judgment.**

Cited in *Cross v. Gould*, 131 Mo. App. 585, 110 S. W. 672, holding that judgment may be set aside upon motion at succeeding term on ground of fraud in its procurement.

Cited in note in 60 Am. St. Rep. 660, on vacation of judgments on motion when not specially authorized by statute.

— Divorce.

Cited in *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708, holding that default judgment of divorce, granted upon constructive service will be set aside for want of jurisdiction where affidavit failed to show diligence in trying to effect personal service upon defendant; *Cohen v. Portland Lodge No. 142*, B. P. O. E. 144 Fed. 266, holding that judgment will not be set aside for insufficiency of affidavit preliminary to service by publication, where it discloses that some diligence was used, and that the party in fact was in another state.

Distinguished in *Reeves v. Reeves*, 24 S. D. 435, 25 L.R.A.(N.S.) 574, 123 N. W. 869, holding that decree of divorce cannot be set aside on motion upon affidavits attacking finding of fact as to plaintiff's domicile.

Authority of attorney after judgment.

Cited in *Brown v. Arnold*, 67 C. C. A. 125, 131 Fed. 723, holding that attorney employed in case has authority to stipulate with reference to it, after judgment, but before expiration of time for appeal.

— To receive service.

Cited in *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095, holding that the service of citation to show cause why a decree should not be set aside may properly be made on the attorney of record who procured the same; *Storgiss v. Dart*, 23 Wash. 244, 62 Pac. 858, holding that a motion to vacate a judgment for want of personal service on defendant may be served on the attorney of record for plaintiff; *Phelps v. Heaton*, 70 Minn. 476, 82 N. W. 990, holding that notice of a motion to vacate a judgment in favor of a nonresident plaintiff may be served on his attorney of record, although more than two years have elapsed since the entry thereof.

Sufficiency of affidavit for publication.

Cited in *Woods v. Pollard*, 14 S. D. 44, 84 N. W. 214, holding due diligence to find defendant within state shown by affidavit for publication stating that defendant cannot after due diligence be found within state, that summons was placed for service in hands of sheriff whose return is referred to, that affiant has known defendant for a number of years and that he sold his residence in state where affiant resided and severed his business connections and removed his family to a specified place in another state where he is at present as affiant is informed by various persons; *De Corvet v. Dolan*, 7 Wash. 365, 35 Pac. 72, 1072 (dissenting opinion), the majority holding that an allegation that defendant resides out of the state is an allegation of fact authorizing service by publication, under Wash. Laws 1877, § 65, authorizing such service

Dak. Rep.—8.

on an affidavit stating that defendant "resides out of the territory; Campbell v. Coulston, 19 N. D. 645, 124 N. W. 689 (dissenting opinion), on sufficiency of affidavit for publication.

6 DAK. 378, NELSON COUNTY v. NORTHCOTE, 6 L.R.A. 230, 43 N. W. 897.

Liability of county commissioners for suffering embezzlements.

Cited in Hudson v. McArthur, 152 N. C. 445, 28 L.R.A.(N.S.) 115, 67 S. E. 995, holding that surety of sheriff cannot recover from county commissioners for default of sheriff in embezzling county funds on ground that they failed to exact receipts from him during a prior term.

6 DAK. 386, SCHMIDT v. LEISTEKOW, 43 N. W. 820.

Master's liability for injury to servant.

Cited in notes in 18 L.R.A. 124, on liability of master for injuries caused by defects in machinery while used for a purpose not contemplated; 16 L.R.A.(N.S.) 986, on liability for injury to servant in using appliance for purpose other than for which primarily intended.

Who are fellow servants.

Cited in note in 50 L.R.A. 437, on what servants are deemed to be in the same common employment, apart from statute, where no questions of vice-principalship arise.

6 DAK. 392, HUBER v. CHICAGO, M. & ST. P. R. CO. 43 N. W. 819.

Force and effect of presumptions.

Cited in United States v. Homestake Min. Co. 54 C. C. A. 303, 117 Fed. 481, 22 Mor. Min. Rep. 365, on duty of court to instruct jury that presumption of fact cannot prevail where completely overcome by the evidence.

—As to care and negligence generally.

Cited in Los Angeles Traction Co. v. Conneally, 69 C. C. A. 92, 136 Fed. 104, holding that where evidence on question of contributory negligence has been introduced, it must be decided upon the evidence regardless of any presumptions; Savage v. Rhode Island Co. 28 R. I. 391, 67 Atl. 633, holding that presumptions of due care, and that person will not expose himself voluntarily to a known danger, have no application where there is direct evidence on the point; Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054, holding that motion for direction of verdict should have been granted where evidence submitted completely overcame presumption of negligence.

—From setting of fire by locomotive.

Cited in Woodward v. Chicago, M. & St. P. R. Co. 75 C. C. A. 591, 145 Fed. 577, holding presumption of negligence from setting fire by railroad not applicable after evidence has been adduced to overcome it; Smith v. Northern P. R. Co. 3 N. D. 17, 53 N. W. 173, holding the ques-

tion whether the inference of negligence on the part of a railroad company from the setting of a single fire has been fully overthrown by defendant's evidence one for the court in the first instance; dissenting opinion in *Great Northern R. Co. v. Coats*, 53 C. C. A. 382, 115 Fed. 452, the majority holding that the question whether the presumption of negligence from the setting of a fire by a locomotive has been overcome by evidence tending to show that the locomotive was properly constructed, equipped, inspected and operated, is for the jury.

Distinguished in *Atchison, T. & S. F. R. Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68, 1 A. & E. Ann. Cas. 812, holding that where statute makes existence of fire caused by sparks from engine prima facie evidence of negligence, it is evidence and not a mere presumption; *Smith v. Chicago, M. & St. P. R. Co.* 4 S. D. 71, 55 N. W. 717, holding that evidence that a locomotive which caused the destruction of plaintiff's property also set two other fires at about the same time is not necessarily overcome by evidence that it was properly equipped with the best known spark arresters and in good condition and properly managed; *Woodward v. Chicago, M. & St. P. R. Co.* 58 C. C. A. 402, 122 Fed. 66, holding that where railroad has raised issue whether setting fire at a certain distance from track indicated defect in engine, plaintiff may introduce evidence to rebut it.

6 DAK. 397, McLAUREN v. GRAND FORKS, 43 N. W. 710.

Estoppel to question special assessment.

Cited in *Harrisburg v. Shepler*, 7 Pa. Super. Ct. 491, on right to question assessment on ground of irregularity in entering contract, though plaintiff was one of the petitioners for the improvement; *Kerker v. Bocher*, 20 Okla. 729, 95 Pac. 981, holding abutting owners bound by assessment for improvement on ground of estoppel, where they stood by in silence when it was being made, knowing that it was to be assessed against the property; *Strout v. Portland*, 26 Or. 294, 38 Pac. 126, holding right to have proceedings conform to mode provided by statute, not waived by petitioning common council to improve a street; *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. 234, holding that the owners of property who have seen an improvement made without active steps to prevent it, and have enjoyed the benefits thereof, are not estopped from taking advantage of the absolute failure of the municipal board to secure power to make the improvement through the essential statutory prerequisite of a petition of the property owners therefor.

Application of rule caveat emptor to purchaser at tax sale.

Cited in *Iowa & D. Land Co. v. Barnes County*, 6 N. D. 601, 72 N. W. 1019, holding that the rule of caveat emptor applies to a purchaser at a tax sale in the absence of statutory provisions indemnifying him against defects; *Budge v. Grand Forks*, 1 N. D. 309, 10 L.R.A. 165, 47 N. W. 390, holding that a purchaser at a tax sale for a street improvement assessment cannot recover from the city the purchase money paid, al-

though the assessment was invalid, in the absence of fraud, misrepresentation, or mistake of facts.

What included in local assessment.

Cited in *Mason v. Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770, holding that cost of curbing street cannot be included in assessment of abutting property where resolution mentions grading only.

6 DAK. 402, NATIONAL GERMAN AMERICAN BANK v. RAYMAN, 43 N. W. 705.

6 DAK. 406, McLAUGHLIN v. FIRST NAT. BANK, 43 N. W. 715.

Relation between bank and depositor.

Cited in *Martin v. Minnekahta State Bank*, 7 S. D. 263, 64 N. W. 127, denying right of bank unconditionally placing deposit to general credit of depositor to assert that he is merely trustee for another.

Distinguished in *Allibone v. Ames*, 9 S. D. 74, 33 L.R.A. 585, 68 N. W. 165, holding a general deposit of public money by a county treasurer in a bank designated as a depository for public funds, and which has given a bond to secure their payment, not a loan within the statute making loans of such funds unlawful.

Duty of bank to pay out deposits.

Cited in *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617, 89 N. W. 618, holding that bank cannot refuse to pay depositor's checks on ground that funds belong to another, where the latter has set up no claims thereto.

Right of bank to recover back amount paid stranger.

Cited in note in 31 L.R.A.(N.S.) 766, on right of bank to charge customer with amount paid stranger without legal duress.

Right to maintain action on commercial paper.

Cited in *Braithwaite v. Aikin*, 1 N. D. 455, 48 N. W. 354, sustaining right of master of vessel indorsing acceptance as master on proposition to enter into contract of affreightment specific in its terms to maintain an action thereon in his own name.

6 DAK. 414, STRAW v. JENKS, 43 N. W. 941.

Followed without discussion in *Citizens' Nat. Bank v. Jenks*, 6 Dak. 432, 43 N. W. 947.

Right of debtor to give preference.

Cited in note in 37 L.R.A. 341, as to whether a preference by mortgage or sale is an assignment for creditors.

Distinguished in *Cribb v. Hibbard, S. B. & Co.* 77 Wis. 199, 46 N. W. 168, holding that as Wis. Rev. Stat. § 2314, expressly authorizes chattel mortgages by way of security, the provision of § 1694 avoiding all voluntary assignments or transfers for the benefit of, or in trust for, creditors not made as therein prescribed, does not include such chattel mortgages.

Disapproved in *Beall v. Cowan*, 21 C. C. A. 267, 44 U. S. App. 505, 75 Fed. 139, holding that Hill's [Or.] Laws, chap. 28, § 3173, declaring invalid general assignments for creditors unless made for all creditors alike, does not apply to a mortgage in the usual form containing a defeasance and reservation to the mortgagor of dominion over the mortgaged property until default in payment, although its ultimate effect may be to distribute all the mortgagor's effects to the creditors named therein in the same manner as if an assignment had been made; *Sandwich Mfg. Co. v. Max*, 5 S. D. 125, 24 L.R.A. 524, 58 N. W. 14, holding insolvent debtor not denied right to prefer creditors unless he evidenced intention of taking advantage of general assignment law.

Cited as overruled in *Brittain v. Burnham*, 9 Okla. 522, 60 Pac. 241, holding that failing or insolvent debtor may give preference to creditor over others and where accepted in good faith for existing debt will be sustained.

What is an assignment for creditors.

Cited in *Cutter v. Pollock*, 4 N. D. 205, 25 L.R.A. 377, 50 Am. St. Rep. 644, 59 N. W. 1062, holding chattel mortgages to substantially all of mortgagor's property to secure portion only of his debts not assignment for creditors; *Marshall v. Livingston Nat. Bank*, 11 Mont. 351, 28 Pac. 212, holding that an instrument by which an insolvent transfers all his property to a creditor, not as security or payment, but to enable the transferee to sell the property, collect the proceeds, pay certain debts, and account to the transferor for the balance, is an "assignment" for creditors; *Wyman v. Mathews*, 53 Fed. 678, holding that under Dak. Comp. Laws, § 4660, when an insolvent debtor transfers all, or substantially all, of his property to a part of his creditors to give them a preference in the payment of their claims, the instrument or instruments, whether in form assignments, chattel mortgages, deeds of trust, or confessions of judgment by which such transfer is made, constitute an assignment.

Disapproved in *Sandwich Mfg. Co. v. Max*, 5 S. D. 125, 24 L.R.A. 524, 58 N. W. 14, holding absolute conveyance in good faith by insolvent debtor in payment of debt not assignment for creditors; *Noyes v. Brace*, 9 S. D. 603, 70 N. W. 846, holding evidence that the defendant possessed no property subject to levy, other than that included in a mortgage attacked as fraudulent by plaintiff, who was a judgment creditor of the mortgagor, inadmissible to show that the mortgage was a general assignment.

Right to attach property in hands of assignee for creditors.

Cited in note in 26 L.R.A. 596, on right to attach property in the hands of an assignee for creditors.

Liability of one procuring receivership.

Cited in *Cutter v. Pollock*, 7 N. D. 631, 76 N. W. 235, holding the one procuring the appointment of a receiver in an action in which he is subsequently defeated liable to reimburse those whose liens were im-

paired by the receivership, although he was misled into doing so by the erroneous decision in *Straw v. Jenks*.

6 DAK. 432, CITIZENS' NAT. BANK v. JENKS, 43 N. W. 947.

6 DAK. 433, SMITH v. CONTINENTAL INS. CO. 43 N. W. 810.

Waiver of forfeiture of policy.

Cited in *Taylor-Baldwin Co. v. Northwestern F. & M. Ins. Co.* 18 N. D. 343, 122 N. W. 396, 20 A. & E. Ann. Cas. 432, holding that rejection of claim on ground that policy had been cancelled did not estop company to claim forfeiture for violation of conditions of policy; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, holding incorrect statements in application for insurance filled in by agent binding on company where insured gave correct statement of facts.

Cited in notes in 67 L.R.A. 732, 739, on retention of policy as waiver of mistake or fraud of insurer or its agent; 16 L.R.A.(N.S.) 1203, 1206, on parol-evidence rule as to varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

Distinguished in *Gish v. Insurance Co. of N. A.* 16 Okla. 59, 13 L.R.A.(N.S.) 826, 87 Pac. 869, holding forfeiture under policy waived by acceptance of premium after the loss and after adjuster had knowledge of the facts causing the forfeiture.

Presumption of knowledge of contents of application.

Cited in *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799, holding that the insured will be presumed to know all the contents of the application, where a copy thereof is indorsed on the policy which he has in his possession.

6 DAK. 444, PIELKE v. CHICAGO, M. & ST. P. R. CO. 43 N. W. 813.

Record on appeal.

Cited in *Kinney v. Brotherhood of American Yeomen*, 15 N. D. 21, 106 N. W. 44, holding instructions to jury, or requests to instruct, or exceptions to instructions not part of record unless made so by the statement of the case.

6 DAK. 449, KALSCHUEER v. UPTON, 43 N. W. 816.

Subrogation to rights of mortgagee.

Cited in *Home Inv. Co. v. Clarson*, 15 S. D. 513, 90 N. W. 153, holding purchaser of property on second mortgage foreclosure who procured release of first mortgage under mistaken belief that summons had been served on third mortgagee entitled as against latter to be subrogated to rights of first, and second mortgages.

Distinguished in *Farm & Colonization Co. v. Meloy*, 11 S. D. 7, 75 N. W. 207, denying right of one foreclosing a third mortgage on land and pur-

chasing same to claim to be subrogated to rights of first mortgagee as well as to own the property in action to determine adverse claims against second mortgagee.

6 DAK. 458, ST. PAUL F. & M. INS. CO. v. COLEMAN, 6 L.R.A. 37, 43 N. W. 693.

Liability on premium note.

Cited in *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092, holding that there is nothing harsh or inequitable in an agreement that, although the insurer is relieved from liability by the insured's default, the premium note of the insured remains binding on him, where the insured, if he desires to end the contract, has the option to cancel the policy by paying the premium due at the customary short rates; *Phenix Ins. Co. v. Rollins*, 44 Neb. 745, 63 N. W. 46, holding that an insurance company may recover the full amount of an insurance note when the policy contains a clause providing that the policy shall be suspended while such note remains unpaid after maturity, but that a subsequent payment in full shall revive the policy for the remainder of the term; *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636, 40 S. W. 1092, holding that the fact that an insurance company went into liquidation during the life of a policy is not a defense in an action on a premium note given when the company was solvent and had amply reinsured its risks; *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.* 86 Cal. 248, 21 Am. St. Rep. 33, 24 Pac. 1018, holding that the insured cannot have the policy canceled without cause and upon his mere request, and recover a pro rata part of the premium, under Cal. Civ. Code, § 2617, which merely provides the amount of the premium to be returned to him, where the property has not been exposed to any of the perils insured against and where the insurance is made for a definite time within which the insured surrenders his policy.

6 DAK. 468, WATERBURY v. DAKOTA F. & M. INS. CO. 43 N. W. 697.

Waiver of forfeiture for false answer in application for insurance.

Cited in *Shotliff v. Modern Woodman*, 100 Mo. App. 138, 73 S. W. 326, holding objection to answer in application waived where answer was made upon advice of physician who was officer of the insurer; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A. (N.S.) 539, 127 N. W. 837, holding incorrect statements in application for insurance filled in by agent binding on company where insured gave correct statement of facts.

Cited in note in 16 L.R.A. 34, on effect of knowledge by insurer's agent of falsity of statements in application.

What are warranties by insured.

Cited in *Soules v. Brotherhood of American Yeoman*, 19 N. D. 23, 120 N.W. 760, on statements in application for insurance as warranties.

Cited in note in 11 L.R.A. (N.S.) 983, on statements as representations, although expressly denominated in policy as warranties.

6 DAK. 478, RUSHTON v. BURKE, 43 N. W. 815.

6 DAK. 488, TERRITORY v. PRATT, 43 N. W. 711.

Requisites of indictment for selling liquor.

Cited in *State v. Mudie*, 22 S. D. 41, 115 N. W. 107, holding it unnecessary that indictment for selling liquor without license show whether license could have been obtained where selling was done.

Waiver of objection to indictment.

Cited in *Shivers v. Territory*, 13 Okla. 466, 74 Pac. 899; *Oligschlager v. Territory*, 15 Okla. 141, 79 Pac. 913,—holding objection to indictment, appearing upon its face, and not affecting jurisdiction, waived if not met by demurrer or motion before plea.

Selfexecuting provision of constitution.

Cited in *State ex rel. Ohlquist v. Swan*, 1 N. D. 5, 44 N. W. 492, holding previously existing license law not repealed by N. D. Const. art. 20, providing against the manufacture or importation of intoxicating liquors, as such provision is not self-executing.

6 DAK. 494, ST. PAUL F. & M. INS. CO. v. NEIDECKEN, 43 N. W. 696.

Sole ownership of insured property.

Cited in note in 8 L.R.A. (N.S.) 903, on house on government land under entry, as within sole and unconditional ownership clause.

6 DAK. 499, BODE v. NEW ENGLAND INVEST. CO. 42 N. W. 658, 45 N. W. 197.

Res adjudicata.

Cited in *Belcher Land-Mortg. Co. v. Norris*, 34 Tex. Civ. App. 111, 78 S. W. 390, on res judicata where part only of an issue has been litigated.

What is a final judgment.

Cited in note in 28 L.R.A. 637, on what entry or record is necessary to complete a judgment or order.

6 DAK. 499, KEEHL v. SCHALLER, 50 N. W. 195.

6 DAK. 501, TERRITORY EX REL. FRENCH v. COX.

Removal of public officers.

Cited in *Cole v. Territory*, 5 Ariz. 137, 48 Pac. 217, holding that governor has power to remove officer whose term is not fixed by law; *Re Carter*, 141 Cal. 316, 74 Pac. 997, holding that power to remove for cause may be conferred upon mayor; *Cameron v. Parker*, 2 Okla. 277, 38 Pac. 14, holding that the incumbent of a state office has no property right in the office and the governor may remove him in pursuance of a power conferred by express legislative enactment, as such power is not a judicial one.

Cited in note in 15 L.R.A. 99, on right to remove officers summarily.

Distinguished in *State ex rel. Hitchcock v. Hewitt*, 3 S. D. 187, 16 L.R.A. 413, 44 Am. St. Rep. 788, 52 N. W. 875, holding that officer appointed for

a term subject to removal for specified causes cannot be removed without notice and opportunity to defend.

Criticised and cited as changed by statute in *State ex rel. Pollock v. Miller*, 3 N. D. 433, 57 N. W. 193, holding the governor not empowered to remove trustees of the North Dakota agricultural college and experimental station.

Disapproved in *State ex rel. Holmes v. Shannon*, 7 S. D. 319, 64 N. W. 175, holding governor not authorized to remove from office any officer made subject of report of public examiner; *State ex rel. Hastings v. Smith*, 35 Neb. 13, 16 L.R.A. 791, 52 N. W. 700, holding that the governor has no power to remove, without specific charges and an opportunity to be heard, one elected or appointed to office for a definite term; *State ex rel. Lee v. Chaney*, 23 Okla. 788, 102 Pac. 133, holding that power to remove officers cannot be conferred upon city mayor and council where judicial power cannot be conferred upon them.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 1 N. D.

1 N. D. 1, MILLER v. SUNDE, 44 N. W. 301.

What actions are transferable to Federal court.

Cited in *Koenigsberger v. Richmond Silver Min. Co.* 158 U. S. 41, 39 L. ed. 889, 15 Sup. Ct. Rep. 751, holding action between citizen of state and citizen of territory subsequently admitted as state, transferable on ground of diverse citizenship to Federal court for newly created district in which former resident of territory resided; *Campbell v. Coulston*, 19 N. D. 645, 124 N. W. 689, to point that upon admission of state transfers to Federal courts in civil actions, in which United States is not party shall not be made except upon written request of one party.

Effect of application for transfer to Federal court.

Cited in *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151, holding state court not ousted of jurisdiction or deprived of power to render judgment in case pending at time of acquiring statehood in territorial court and transferable on proper request to state court, by request for transfer to Federal court where requests have been previously submitted for decision by state court; *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 110, 95 Pac. 606, holding that the filing of an application for transfer to Federal court at once divests state court of jurisdiction where the right rests upon the decision of a question of fact.

Distinguished in *State ex rel. Mears v. Barnes*, 5 N. D. 350, 65 N. W. 488, holding that filing of petition to remove cause to federal court does not divest state court of jurisdiction where record shows on its face that petitioner is not entitled to removal.

Consideration on appeal of points not raised by parties.

Cited in *Parker v. Dekle*, 46 Fla. 452, 35 So. 4, holding that by weight of

authority error apparent on the face of the record may be considered on appeal though not assigned.

1 N. D. 5, STATE EX REL. OHLQUIST v. SWAN, 44 N. W. 492.

What provisions of constitution are self-executing.

Cited in *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577, holding constitutional provision that legislature "shall by a general law exempt" all property used exclusively for charitable purposes not self-executing; *State v. Bradford*, 12 S. D. 207, 80 N. W. 143, holding constitutional provision that manufacture and sale of intoxicating liquors shall be under exclusive state control and conducted by authorized agents of state and that the purity of all liquors shall be established not self-executing nor prohibitive; *Doherty v. Ransom County*, 5 N. D. 1, 63 N. W. 148, holding statute giving boards of county commissioners power to fix salaries of state attorneys not repealed by subsequent adoption of Constitution providing that the legislative assembly "shall prescribe the duties and compensation" of all county, township, and district officers; *Roesler v. Taylor*, 3 N. D. 546, 58 N. W. 342, holding pre-existing exemption laws not repealed by provision of North Dakota Constitution that debtor's right to enjoy comforts and necessities of life shall be recognized by homestead exemption law.

Nullity of decision against constitutional right.

Cited in note in 39 L.R.A. 456, on decision against constitutional right as a nullity subject to collateral attack.

1 N. D. 20, BAKER v. MARSH, 44 N. W. 662.

1 N. D. 21, BOWMAN v. EPPINGER, 44 N. W. 1000.

Necessity for specific objection to complaint.

Cited in *James River Nat. Bank v. Purchase*, 9 N. D. 280, 83 N. W. 7, holding insufficient, objection to introduction of evidence for insufficiency of complaint without directing attention to particular defect relied on; *Chilson v. Bank of Fairmount*, 9 N. D. 96, 81 N. W. 33, holding that court will not review objection to admission of evidence on the ground that the complaint does not state a cause of action unless the particular defect complained of is pointed out; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357, holding that objection to the introduction of evidence on the ground that complaint is insufficient to state a cause of action was properly overruled where counsel failed to point out wherein he considered the complaint insufficient.

Waiver of defendant's motion for verdict on plaintiff's evidence.

Cited in *Illstead v. Anderson*, 2 N. D. 167, 49 N. W. 659; *Conrad v. Smith*, 2 N. D. 408, 51 N. W. 720; *Colby and McDermont*, 6 N. D. 495, 71 N. W. 772; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225; *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319, 83 N. W. 221; *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026; *Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037,—holding motion for judgment or direction of verdict for de-

fendant at close of plaintiff's case waived by failure to renew after all evidence is in; Cincinnati Traction Co. v. Durack, 78 Ohio St. 243, 85 N. E. 38, 14 A. & E. Ann. Cas. 218; Ward v. McQueen, 13 N. D. 153, 100 N. W. 253,—holding that defendant's introduction of evidence waives error, if any, in denying motion for directed verdict at end of plaintiff's evidence and the motion to be saved must be renewed at close of all the evidence; Madson v. Rutten, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872, on same point.

Evidence of agency.

Cited in Moore v. Booker, 4 N. D. 550, 62 N. W. 607, holding that neither agency nor authority of agent can be established by declarations of alleged agent.

Admissibility of declarations of agent.

Cited in Short v. Northern P. Elevator Co. 1 N. D. 159, 45 N. W. 706, holding statement by one engaged in buying grain at defendant's elevator issuing tickets therefor and receiving grain into elevator that certain person believed by plaintiff to have stolen and delivered a load of his grain at such elevator actually delivered grain corresponding to plaintiff's, inadmissible against defendant.

1 N. D. 26, GOOSE RIVER BANK v. WILLOW LAKE SCHOOL TWP. 26 AM. ST. REP. 605, 44 N. W. 1002.

Estoppel of township by acts of its officers.

Cited in Bangor Twp. v. Bay City Traction & Electric Co. 147 Mich. 165, 7 L.R.A.(N.S.) 1187, 118 Am. St. Rep. 546, 110 N. W. 490, 11 A. & E. Ann. Cas. 293, holding that township is not estopped by the acquiescence of its officers to deny license of electric railway to use highway; Smith v. Lawrence, 2 S. D. 185, 49 N. W. 7, holding that a certificate of officers not authorized or required by law has no more force than the certificate of private persons; Meyer v. School Dist. No. 31, 4 S. D. 420, 57 N. W. 68, holding a certificate of school district officers referring to an order as payable within a specified time and certifying to the legality of the proceeding in which it was issued admissible to show such officer's knowledge of an assent to the payee's indorsement on the order of an extension of the time of payment for the time specified.

Estoppel of municipality by retaining benefits of contract.

Cited in Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292, holding a city not liable for the contract price for the construction of an electric light plant by retaining the benefit of the contract, where such contract was expressly prohibited by its charter, because entered into in advance of an appropriation or levy of taxes therefor; Capital Bank v. School Dist. No. 53, 1 N. D. 479, 48 N. W. 363, holding that school district cannot estop itself to set up claim that contract for erection of schoolhouse was void because in excess of funds on hand or subject to collection for the purpose an amount which could be realized from maximum tax leviable for current year.

Nature and negotiability of county warrants.

Cited in Gilman v. Gilby Twp. 8 N. D. 627, 73 Am. St. Rep. 791, 80 N.

W. 889, holding a county warrant non-negotiable; *Hamilton County v. Sherwood*, 11 C. C. A. 507, 27 U. S. App. 458, 64 Fed. 103, holding that county warrants are merely prima facie evidence of indebtedness, and do not bar a reinvestigation of the merits of the claim on which the warrant is founded when a suit is brought on the warrant.

Liability to bona fide purchaser of void school warrant.

Cited in *Capital Bank v. School Dist. No. 53*, 1 N. D. 479, 48 N. W. 363, holding school district not liable even to bona fide purchaser on warrant given for debt for which it was not liable.

Liability on original debt where county warrant is void.

Cited in *Crawford v. Noble County*, 8 Okla. 450, 58 Pac. 616, holding that the assignee of a county warrant has no cause of action to recover upon quantum meruit for services rendered under a contract which has been determined in another action to be void.

Ultra vires acts of municipality.

Cited in note in 19 L.R.A. 620, on limitation of doctrine of ultra vires in respect to municipal corporations.

Presumption of validity of contract by corporation.

Cited in note in 7 Eng. Rul. Cas. 372, on presumption of performance of everything necessary to make executed contract acted upon by corporation a binding one.

Validity of employment of teacher.

Cited in *Hosmer v. Sheldon School Dist. No. 2*, 4 N. D. 197, 25 L.R.A. 383, 59 N. W. 1035, holding contract of employment as teacher by one not legally authorized at time of making contract not validated by subsequent procurement of certificate; *Bryan v. Fractional School Dist. No. 1*, 111 Mich. 67, 69 N. W. 74, holding that a teacher cannot recover salary due under a contract made after the expiration of his certificate authorizing him to teach, as How. Anno. St. § 5065, declares that no contract made with a person who does not possess a certificate of qualification then authorizing him to teach shall be valid.

1 N. D. 30, TERRITORY v. O'HARE, 44 N. W. 1003.

Actions or prosecutions pending upon creation of state.

Cited in *Higgins v. Brown*, 20 Okla. 355, 1 Okla. Crim. Rep. 33, 94 Pac. 703, as an example of a state court assuming jurisdiction of a matter originating in territorial court prior to organization of state.

Evidence as to handwriting.

Cited in *Cochrane v. National Elevator Co.* 20 N. D. 169, 127 N. W. 725, holding that in absence of statutory rule, court may adopt rule as to standards for comparison of handwriting.

Cited in notes in 62 L.R.A. 853, on comparison of handwriting; 63 L.R.A. 979, on competency of witnesses to handwriting.

Cross-examination on collateral matters.

Cited in *State v. Kent*, 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, sustaining right on cross-examination to ask witness questions tending to

degrade, disgrace, or incriminate, subject to his constitutional privilege; *State v. Malmberg*, 14 N. D. 523, 105 N. W. 614, holding it was proper cross-examination to ask complaining witness if he was of a rival political faction when he had previously testified that he had no personal feeling against defendant; *State v. Shockley*, 29 Utah, 25, 110 Am. St. Rep. 639, 80 Pac. 865, on the discretionary power of the court to permit cross-examination upon collateral matters which affect credibility of witness.

- Of accused.

Cited in *State v. Phelps*, 5 S. D. 480, 59 N. W. 471, holding that defendant testifying in his own behalf upon all issues may be cross-examined as to matters tending to impugn his moral character or lay foundation for impeachment; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477, holding that an accused who voluntarily takes the witness stand may be asked on cross-examination, for the purpose of testing his credibility, whether he had not on a prior arrest resisted the officer making it; *People v. Larsen*, 10 Utah, 143, 37 Pac. 258, holding that it is not an abuse of discretion for the trial court to permit the questioning of an accused on his cross-examination as to whether he had been previously arrested for a similar offense, for the purpose of determining his credibility as a witness; *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349, holding that one charged with murder may be asked on cross-examination with a view to show his character for truthfulness as to the killing of other persons by him a few days after the homicide; *People v. Hite*, 8 Utah, 461, 33 Pac. 254, holding that when a defendant has testified as a witness in his own behalf as to his business for twenty years past, his cross-examination may extend to other events still further back and go further into particulars, for the purpose of testing his recollection and of bringing to light conduct that would affect his credibility.

Cited in note in 15 L.R.A. 671, on cross-examination of the defendant in criminal cases.

Conduct of trial judge.

Cited in *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617, holding that interruptions of cross-examination by trial judge in a manner which evinced his conviction as to the merits of the case constituted error.

Argumentative instructions.

Cited in *State v. Yates*, 99 Minn. 461, 109 N. W. 1070, holding that argumentative instructions laying particular stress upon certain portions of the testimony constituted error.

Instructions upon weight or credibility of evidence.

Followed in *State v. Barry*, 11 N. D. 428, 92 N. W. 809, holding that the common law rule permitting the court to instruct upon the weight or credibility of evidence is abrogated by statute; *State v. Peltier*, 21 N. D. 188, 129 N. W. 451, holding charge as to what evidence should be given weight in deciding between death penalty and life imprisonment, erroneous.

Distinguished in *State v. Campbell*, 7 N. D. 58, 72 N. W. 935, holding instruction that jury in weighing testimony of accused are to consider his interest in the matter not ground for reversal.

1 N. D. 52, HENNESSY v. GRIGGS, 44 N. W. 1010.**Dissolution of partnership.**

Cited in note in 31 L.R.A.(N.S.) 471, on dissolution of partnership by formation of corporation.

1 N. D. 62, NEWELL v. WAGNESS, 44 N. W. 1014.**Conveyances in fraud of creditors.**

Cited in Paulson v. Ward, 4 N. D. 100, 58 N. W. 792, holding a mortgage void where it was accompanied by a secret reservation in favor of the mortgagors; Hall v. Feeney, 22 S. D. 541, 21 L.R.A.(N.S.) 513, 118 N. W. 1038, holding that an insolvent debtor cannot dispose of his property to a third person without consideration and authorize him to select such creditors as he may deem proper to be paid out of the proceeds; Bergman v. Jones, 10 N. D. 520, 88 Am. St. Rep. 739, 88 N. W. 284, holding that a chattel mortgage which hinders and delays creditors will be declared void by the court, notwithstanding N. D. Rev. Codes 1899, § 5055, making fraudulent intent a question of fact, and not of law; William B. Grimes Dry Goods Co. v. Shaffer, 41 Neb. 112, 59 N. W. 741, holding a bill of sale of a stock of goods, given by a debtor in failing circumstances, fraudulent as against other creditors, when taken under an agreement that the said creditor should make sales from said stock and with the proceeds reimburse himself for antecedent loans and for advances to discharge levies upon said stock, and after said reimbursements were complete to return to the debtor whatever should remain of such stock.

Distinguished in Red River Valley Nat. Bank v. Barnes, 8 N. D. 432, 79 N. W. 880, holding a chattel mortgage not fraudulent as to creditors because the mortgagor was receiving a benefit by remaining in possession by stipulation of the mortgagee, where there was no actual fraud or intent to hinder or delay creditors; Wilson v. American Nat. Bank, 7 Colo. App. 194, 42 Pac. 1037, holding that an assignment to one creditor of a debtor's book accounts and bills receivable, to be collected and applied on a larger indebtedness, is valid, and not within the statute of frauds, § 11 (Colo. Gen. Stat. § 1520), providing that all assignments of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the existing creditors of such person; Merchants' State Bank v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760, holding that a deed which constituted an equitable mortgage to secure future advances, was not constructively fraudulent when made in good faith to secure a bona fide debt and there were no secret reservations other than the agreement to reconvey; McCormick Harvester Mach. Co. v. Caldwell, 15 N. D. 132, 106 N. W. 122, holding that a deed, in fact an equitable mortgage to secure debt, is not void as a matter of law where the creditor has no rights thereunder except to hold the property as security and the debtor's rights are simply to pay the debt and thereby redeem.

1 N. D. 72, TAYLOR v. RICE, 44 N. W. 1017.**Right to exemption.**

Cited in Shreck v. Gilbert, 52 Neb. 813, 73 N. W. 276, holding operation

of Neb. Code Civ. Proc. § 531, which deprives attorney at law of all exemptions as against a judgment recovered against him for money collected for a client and unlawfully detained, not affected by fact that privileged character of debt is not disclosed by the judgment or by execution issued thereon.

Levy on exempt property.

Cited in *Sobolisk v. Jacobson*, 6 N. D. 175, 69 N. W. 46, holding judgment by default in action on contract, the complaint in which embodied allegations as to false pretenses adjudging that the debt was incurred for property so obtained, not evidence of such facts in an action by the judgment debtor against the sheriff for seizing property claimed to be exempt; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225, holding exclusion of evidence of fraud in purchase of goods in order to deprive purchaser of the benefit of exemptions harmless where the jury are instructed that defendant is not entitled to exemptions for other reasons.

1 N. D. 75, **JASPER v. HAZEN**, 44 N. W. 1018, Later appeals in 2 N. D. 401, 51 N. W. 583; 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454.

Right of action against trustee.

Cited in *Nodine v. Wright*, 37 Or. 411, 61 Pac. 734, holding that a cestui que trust cannot maintain an action at law against a trustee where the trust is still open, and it appears from the complaint that an accounting must be had before the liability, if any, of the trustee can be ascertained.

Remedy in equity.

Cited in *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012, holding that remedy at law will not be recognized where remedy in equity is ample, long-established, and exclusive by usage.

1 N. D. 85, **TERRITORY EX REL. WALLACE v. WOODBURY**, 44 N. W. 1077.

Propriety of mandamus.

Cited in *State ex rel. Wiles v. Albright*, 11 N. D. 22, 88 N. W. 729, denying mandamus to control discretion of county auditor to issue salary warrant where the facts upon which the salary right were based are in doubt.

Withholding mandamus pending result of litigation.

Cited in *Bibb v. Gaston*, 146 Ala. 439, 40 So. 936, denying mandamus to probate a will pending appeal from probate of another will by same testator.

1 N. D. 88, **STATE EX REL. GOODWIN v. NELSON COUNTY**, 8 L.R.A. 283, 26 AM. ST. REP. 609, 45 N. W. 33.

Purposes for which bonds may be issued, or taxes raised.

Cited in *Lund v. Chippewa County*, 93 Wis. 640, 34 L.R.A. 131, 67 N. W. 927, holding that the donation by a county of money or other securities as a bonus for the establishment and building of a state home for Dak. Rep.—9.

feeble minded within such county is for a public purpose; *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568, holding that a statute permitting everyone who has not more than 160 acres of land, free from mortgage encumbrance, to borrow from the state, is forbidden by Minn. Const. art. 9, § 10, providing that the credit of the state shall never be given or loaned in aid of any individual, association, or corporation.

Cited in notes in 14 L.R.A. 475, on public purposes for which money may be appropriated or raised by taxation; 7 L.R.A.(N.S.) 1197, on validity of statute providing for assistance of individual members of certain classes of unfortunate or afflicted persons.

— Purchase of seed grain.

Distinguished in *Yeatman v. King*, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 721, holding that the obligation resting upon one who has received seed grain from a county to pay the county therefor is a debt and not a tax and the lien for the same which attaches to such person's realty does not have priority over a prior mortgage; *Re Relief Bills*, 21 Colo. 62, 39 Pac. 1089, holding that an appropriation for the purchase of seed and grain for farmers made destitute by drouth in certain counties is forbidden by Colo. Const. art. 5, § 34, providing that no appropriation shall be made for charitable, industrial, educational, or benevolent purposes, or to any person, corporation, or community not under the absolute control of the state.

Assumption of original jurisdiction by supreme court.

Cited as leading case in *State ex rel. McDonald v. Holmes*, 16 N. D. 457, 114 N. W. 367, holding that the supreme court will issue prerogative writs in the exercise of its original jurisdiction only in a case publici juris and ordinarily the application should be made by the attorney general.

Cited in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860, as affirming the rule that the supreme court will assume original jurisdiction only in matters affecting the state in its sovereign capacity; *Duluth Elevator Co. v. White*, 11 N. D. 534, 90 N. W. 12, refusing to assume original jurisdiction and to issue certiorari to review the action of the board of equalization, only the private rights of an individual taxpayer being involved; *Anderson v. Gordon*, 9 N. D. 480, 52 L.R.A. 134, 83 N. W. 993, holding that supreme court can issue writ of injunction in exercise of original jurisdiction only on information filed by attorney general in name of state after obtaining leave of court; *State ex rel. Brett v. Kenner*, 21 Okla. 817, 97 Pac. 258, holding that the supreme court is without original jurisdiction to issue injunction in actions where the sole relief sought is the issuance of such writ; *Homesteaders v. McCombs*, 24 Okla. 201. — L.R.A. —, 103 Pac. 691, 20 A. & E. Ann. Cas. 181, holding that supreme court has no original jurisdiction of action instituted by insurance company seeking writ of mandamus to compel insurance commissioner to issue permit to company to do business in state; *State ex rel. Fosser v. Lavik*, 9 N. D. 461, 83 N. W. 914, sustaining jurisdiction of supreme court to issue original writ of mandamus where county auditor refuses to receive and appeal certificates of nominations for county officers by political party

entitled to claim on official ballot; *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234, holding sovereignty of state so directly involved as to give supreme court jurisdiction in mandamus proceedings to compel removed superintendent of state hospital for insane to turn over office to person appointed as his successor; *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385, refusing to exercise original jurisdiction and issue quo warranto to counties alleged to have unlawfully extended their boundaries where the remedy is sought by a private relator and there is adequate jurisdiction in the district court; *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282, holding that supreme court, in exercise of its original jurisdiction, will enjoin alleged new county and those assuming to act as its officers from exercising jurisdiction over territory embraced in such county until validity of organization of county, involved in pending proceeding, is finally adjudicated; *State ex rel. Shaw v. Thompson*, 21 N. D. 426, 131 N. W. 231, sustaining jurisdiction of supreme court to issue original writ of mandamus where city auditor refuses to prepare and cause to be furnished ballots and election supplies necessary to conduct election upon question of adoption of commission system of government.

Cited in notes in 58 L.R.A. 863, on original jurisdiction of court of last resort in mandamus case; 51 L.R.A. 63, on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

— At instance of private citizen.

Cited in *State ex rel. Byrne v. Wilcox*, 11 N. D. 329, 91 N. W. 955, refusing to assume original jurisdiction and enjoin the illegal creation of election precincts at the instance of a private citizen when the attorney general refuses to approve the information; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705, assuming jurisdiction to issue writ in the nature of quo warranto to test the authority of a district judge to take office although the attorney general refused to approve the application.

1 N. D. 102, **FARRINGTON v. NEW ENGLAND INVEST. CO.** 45 N. W. 191.

Followed without special discussion in *Bode v. New England Invest. Co.* 1 N. D. 121, 45 N. W. 197.

Presumption and burden of proof as to validity of tax.

Cited in *Shattuck v. Smith*, 6 N. D. 56, 60 N. W. 5, upholding presumption that tax is valid; *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, holding burden of proof is upon the person asserting the invalidity of tax levies.

When injunction lies generally.

Cited in *Macomb v. Lake County*, 9 S. D. 466, 70 N. W. 652, holding that a public sale to numerous purchasers of corporate stock for illegal personal taxes levied thereon involves a multiplicity of suits and irreparable injury, to avoid which the aid of a court of equity may be invoked.

Equitable interference with tax proceedings.

Cited in *Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County*, 11

N. D. 107, 90 N. W. 260, refusing to enjoin the collection of personal property tax, the property not being exempt and an adequate remedy existing at law in case of unjust assessment; *Wisconsin C. R. Co. v. Ashland County*, 81 Wis. 1, 50 N. W. 937, holding that court of equity will not interfere to declare tax invalid by reason of defective proceedings, and restrain its collection, unless objections to proceedings go to very groundwork of tax; *Schaffner v. Young*, 10 N. D. 245, 86 N. W. 733, holding collection of tax on personal property enjoined only where property is exempt or tax unauthorized or imposed by void statute or attempted to be enforced by officers acting outside of jurisdiction; *Northern P. R. Co. v. McGinnis*, 4 N. D. 494, 61 N. W. 1032, holding that an action will lie to restrain regular tax proceedings without paying or tendering the taxes due, as the North Dakota statute substitutes a judgment for such taxes in place of payment or tender.

— **Necessity for tender of tax legally due.**

Cited in *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, holding that in order to invoke equitable relief from tax proceedings there must have been a tender or payment of the tax justly due; *Olando v. Equitable Bldg. & L. Asso.* 45 Fla. 507, 33 So. 986, on same point; *Powers v. First Nat. Bank*, 15 N. D. 466, 109 N. W. 361, holding that he who seeks equitable relief from tax sale must first reimburse the tax purchaser to the extent of the taxes admittedly due at time of sale.

Cited as overruled in *Warfield-Pratt-Howell Co. v. Averill Grocery Co.* 119 Iowa, 75, 93 N. W. 80, on the total invalidity of void assessment.

Validity of assessment.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding valid assessment essential to valid tax; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90, holding "substantial injury" invalidating tax suffered by one against whose property heavy tax is laid under assessment in pursuance of repealed law though no pecuniary loss has resulted; *Tampa v. Kaunitz*, 39 Fla. 683, 63 Am. St. Rep. 202, 23 So. 416, holding that the omission of tax officers to assess taxable property because of a bona fide belief on their part that it is exempt, or because of inadvertence or negligence without any intent on their part to impose additional or unequal burdens upon other taxpayers, will not invalidate an assessment; *Powers v. Larabee*, 2 N. D. 149, 49 N. W. 724, holding description of real estate in assessment where any character and abbreviations used neither by conveyancers nor people generally in describing land insufficient as basis of valid tax; *Tampa v. Kaunitz*, 39 Fla. 683, 63 Am. St. Rep. 202, 23 So. 416, holding that if the statutory assessor for any reason permits his assistants to perform all the duties relating to an assessment, while he abstains from supervising or ratifying their work, the assessment is void; *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724, holding an assessment void as made without due process of law because of the failure of the board of equalization to meet at the time fixed by statute.

— **Necessity for verification of assessment roll.**

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St.

Rep. 621, 112 N. W. 839, holding that absence of verification to assessment roll is fatal to the tax in proceedings brought under act to enforce taxes against lands forfeited to state and not redeemed, legal defenses being permitted; *Corbet v. Rocksbury*, 94 Minn. 397, 103 N. W. 11, on effect of failure to verify assessment roll; *Northern P. R. Co. v. Barnea*, 2 N. D. 310, 51 N. W. 386 (dissenting opinion), to the effect that the judgment in an action to remove a cloud from title resulting from illegal tax proceedings should embody a provision for payment by the plaintiff of the penalties and interest prescribed by law in cases of delinquency.

Distinguished in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding that omission of assessor's verification rendered assessment and tax based thereon void.

Duty of assessor to determine exempt nature of property.

Cited in *Tyler v. Cass County*, 1 N. D. 369, 48 N. W. 232, holding it duty of assessor to determine whether or not a particular piece of property falls within any exempt class.

Allegations in action attacking tax sale.

Limited in *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. 434, holding that defendant in an action to quiet title to land claimed by him by tax title must, to recover against the plaintiff subsequent taxes which he claimed to have paid, allege the validity of such taxes and that they have been assessed and levied.

De jure office as essential to de facto officer.

Cited in note in 15 L.R.A.(N.S.) 95, on de jure office as condition of de facto officer.

1 N. D. 121, *BODE v. NEW ENGLAND INVEST CO.* 45 N. W. 197.

Tender of justly due tax as prerequisite to equitable relief from tax proceedings.

Cited in *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, holding that one seeking equitable relief from tax proceedings must show tender or payment of tax justly due.

What is a final judgment.

Cited in note in 28 L.R.A. 623, on what entry or record is necessary to complete a judgment or order.

1 N. D. 130, *MORRIS v. BEECHER*, 45 N. W. 696.

1 N. D. 137, *NORTHWESTERN FUEL CO. v. BRUNS*, 45 N. W. 699.

Merger of oral in written contract.

Cited in *Gage v. Phillips*, 21 Nev. 150, 37 Am. St. Rep. 494, 26 Pac. 60, holding that when parties reduce their contract to writing, all oral negotiations and agreements are merged in the writing.

1 N. D. 140, MOE v. JOB, 45 N. W. 700.**Liability for injury by fire.**

Cited in *Mattoon v. Fremont, E. & M. Valley R. Co.* 6 S. D. 301, 60 N. W. 69, holding that no recovery can be had against a railroad company for damages from a fire set on its right of way which escapes therefrom, in the absence of negligence.

1 N. D. 143, DEVORE v. WOODRUFF, 45 N. W. 701.**Legal action against partner.**

Cited in *Lord v. Peaks*, 41 Neb. 891, 60 N. W. 353, holding that action at law will not lie between partners to settle alleged debts arising out of the business.

What constitutes a mortgage.

Cited in *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499, holding that agreement to reconvey on fixed terms does not necessarily show deed to be mortgage.

1 N. D. 151, TRAVELERS' INS. CO. v. CALIFORNIA INS. CO. 3 L.R.A. 769, 45 N. W. 703.**Validity of provisions limiting time for bringing action on policy.**

Cited in *Dolan v. Royal Neighbors of America*, 123 Mo. App. 147, 100 S. W. 498, holding that stipulation in insurance policy limiting time for bringing action thereon is valid.

Running of limitations expressed in policy.

Cited in *Appel v. Cooper Ins. Co.* 76 Ohio St. 52, 10 L.R.A.(N.S.) 674, 80 N. E. 955, 10 A. & E. Ann. Cas. 821, holding that a provision limiting time for bringing action on the policy begins to run from time of fire; *Provident Fund Soc. v. Howell*, 110 Ala. 508, 18 So. 311, holding that under an insurance policy providing that no legal proceedings for a recovery under the policy shall be brought within three months after receipt at the office of the society of proof of injury, nor at all unless begun within six months from the date of said receipt, the period of limitation began to run from the time the proofs are filed; *State Ins. Co. v. Meesman*, 2 Wash. 459, 27 Pac. 77, holding that under a provision in a policy of fire insurance that no action thereon shall be sustained until certain things have been done or unless commenced within six months after the fire shall have occurred, and that the lapse of said time shall be conclusive evidence of the invalidity of any claim against the company, the said limitation of six months is to be computed from the date of the fire, the company having disavowed liability within fifteen days after the fire; *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L.R.A. 743, 39 Am. St. Rep. 877, 56 N. W. 332, holding that a provision that a suit on a policy must be brought within twelve months after the fire requires the said time to be computed from the date of the fire, and not from the time the loss is ascertained and established; *McFarland v. Railway Officials & Employees Acci. Asso.* 5 Wyo. 126, 27 L.R.A. 48, 63 Am. St. Rep. 29, 38 Pac. 347, holding that the time of death by accident, and not the time when the cause of action

accrued on a policy of accident insurance, is the time from which is to be computed the period of "one year from the date of the happening of the alleged injury" within which suit must be brought by the terms of the policy, although the right of action on the policy did not accrue until the expiration of ninety days after proof of the injury; *Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co.* 112 Iowa, 608, 84 N. W. 904, holding that a statute which declares that actions on insurance policies shall not be limited to less than one year, and that no provision of a policy to the contrary shall be availing, does not apply to a policy limiting the time to six months, and under which a loss occurred prior to the time the statute took effect; *Egan v. Oakland Ins. Co.* 29 Or. 403, 54 Am. St. Rep. 798, 42 Pac. 990, holding that the time limitation upon the assured's right of action must be computed from the date of the happening of the loss under a policy providing that "no suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity . . . unless commenced within six months next after the fire shall have occurred."

Cited in notes in 28 Am. St. Rep. 583, on limitation of actions on insurance policies; 47 L.R.A. 697, on stipulation limiting time for suit on insurance policy; when begins to run.

Disapproved in *Sample v. London & L. F. Ins. Co.* 46 S. C. 491, 47 L.R.A. 696, 57 Am. St. Rep. 701, 24 S. E. 334, holding that an action brought within twelve months from the expiration of the sixty days after the filing of the proofs of loss with the company is sustainable as within the time contemplated by the parties to a policy, providing that suit shall not be sustainable unless commenced within twelve months next after the fire, nor until full compliance with requirements which exempt the company from suit for sixty days in any event, and for as much longer time as may be required to make satisfactory proof of loss and secure an award from appraisers if required; *Read v. State Ins. Co.* 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665, holding that an action commenced on an insurance policy within six months from the time the right of action accrued was within a policy stipulating that "no suit or action against the company for the recovery of any claim under or by virtue of this policy shall be sustained in any court of law or equity unless commenced within the term of six months next after the fire shall have occurred," and the insured has sixty days in which to furnish the notice and proof of loss, although it is said that parties may waive the limitation fixed by statute and adopt one for themselves, if reasonable.

Rights of policy holder against reinsurer.

Cited in *Ruohs v. Traders' F. Ins. Co.* 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85, holding when reinsurer takes over entire business of insured and assumes its policies, policy holder may sue reinsurer on the policy.

Cited in note in 8 L.R.A.(N.S.) 862, on liability of reinsurer.

Rights of mortgagee under "loss payable" clause.

Cited in *Brown v. Commercial F. Ins. Co.* 21 App. D. C. 325, sustaining right of mortgagee to maintain action on policy under "loss payable"

clause, the "interest" referred to being the debt secured and not an estate in the property; *Palmer Sav. Bank v. Ins. Co. of N. A.* 166 Mass. 189, 32 L.R.A. 615, 55 Am. St. Rep. 387, 44 N. E. 211, holding that a mortgagee is entitled to recover in his own name to the extent of his interest on a policy of insurance payable to him, as his interest may appear where the mortgagor is by the mortgage required to insure the property for the mortgagee's benefit.

Cited in note in 25 L.R.A. 306, on rights of mortgagee to benefit of insurance taken in name of mortgagor.

Construction of insurance policies.

Cited in note in 14 Eng. Rul. Cas. 22, on rules for construing insurance policies.

Conflict of laws as to insurance contracts.

Cited in note in 63 L.R.A. 868, on conflict of laws as to insurance contracts.

1 N. D. 159, SHORT v. NORTHERN P. ELEVATOR CO. 45 N. W. 706.

Admissions or declarations of agent.

Cited in *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305, holding admissions or declarations of agent as to past transactions are inadmissible to bind principal; *La Rue v. St. Anthony & D. Elevator Co.* 3 S. D. 637, 54 N. W. 806, holding declarations of agent of elevator company inadmissible to prove the party from whom wheat was purchased the parties delivering same and number of bushels delivered when made after mingling of such wheat with other wheat in the elevator; *Rounseville v. Paulson*, 19 N. D. 466, 126 N. W. 221, holding declarations of agent inadmissible because not made while acting within scope of agency.

1 N. D. 167, JOHNSON v. DAKOTA F. & M. INS. CO. 45 N. W. 799.

Validity of stipulation limiting time for bringing action on policy.

Cited in *Karnes v. American F. Ins. Co.* 144 Mo. 413, 46 S. W. 166, holding that a stipulation in an insurance policy limiting the time to sue is void under Mo. Rev. Stat. § 2394, providing that "all parts of any contract or agreement hereafter made or entered into which either directly or indirectly limit or tend to limit the time in which suit or action may be instituted, shall be null and void;" *Vesey v. Commercial Union Assur. Co.* 18 S. D. 632, 101 N. W. 1074, holding that stipulation limiting time for bringing action on insurance policy is void under the code.

Incorporation of extraneous papers into contract.

Cited in note in 70 L.R.A. 107, on effect of party's ignorance of contents of extraneous papers upon attempt to incorporate it into contract by reference.

Distinguished in *State Ins. Co. v. Gray*, 44 Kan. 731, 25 Pac. 197, holding that a person not able to read or write, who holds in his possession a policy which contains his application signed with his mark, does not

thereby approve the action of the agent or solicitor in falsely or improperly taking his application.

Knowledge of agent imputable to insurer.

Cited in *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789, holding that mere fact that agent who negotiated mortgage without consent of insurer was also agent of insurer did not estop insured from setting up mortgage to avoid policy.

Cited in note in 16 L.R.A. 36, on effect of knowledge by insurer's agent of falsity of statement in application.

Warranties made material by agreement of parties.

Cited in *Satterlee v. Modern Brotherhood of America*, 15 N. D. 92, 106 N. W. 561, holding that a statement that applicant was not pregnant was a statement of material fact and being expressly declared a warranty in the contract of insurance must be so construed by the court; *O'Brien v. Home Ins. Co.* (1891) 79 Wis. 399, 48 N. W. 714, holding that a false statement in an application for insurance as to the amount of encumbrance on the property renders the policy void from its inception, when it was agreed that said policy should be null and void if any false statements were made in said application or otherwise; *Soules v. Brotherhood of American Yeoman*, 19 N. D. 23, 120 N. W. 760, on statements in application for insurance as made material by express agreement.

Waiver of provision in policy.

Cited in *Purcell v. St. Paul F. & M. Ins. Co.* 5 N. D. 100, 64 N. W. 943, holding provision as to giving notice of loss waived by retaining without objection or comment proofs of loss furnished too late; *Taylor-Baldwin Co. v. Northwestern F. & M. Ins. Co.* 18 N. D. 343, 122 N. W. 396, 20 A. & E. Ann. Cas. 432, holding that rejection of insurance claim on ground that policy was cancelled did not estop defense of forfeiture for violation of conditions of policy.

Cited in notes in 107 Am. St. Rep. 116, on waiver of provisions of non-waiver or written waiver of conditions and forfeitures in policies; 67 L.R.A. 734, 737, on retention of policy as waiver of mistake or fraud of insurer or its agent; 16 L.R.A.(N.S.) 1191, on parol evidence rule as to varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

Overruled in *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, holding forfeiture of policy, void at inception waived where company with full knowledge of facts, issues and delivers same and collects and retains premium therefor.

1 N. D. 190, **STATE EX REL. FAUSSETT v. HARRIS**, 45 N. W. 1101.

Appointment to fill vacancy in elective office.

Cited in *Reals v. Smith*, 8 Wyo. 159, 56 Pac. 690, holding constitutional provision for election does not preclude legislative provision for appointment pending election.

Distinction between constitutional and nonconstitutional offices.

Cited in *Ex parte Corliss*, 16 N. D. 470, 114 N. W. 962, holding that the law creating deputy enforcement commissioners is invalid as vesting in other persons the duties appertaining to a constitutional office.

1 N. D. 196, RED RIVER VALLEY BANK v. FREEMAN, 46 N. W. 86.**Validity of assignment for creditors.**

Cited in *Bangs v. Fadden*, 5 N. D. 92, 64 N. W. 78, holding assignment for creditors not rendered void by reservation in general terms without specifying the property.

Right to exemptions.

Cited in *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712, holding that the surviving husband's or wife's possession of a homestead does not cease on the final distribution of the estate; *Cleveland v. McCanna*, 7 N. D. 455, 41 L.R.A. 852, 66 Am. St. Rep. 670, 75 N. W. 908, holding that mutual judgments cannot be set off against each other so as to defeat the exemption laws.

Attachment of assigned property.

Distinguished in *State ex rel. Enderlin State Bank v. Rose*, 4 N. D. 319, 26 L.R.A. 593, 58 N. W. 514, holding property not placed in custody of law so as to prevent attachment by assignment for creditors.

1 N. D. 206, JORDAN v. FRANK, 46 N. W. 171.**Attachment papers as part of pleadings.**

Cited in *Western Twine Co. v. Scott*, 11 S. D. 27, 75 N. W. 273, holding that attachment proceedings formed no part of the pleadings proper.

Consideration of summons in determining demurrer to complaint.

Cited in *Lindskog v. Schouweiler*, 12 S. D. 176, 80 N. W. 190, holding that the summons cannot be considered in determining a demurrer to the complaint.

1 N. D. 210, JASPER v. HAZEN, 46 N. W. 173.**1 N. D. 211, NASHUA SAV. BANK v. LOVEJOY, 46 N. W. 411.****1 N. D. 216, PENFIELD v. TOWER, 46 N. W. 413.****Suspension of power of alienation.**

Cited in *Re Walkerly*, 108 Cal. 627, 49 Am. St. Rep. 97n, 41 Pac. 772, holding that a devise to trustees to manage realty for twenty-five years and apply the proceeds for the use of the persons designated, and then, or at the death thereafter of the widow, to sell it and distribute the proceeds, suspends the power of alienation for a longer period than during lives in being.

Cited in note in 49 Am. St. Rep. 130, on rule against perpetuities.

Conflict of laws as to rights in property.

Cited in *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347, holding validity

and interpretation of will bequeathing mortgage on land governed by laws of testator's domicile; *Campbell-Kawannanako v. Campbell*, 152 Cal. 201, 92 Pac. 184, holding that the validity of a trust in real estate attempted to be created by will depends upon the law of the situs of the realty.

Cited in note in 2 L.R.A.(N.S.) 432, on conflict of laws as to wills.

Equitable conversion.

Cited in *Harris v. Ingalls*, 74 N. H. 339, 68 Atl. 34, on the forms of will which will create a valid equitable conversion of the realty; *Re Sacrison*, 19 N. D. 160, 26 L.R.A.(N.S.) 724, 123 N. W. 518; *Wood v. Pehrsson*, 21 N. D. 357, 130 N. W. 1010,—holding that a valid direction to executor to sell realty and distribute proceeds creates an equitable conversion as of the date of testator's death; *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751, holding that a will directing the conversion and distribution of testator's realty worked an equitable conversion as of the date of testator's death; *Clapp v. Tower*, 11 N. D. 556, 93 N. W. 862, holding that certain realty having been equitably converted into personalty was properly disposed of by executor's notwithstanding cited case which held the will void as to realty.

Limited in *Becker v. Chester*, 115 Wis. 90, 91 N. W. 87, holding that a trust in land with power of sale offends against the law prohibiting perpetuities only where the converted fund is fettered by an invalid trust.

Validity and effect of power of sale generally.

Cited in *Pottle v. Lowe*, 99 Ga. 576, 59 Am. St. Rep. 246, 27 S. E. 145, holding that when a deed is void because given to secure a usurious debt, a power of sale contained in said deed is likewise void; *Greenwood v. Greenwood*, 178 Ill. 387, 53 N. E. 101, holding that the mere absence of words of express command or direction does not render the exercise of a power of sale discretionary, when to so hold would defeat a testator's intention as it appears from the whole will.

Cited in note in 32 L.R.A.(N.S.) 678, 690, on implied power of executor or trustee to sell realty.

1 N. D. 230, PICKERT v. RUGG, 46 N. W. 446.

Measure of damages for conversion.

Cited in *First Nat. Bank v. Minneapolis & N. Elevator Co.* 8 N. D. 430, 79 N. W. 874, holding that delay of eleven months in instituting action for conversion, deprives plaintiff of right to damages based on highest market value of property between conversion and verdict; *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319, 83 N. W. 221, holding want of reasonable diligence in prosecuting action so as to deprive plaintiff of right to highest market value between conversion and verdict not shown by delay of nearly two years, arising from disqualification of judge; *Rosum v. Hodges*, 1 S. D. 308, 9 L.R.A. 817, 47 N. W. 140, holding that reasonable diligence is shown where the conversion occurred on November 22d during the plaintiff's absence which continued until December 16th and the action was commenced February 26th following, and tried at the ensuing April term; *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195, holding that

the measure of damages for the conversion of marketable stock is the highest market value between time of conversion and reasonable time for replacing stock, or if purchase price has been paid, the highest value between time of conversion and time of bringing suit, in either case with interest and dividends from time of conversion.

Cited in note in 9 N. D. 636, on damages in actions for trover and conversion.

Necessity for assigning particular error.

Cited in *Gagnier v. Fargo*, 12 N. D. 219, 96 N. W. 841, holding that sufficiency of evidence cannot be considered where assignments of error refer solely to the instructions.

1 N. D. 238, JACKSON v. LA MOURE COUNTY, 46 N. W. 449.

What necessary to vesting of title to indemnity lands.

Cited in *Grandin v. LaBar*, 3 N. D. 446, 57 N. W. 241, holding approval of secretary of interior expressed in some manner necessary to passing of title to land in indemnity belt of Northern Pacific Railroad Company.

Held obiter in *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386, holding approval of secretary of interior not necessary to vesting of title to lands selected by Northern Pacific Railroad Company from indemnity lands to make up deficiency of lands within place limits.

When public land becomes subject to tax.

Cited in *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241, holding railroad indemnity lands not subject to levy for taxes in interval between selection of land and approval thereof by secretary of interior; *Slade v. Butte County*, 14 Cal. App. 453, 112 Pac. 485, holding certificate of purchase of lien lands not taxable as property.

Cited in note in 132 Am. St. Rep. 339, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

Who may question legality of tax levy.

Cited in *Northern P. R. Co. v. McGinnis*, 4 N. D. 494, 61 N. W. 1032, holding that the legality of a tax levy cannot be questioned by one who has not sufficient title to the land to support the levy.

Cited in note in 45 Am. St. Rep. 376, on who may maintain action to remove cloud on title.

1 N. D. 243, PERSONS v. SIMONS, 46 N. W. 969.

1 N. D. 246, STATE EX REL. GOODSILL v. WOODMANSEE, 11 L.R.A. 420, 46 N. W. 970.

Title and subject matter of acts.

Cited in *State ex rel. Standish v. Nomland*, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85, holding provisions of statute not covered by title "an act creating the office of board of state auditors and prescribing the duties thereof;" *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705; *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703,—

holding that the constitutional provision that no bill shall contain more than one subject which shall be expressed in its title is mandatory upon the courts and the legislature; *State v. Minneapolis & N. Elevator Co.* 17 N. D. 23, 114 N. W. 482, holding that subject matter germane to the title of the act is proper although not expressly mentioned in title; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841, holding that an amendment may include provisions not directly related to those embraced in the original statute providing the amendment is germane to the subject matter of the original or expressed in its title; *Martin v. Tyler*, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392, holding provisions for appointment of commission with specified powers, to provide for levying assessments for costs of drains, and issuance of county bonds to meet expenses, and creation of sinking fund to pay bonds, within title "An Act to Provide for Establishing, Constructing, and Maintaining Drains;" *State ex rel. Standish v. Nomland*, 3 N. D. 427, 57 N. W. 85, holding provisions that board of state auditors shall check up books of state treasurer and ascertain funds on hand, and shall with governor designate depositories for funds, and approve their bonds, and that treasurer shall deposit state funds therein, and be relieved from liability for such funds, and that depositories shall pay interest thereon, not within title "An Act Creating the Office of the Board of State Auditors and Prescribing the Duties Thereof;" *State ex rel. Kol v. North Dakota Children's Home Soc.* 10 N. D. 493, 88 N. W. 273, holding that act having but a single purpose expressed in title may embrace all matters naturally and reasonably included therein and all measures which may facilitate accomplishment of legislative purpose; *Blaker v. Hood*, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115, holding that the title of Kan. Laws 1891, chap. 43, "Providing for the Organization and Regulation of Banks, and Prescribing Penalties for Violations," does not contain more than one subject.

Cited in notes in 64 Am. St. Rep. 77, 83, on sufficiency of title of statute; 79 Am. St. Rep. 468, as to when title of statute embraces only one subject, and what may be included thereunder.

State regulation of banks.

Cited in *Re Surety Guarantee & T. Co.* 56 C. C. A. 654, 121 Fed. 73, on the control of the state over the common law privilege of banking; *Blaker v. Hood*, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115, holding the regulation of the banking business to be within the police power of the legislature; *State v. Richcreek*, 167 Ind. 217, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 A. & E. Ann. Cas. 899, on legislative police power to restrict and regulate the banking business; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 117, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186 (affirming 22 Okla. 48, 97 Pac. 590), holding statutes of Oklahoma subjecting state banks to assessments for Depositors Guaranty Fund, within police power of state and valid.

Cited in note in 135 Am. St. Rep. 62, on business of banking as a proper subject for legislative regulation.

— Restriction of banking business to corporations.

Cited in *Bruner v. Citizens' Bank*, 134 Ky. 283, 120 S. W. 345; *First State Bank v. Shallenberger*, 172 Fed. 999,—on the restriction of banking business to corporate bankers; *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358, holding that the legislature may limit the building and loan business to incorporated associations; *Weed v. Bergh*, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664, upholding a statute requiring all persons doing a banking business to become incorporated and comply with certain regulations.

Cited in note in 5 L.R.A.(N.S.) 875, on power to prohibit or impose conditions upon right of individuals to engage in banking; 55 L. ed. U. S. 130, on prohibiting or restricting private banking.

Disapproved in *State v. Scougal*, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858, holding void, statute prohibiting any individuals or firms from carrying on business of banking.

1 N. D. 252, GRAM v. NORTHERN P. R. CO. 46 N. E. 972.

Proximate cause of injury.

Cited in note in 20 L.R.A.(N.S.) 95, on weather conditions as independent, intervening, efficient cause.

Necessity for plaintiff to negative contributory negligence.

Followed in *Pengilly v. J. I. Case Threshing Mach. Co.* 11 N. D. 249, 91 N. W. 63, holding it unnecessary to insert in a complaint for personal injuries a denial of plaintiff's contributory negligence, it being a matter of defense.

Cited in *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676, holding that defendant has the burden of proving contributory negligence, where such negligence is not shown by plaintiff's evidence.

Cited in note in 33 L.R.A.(N.S.) 1171, 1173, on burden of proof as to contributory negligence.

Evidence as to cause of fire.

Cited in *McTavish v. Great Northern R. Co.* 8 N. D. 333, 79 N. W. 443, holding testimony of railroad employee as to width of strip he was instructed to burn over competent to show amount of land used as right of way.

Liability of railroad company for fire.

Cited in *Johnson v. Northern P. R. Co.* 1 N. D. 354, 48 N. W. 227, holding negligence of railroad company sufficiently shown prima facie by evidence tending directly to show that fire destroying plaintiff's property was thrown from a passing engine; *Gulf, C. & S. F. R. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. 43, holding that it is not negligence per se for a railway company to permit grass and weeds or other combustible matter to accumulate upon its right of way.

Effect of failure to properly settle bill of exceptions.

Cited in *Schlachter v. St. Bernard's Roman Catholic Church*, 20 S. D. 186, 105 N. W. 279, holding that failure to serve and settle a bill

of exceptions is not fatal to appeal since appeal may be taken from judgment alone and that the only motion proper in such case is to strike the bill of exceptions.

1 N. D. 264, SLATTERY v. DONNELLY, 47 N. W. 375.

Taking case from jury.

Cited in *Ness v. Jones*, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706, holding no question of fact involved in review of ruling of trial court on motion to direct a verdict; *Zink v. Lahart*, 16 N. D. 56, 110 N. W. 931, on the importance of exercising great caution in taking case from jury; *McRea v. Hillsboro Nat. Bank*, 6 N. D. 353, 70 N. W. 813, holding that where there is a substantial conflict in the evidence it is error to withdraw an issue of fact from the consideration of the jury; *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193, holding that a controverted question of fact should not be taken from the jury where there is reasonable doubt on the state of the evidence; *Merchants' Nat. Bank v. Stebbins*, 15 S. D. 280, 89 N. W. 674, overruling a directed verdict for the defendant in an action by a bank to recover money on the ground that it was loaned to a copartnership, where the evidence shows the advance to three of the members, but whether in their capacity as officers of certain corporations or as individuals and copartners, is not clear.

1 N. D. 266, MORRIS v. McKNIGHT, 47 N. W. 375.

Foreclosure by advertisement.

Explained in *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85, as not following the Minnesota decisions as to strict and literal compliance with statutory provisions for foreclosure by advertisement.

Who may foreclose by advertisement.

Cited in *Backus v. Burke*, 48 Minn. 260, 51 N. W. 284, holding that a person cannot legally foreclose a mortgage on real property by advertisement when the record title to the instrument is in another; *Brown v. Commonow*, 17 N. D. 84, 114 N. W. 728, holding assignee of beneficiary in deed of trust not authorized to foreclose same by advertisement; *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85, holding that under statute making record of power of sale prerequisite to mortgage foreclosure one must be owner and holder of record title before proceeding to foreclose by advertisement.

Distinguished in *Stockwell v. Barnum*, 7 Cal. App. 413, 94 Pac. 400, as not applicable to foreclosure under deed of trust where trustee takes a legal marketable title rather than a lien.

1 N. D. 273, STATE v. BAUER, 47 N. W. 378.

What is extortion.

Cited in note in 116 Am. St. Rep. 451, 453, 454, on what constitutes extortion.

1 N. D. 279, O'HARA v. PARK RIVER, 47 N. W. 360.

Executed agreement to accept less than official salary.

Cited in *Boyle v. Ogden City*, 24 Utah, 443, 68 Pac. 153, holding that an executed agreement by a public officer to accept half his legal salary in full payment thereof is binding upon him although it was invalid while executory only; *De Boest v. Gambell*, 35 Or. 368, 58 Pac. 72, 353, holding that where a public officer enters into an agreement with the board or person by whom he is employed or appointed to accept an office and discharge the duties thereof for a less compensation than that provided by law, and such an agreement has been fully executed and performed, it is binding, although invalid as against public policy at its inception.

Distinguished in *Nelson v. Superior*, 109 Wis. 618, 85 N. W. 412, holding that a municipal officer by agreeing to receive and accepting an amount less than his legal salary does not estop himself from claiming the difference between such amount and his said salary when the agreement was entered into by him under threats of removal.

1 N. D. 284, LARISON v. WILBUR, 47 N. W. 381.

Written contract as affected by prior illegal parol agreement.

Distinguished in *Fleischer v. Fleischer*, 11 N. D. 221, 91 N. W. 51, where the agreement to obtain government land for the benefit of another was wholly oral and there was no agreement to sell.

Who may assert abandonment of land claim.

Cited in *Semer v. Auditor General*, 133 Mich. 569, 95 N. W. 732, holding that abandonment of homestead is not available to one asserting adverse claim to the land, the forfeiture being wholly at the option of the state; *McMillen v. Gerstle*, 19 Colo. 198, 34 Pac. 681, holding that a question of forfeiture of rights under the Federal pre-emption laws, for violation of U. S. Rev. Stat. § 2262 (U. S. Comp. Stat. 1901, p. 1379), can only be raised by the United States; *Ziegele v. Richelieu & O. Nav. Co.* 3 App. Div. 77, 38 N. Y. Supp. 1022, holding that only the state can question the power of its licensee to assign his rights and interests under the license.

What is a violation of provision against conveyance by pre-emptor.

Cited in *Norris v. Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. 1121, holding that a mortgage by a pre-emptor of land, prior to the time of making his final proofs, is not a grant or conveyance within the prohibitory clause of U. S. Rev. Stat. § 2262, U. S. Comp. Stat. 1901, p. 1379.

1 N. D. 291, LAVIN v. BRADLEY, 47 N. W. 369.

Prerequisite to statutory lien.

Cited in *Joslyn v. Smith*, 2 N. D. 53, 49 N. W. 382, denying right of seed lien holder to take possession of property covered by lien even after default.

—Thresher's lien.

Cited in *Anderson v. Alseth*, 6 S. D. 566, 62 N. W. 435, holding threshing lien acquirable only by substantial compliance with South Dakota statute; *Moher v. Rasmusson*, 12 N. D. 71, 95 N. W. 152, holding that threshers lien is wholly statutory and statutory requirement for filing statement of amount and kind of grain threshed is imperative.

Lien under entire contract to furnish separate materials.

Cited in *Schlusser v. Moores*, 16 N. D. 185, 112 N. W. 78, on the question of whether one furnishing different sorts of seed under an entire contract has a seed lien upon the whole crop.

Sufficiency of affidavit for lien.

Cited in *Parker v. First Nat. Bank*, 3 N. D. 87, 54 N. W. 313, holding allegation in complaint for conversion of wheat on which plaintiff claims a thresher's lien that he caused an itemized statement of his account for threshing containing bill therefor to be made insufficient to show that the statement contained a description of the land on which the grain was grown.

Distinguished in *Howe v. Smith*, 6 N. D. 432, 71 N. W. 552, holding affidavit for lien not rendered insufficient as between lienor and owner by failure to state that the addition in which the property is situated is the second one of that name.

1 N. D. 298, FOX v. MACKENZIE, 47 N. W. 386.**Effect of bond or undertaking to dissolve attachment.**

Cited in *Moffitt v. Garrett*, 23 Okla. 398, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818, 100 Pac. 533, holding that giving of bond to release attachment renders obligors liable upon any judgment recovered in the action by plaintiff regardless of the validity of the attachment; *Brady v. Onfroy*, 37 Wash. 482, 79 Pac. 1004, holding that where defendant in attachment elects to give bond he thereby waives any right to attack the regularity of the attachment; *Anvil Gold Min. Co. v. Hoxie*, 1 Alaska, 604, holding that by giving statutory bail bond defendant in attachment waives defects and irregularities in the original proceedings.

Cited in notes in 123 Am. St. Rep. 1050, 1051, on proceedings to dissolve attachments; 32 L.R.A.(N.S.) 409, on right of obligor in bond for release of attached property to attack attachment.

Distinguished in *Anvil Gold Min. Co. v. Hoxsie*, 60 C. C. A. 492, 125 Fed. 724, holding that the giving of an undertaking to discharge attachment will not preclude defendants maintaining action to recover damages where the attachment was without sufficient cause.

1 N. D. 309, BUDGE v. GRAND FORKS, 10 L.R.A. 165, 47 N. W. 222.**Caveat emptor in tax sales.**

Cited in *Iowa & D. Land Co. v. Barnes County*, 6 N. D. 601, 72 N. W. 1019, holding rule caveat emptor applicable to purchaser at tax sale; *Lindner v. New Orleans*, 116 La. 372, 40 So. 736, 7 A. & E. Ann. Cas. 919, Dak. Rep.—10.

holding that a tax sale is subject to the rule caveat emptor and the purchaser assumes the risk of all irregularities which since the records are open to inspection he is presumed to know; *Tyler v. Cass County*, 1 N. D. 369, 48 N. W. 232, holding rule of caveat emptor applicable to purchaser of lands originally granted to railroad company at a tax sale void because the lands were not taxable because United States had lien thereon for unpaid survey fees; *Pennock v. Douglas County*, 39 Neb. 293, 21 L.R.A. 121, 42 Am. St. Rep. 579, 58 N. W. 117, holding that the rule of caveat emptor applies to purchasers at tax sales, and in the absence of a statute therefor no municipality can be compelled, either at law or in equity, to refund money which it has received from the sale of real estate for taxes, even where the property against which such taxes were levied was not liable therefor; *American Invest. Co. v. Beadle County*, 5 S. D. 410, 59 N. W. 212, holding purchaser of land at tax sale not bona fide purchaser for value.

Right of purchaser at void tax sale to recover back amount paid.

Cited in *McHenry v. Brett*, 9 N. D. 68, 81 N. W. 65, denying right of purchaser at void tax sale to recover from owner amount of subsequent valid taxes voluntarily paid by him; *Van Nest v. Sargent County*, 7 N. D. 139, 73 N. W. 1083, holding adjudication that tax sale is void, condition precedent to liability of county to purchaser for purchase price and subsequent taxes, penalties, and costs paid by him; *Lisso v. Nachitoches Parish*, 127 La. 283, 31 L.R.A.(N.S.) 1141, 53 So. 566, holding that one who voluntarily pays taxes on property purchased at tax sale cannot recover such payments back as having been paid in error.

Cited in notes in 42 Am. St. Rep. 588, 589, on right to recover money paid at void tax sale; 31 L.R.A.(N.S.) 1142, on right of purchaser at invalid tax sale, in absence of statute, to be reimbursed for purchase price, or subsequent taxes.

Reassessment for benefit of tax sale purchaser.

Cited in *Barkley v. Lincoln*, 82 Neb. 181, 18 L.R.A.(N.S.) 392, 130 Am. St. Rep. 659, 117 N. W. 398, holding that municipality may not reassess special taxes for the benefit of a tax sale purchaser who was unable to recover amount paid thereon owing to invalidity of original assessment.

1 N. D. 325, HALLEY v. FOLSOM, 48 N. W. 219.

What constitutes warranty.

Cited in note in 25 L.R.A.(N.S.) 164, as to whether words constituting basis of implied warranty of quality may be considered an express warranty.

Acceptance as waiver of defects.

Cited in *International Soc. v. Hildreth*, 11 N. D. 262, 91 N. W. 70, holding that evidence of unqualified acceptance is admissible on the issue of waiver of vendors warranties as to defects.

Necessity for indicating line of proof.

Cited in *Regan v. Jones*, 14 N. D. 591, 105 N. W. 613, holding that

objections to questions were properly sustained no offer of proof being made and the questions themselves not indicating that the answers would be material or competent; *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A. (N.S.) 554, 113 N. W. 872, holding that there was no error in excluding evidence, no offer of proof being made and no showing of prejudice by reason of such exclusion.

Conclusiveness of verdict on conflicting evidence.

Cited in *Hegar v. De Groat*, 3 N. D. 354, 56 N. W. 150, holding that verdict will not be disturbed on appeal on ground that preponderance of evidence favored a smaller recovery.

1 N. D. 221, KIDD v. MCGINNIS, 48 N. W. 221.

Right to specific enforcement of contract.

Cited in *Bomer Bros. v. Canady*, 79 Miss. 222, 55 L.R.A. 328, 89 Am. St. Rep. 593, 30 So. 638, holding equity will not decree the specific performance of a contract to cut a large and indefinite number of trees and manufacture them into lumber, and appoint a receiver therefor, as the superintendence of the court would be unduly taxed.

Cited in notes in 68 Am. St. Rep. 754, 761, on specific performance of contract where decree cannot be enforced; 3 L.R.A. (N.S.) 829, on specific performance of contract for performance of continuous acts.

1 N. D. 226, ELL v. NORTHERN P. R. CO. 12 L.R.A. 97, 26 AM. ST. REP. 621, 48 N. W. 222.

Fellow servant rule as an affirmative defense.

Cited in *Longpre v. Big Blackfoot Mill. Co.* 38 Mont. 99, 99 Pac. 131, holding that where contributory negligence and assumption of risk must be specially pleaded the same rule should apply to the defense of negligence of fellow servant.

Who are fellow servants.

Cited in *Northern P. R. Co. v. Hogan*, 11 C. C. A. 51, 27 U. S. App. 184, 63 Fed. 102, holding brakeman and conductor not fellow servants; *Standard Cement Co. v. Minor*, 27 Ind. App. 479, 61 N. E. 684, holding that a quarry boss is a fellow servant with the laborers in the quarry; *Parker v. Hannibal & St. J. R. Co.* 109 Mo. 362, 18 L.R.A. 802, 19 S. W. 1119, holding that a track repairer under direction of a foreman, and the operatives of a passing construction train under different management from the section gang, are not fellow-servants; *Jemming v. Great Northern R. Co.* 96 Minn. 302, 1 L.R.A. (N.S.) 696, 104 N. W. 1079, holding that engineer of steam shovel was fellow servant of pitman employed in laying track therefor although engineer had general supervision of the crew; *Atchison & E. Bridge Co. v. Miller*, 71 Kan. 13, 1 L.R.A. (N.S.) 682, 80 Pac. 18, holding that member of pile driving crew is fellow servant of machinist employed to repair stationary engines situated in the midst of the work being done by the pile driver; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886, holding that complaint does not state a cause of action against

master which merely alleges injury incurred in obeying an order of foreman, the latter not being necessarily more than a fellow servant; *Clavin v. William Tinkham Co.* 29 R. I. 599, 132 Am. St. Rep. 836, 73 Atl. 392, holding that loom fixer was performing non delegable duty of master and latter was liable to weaver injured by negligence of loom fixer in the performance of his duties; *Bennett v. Northern P. R. Co.* 2 N. D. 112, 13 L.R.A. 465, 49 N. W. 408, holding servant on whom master devolves duty of inspecting cars not fellow servant of employee injured as result of failure to make proper inspection; *Missouri P. R. Co. v. Lyons*, 54 Neb. 633, 75 N. W. 13, holding that where two switching crews are in the employ of the same railroad company, subject to the control and direction of the same yard master, no member of either of said crews having any right of control or direction over any member of the other crew, each member of one crew is the fellow servant of each member of the other crew; *Jaques v. Great Falls Mfg. Co.* 66 N. H. 482, 13 L.R.A. 824, 22 Atl. 552; *Mast v. Kern*, 34 Or. 247, 75 Am. St. Rep. 580, 54 Pac. 950, both cases holding that as a general rule those doing the work of a servant are fellow servants whatever their grade of service; and a servant of whatever rank, charged with the performance of the master's duty toward his servants, is, as to the discharge of that duty, a vice principal; *Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 380, 48 L.R.A. 399, 77 Am. St. Rep. 721, 55 S. W. 108, holding that the conductor, engineer, and fireman operating a train are fellow-servants; *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659, holding that a servant is a vice principal only when he stands in place of the principal with reference to the principal's duty; *Jaques v. Great Falls Mfg. Co.* 66 N. H. 482, 13 L.R.A. 824, 22 Atl. 552, holding that a servant of whatever rank, charged with the performance of the master's duty towards his servants, is, as to the discharge of that duty, a vice principal; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L.R.A. 352, 27 S. E. 278, 31 S. E. 258, holding that a master's liability to one servant for the negligence of another is not dependent on the grade of the servants nor on the fact that one has authority over the other, but on the character of the negligent act, and that a railway conductor who is a vice principal becomes a fellow servant of a brakeman while he is performing simply the work of a brakeman, as he is not then performing a duty of the company; *Barnicle v. Connor*, 110 Iowa, 238, 81 N. W. 452, holding that the negligence of a foreman while taking an employee's place while said employee, by his direction, does something else, is the negligence of a fellow servant; *Atchison, T. & S. F. R. Co. v. Martin*, 7 N. M. 158, 34 Pac. 536, holding that the negligence of a foreman of a railway section gang in failing to look out for approaching trains is that of a fellow servant, notwithstanding that he had some control over the employee injured thereby; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L.R.A. 337, 27 S. E. 278, 31 S. E. 258, holding that the negligence of a railway conductor in signaling for a train to back for a coupling is that of a fellow servant as to a brakeman of his crew.

Cited in notes in 75 Am. St. Rep. 588, 589, 591, 596, 597, 600, 602, on who is a vice principal; 18 L.R.A. 825, on negligent superiors; 51 L.R.A.

520, on vice principalship considered with reference to superior rank of negligent servant; 54 L.R.A. 39, 43, 61, on vice principalship as determined with reference to the character of the act which caused the injury.

Duty and liability of master under Code.

Cited in *Hardesty v. Largey Lumber Co.* 34 Mont. 151, 86 Pac. 29, as declaring that the code imposes upon the master no greater liability than at common law.

Cited in notes in 27 Am. St. Rep. 819, on master's duty as to place and appliances; 54 Am. St. Rep. 92, on acts of servant for which master is not responsible.

Assumption of risk by employee.

Cited in note in 31 Am. St. Rep. 349 (1st Par.), on assumption of risks by employee.

Right to interest on damages.

Cited in notes in 28 L.R.A.(N.S.) 70, on interest on unliquidated damages; 14 Eng. Rul. Cas. 562, as to when interest will be allowed; 14 L.R.A. 548, on interest on amount of damages awarded for the negligent infliction of a personal injury; 18 L.R.A. 449, on interest on sum allowed as damages.

1 N. D. 354, JOHNSON v. NORTHERN P. R. CO. 48 N. W. 227.

Extending time for settling statement of case, bill of exceptions, or notice of intention.

Cited in *Smith v. Hoff*, 20 N. D. 419, 127 N. W. 1047, holding it abuse of discretion to deny reasonable extension of time for settling statement of case on appeal where shown that appeal is being prosecuted in good faith upon meritorious grounds and there was reasonable excuse for delay; *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428, holding that the power of the district court to extend term for settling bill of exceptions is, under the statute, limited to cases where there is a showing of good cause therefor; *Glaspell v. Northern P. R. Co.* 144 U. S. 211, 36 L. ed. 413, 12 Sup. Ct. Rep. 593, on power of the district court to extend time for settling bill of exceptions by the very order making such settlement; *Kittrick v. Pardee*, 8 S. D. 39, 65 N. W. 23, holding that a motion to strike from the files an amended and substituted notice of intention to move for a new trial because served too late, and the granting of further time, are in effect an extension of time or the fixing of a new time to make the motion; *Edwards & M. Lumber Co. v. Baker*, 2 N. D. 289, 50 N. W. 718, holding order settling statement of the case not invalid because made after statutory time for settlement; *McDonald v. Beatty*, 9 N. D. 293, 83 N. W. 224, holding that settlement of case on appeal operates as an extension of time even though made after expiration of statutory period for settlements; *Gardner v. Gardner*, 9 N. D. 192, 82 N. W. 872, holding that statutes permitting extension of time for settling statements of cases should be liberally construed in favor of the discretion vested in the trial court; *Gade v. Collins*, 8 S. D. 322, 66 N. W. 486, holding that time for service of notice of intention to move for new trial or of a bill

of exceptions not filed within prescribed time fixed will be presumed on appeal to have been extended or another time fixed as provided by statute; *McKittrick v. Pardee*, 8 S. D. 39, 65 N. W. 23, holding that court below will be presumed on appeal to have acted on good cause shown in granting extension of time to move for new trial; *Glaspell v. Missouri P. R. Co.* 144 U. S. 211, 36 L. ed. 409, 12 Sup. Ct. Rep. 593, holding that a cause was not pending in the courts of the territory of Dakota at the time North Dakota was admitted as a state, under an enabling act which transferred pending causes to the United States district court, where, after judgment, the steps required by the laws of that territory for obtaining a new trial had not been taken within the time required by such laws, and were not pending at the time of admission of said state.

Distinguished in *McGillicuddy v. Morris*, 7 S. D. 592, 65 N. W. 14, holding that a sufficient showing to authorize fixing of date outside statutory limit for settlement of bill of exceptions will be presumed on appeal in absence of affirmative showing to the contrary; *Moe v. Northern P. R. Co.* 2 N. D. 282, 50 N. W. 715, holding ignorance of appellant's counsel of statute limiting time to settle bill of exceptions in good cause for extension of time after expiration thereof.

Presumption of negligence where fire is started by locomotive.

Cited in *Continental Ins. Co. v. Chicago & N. W. R. Co.* 97 Minn. 467, 5 L.R.A.(N.S.) 99, 107 N. W. 548, on the proof necessary to rebut presumption of negligence from fact of fire set by locomotive; *Smith v. Northern P. R. Co.* 3 N. D. 17, 53 N. W. 173, holding that the question whether the inference of negligence from the setting out of a single fire has been overthrown must be determined by the court in the first instance.

Right to interest on damages.

Cited in *Hegar v. De Groat*, 3 N. D. 354, 56 N. W. 150, holding that interest may, in the option of the jury, be allowed in ejectment on the annual value of the use of the land while wrongfully occupied by defendant; *Uhe v. Chicago, M. & St. P. R. Co.* 4 S. D. 505, 57 N. W. 484, holding an instrument requiring the jury to compute interest on the damages, if any, found for plaintiff in an action for injury to property by negligence, erroneous.

Cited in note in 28 L.R.A.(N.S.) 68, on interest on unliquidated damages.

1 N. D. 365, SARLES v. MCGEE, 26 AM. ST. REP. 633, 48 N. W. 231.

1 N. D. 369, TYLER v. CASS COUNTY, 48 N. W. 232, Writ of error dismissed in 142 U. S. 288, 35 L. ed. 1016, 12 Sup. Ct. Rep. 225.

Rights of purchaser at void tax sale.

Cited in *Martin v. Kearney County*, 62 Neb. 538, 87 N. W. 351, holding erroneous tax sale not "mistake on wrongful act of county treasurer" for which county may be held liable; *Iowa & D. Land Co. v. Barnes County*,

6 N. D. 601, 72 N. W. 1019, holding recovery from county by purchaser at tax sale of land on which no tax was due, not possible, unless defects in procedure were traceable to mistake or wrongful act of treasurer; *American Invest. Co. v. Beadle County*, 5 S. D. 410, 59 N. W. 212, holding purchaser of land at tax sale not bona fide purchaser for value.

—To recover back purchase money paid.

Cited in *Paine v. Dickey County*, 8 N. D. 581, 80 N. W. 770, holding provision in North Dakota statute for return of purchase money to purchaser at tax sale of land on which no tax was due prescriptive only in operation; *American Invest. Co. v. Beadle County*, 5 S. D. 410, 59 N. W. 212, holding South Dakota statute for repayment of taxes by county to purchaser at tax sale where the injury is cancelled by the federal government after the land has been listed and sold for such taxes in retroaction; *McHenry v. Brett*, 9 N. D. 68, 81 N. W. 65, denying right of purchaser at void tax sale to recover from owner amount of subsequent valid taxes voluntarily paid by him; *Van Nest v. Sargent County*, 7 N. D. 139, 73 N. W. 1083, holding adjudication that tax sale is void, condition precedent to liability of county to purchaser for purchase price and subsequent taxes, penalties, and costs paid by him; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227, holding the county treasurer not liable to a purchaser at a tax sale for money paid as the purchase price, although the lands were not taxable and the tax proceedings were void, as such sale was neither the mistake nor wrongful act of the treasurer.

Cited in note in 31 L.R.A.(N.S.) 1142, 1143, on right of purchaser at invalid tax sale, in absence of statute, to be reimbursed for purchase price, or subsequent taxes.

Nature of acts of tax assessor.

Cited in *Shuttuck v. Smith*, 6 N. D. 56, 69 N. W. 5, holding that tax assessor acts as judicial officer in determining title to property and declaring use to which it is exclusively devoted.

Exemption of public lands from taxation.

Cited in note in 132 Am. St. Rep. 340, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

Federal question incidentally involved.

Cited in *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 290, 16 Sup. Ct. Rep. 113, as an example of a case raising a Federal question not necessary to the determination of the rights of the litigants and hence not impressing the inquiry as to the right to recover with a Federal character.

1 N. D. 402, C. AULTMAN & CO. v. GINN, 48 N. W. 336.

1 N. D. 404, CLARK v. WALLACE, 26 AM. ST. REP. 636, 48 N. W. 339.

Authority of partner or corporate officer.

Cited in *Seufert v. Gille*, 230 Mo. 453, 31 L.R.A.(N.S.) 471, 131 S. W.

102, holding that authority to execute notes in name of firm does not imply authority to indorse firm name on third party's note; *North Star Boot & Shoe Co. v. Stebbins*, 2 S. D. 74, 48 N. W. 833, denying power of partner in banking firm to bind other members by ratification of cashier's act beyond scope of banking business; *Security Bank v. Kingsland*, 5 N. D. 263, 65 N. W. 697, holding that the secretary and treasurer of a corporation has no implied authority as such to indorse notes for his individual use.

1 N. D. 408, GULL RIVER LUMBER CO. v. SCHOOL DIST. NO. 39, 48 N. W. 340.

Transfer of causes upon admission of state.

Cited in *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 110, 95 Pac. 606, holding that acquiescence in setting case for trial in state court which originated in territorial court prior to statehood constitutes an election precluding application for transfer to Federal court thereafter; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151, holding that under 25 Stat. at L. 683, chap. 180, § 23, a defendant, knowing his rights and the facts loses his right of transfer to the Federal court, and elects to remain in the state court, by submitting a motion for a continuance at the June term for 1890, and submitting to the order made by the state court for a continuance, and the settling of the cases for trial upon the pre-emptory call at the succeeding term of the said court, as he has thereby actively invoked the jurisdiction of the state court; *Campbell v. Coulston*, 19 N. D. 645, 124 N. W. 689, to point that transfers to Federal courts, in civil actions in which United States is not party, shall only be made upon written request of one party.

1 N. D. 411, RHODE ISLAND HOSPITAL TRUST CO. v. KEENEY, 48 N. W. 341.

Sufficiency of service of process.

Cited in *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512, holding that service of a complaint by mail cannot be converted into personal service by showing the time it was taken from the postoffice, so as to diminish the time to serve a demurrer thereto; *McKenzie v. Boynton*, 19 N. D. 531, 125 N. W. 1059, holding it insufficient service of statutory notice of expiration of redemption period where attempted to be made by registered mail and also by leaving copy with employee of hotel where party lived.

Distinguished in *First Nat. Bank v. Holmes*, 12 N. D. 38, 94 N. W. 764, where domiciliary on substituted service outside the state was attempted after service by publication had been ordered; *Darnell v. Mack*, 46 Neb. 740, 65 N. W. 805, holding that jurisdiction sufficient to render the custody of the officers lawful is acquired by the seizure of property under a regular writ of attachment, and is not lost so long as the action remains pending by failure to serve process in the main action upon the defendant.

1 N. D. 415, BOWNE v. WOLCOTT, 48 N. W. 336.

Alienation by settlers on public lands.

Cited in note in 31 Am. St. Rep. 197, on alienation of rights of settlers on public lands.

Breach of covenant of seisin.

Cited in *Bowne v. Wolcott*, 1 N. D. 497, 48 N. W. 426, holding that no action lies against grantor for breach of covenant of seisin, "for his heirs, executors and administrators;" *Watson v. Heyn*, 62 Neb. 191, 86 N. W. 1064, holding that breach of covenant of seisin occurred upon decree for specific enforcement of oral agreement for sale by prior holder of title to the one actually in possession; *Zerfing v. Seelig*, 12 S. D. 25, 80 N. W. 140, holding that an action may be maintained for the purchase price of land by warranty deed notwithstanding a defect in the title, while the presumption remains unchallenged that the vendor is able to respond in damages.

Cited in note in 17 L.R.A.(N.S.) 1186, on necessity of eviction to maintenance of action on warranty of title or seisin.

1 N. D. 422, DE LENDRECIE v. PECK, 48 N. W. 342.**Appeal from ruling on motion for directed verdict.**

Cited in *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353, holding that errors of law in ruling upon motion for directed verdict can be made available on appeal only when exceptions are saved; *Holum v. Chicago, M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99, holding that the trial court's direction of verdict for the defendant must be excepted to, and such exception preserved and incorporated into the bill of exceptions, to be reviewable on appeal; *Ness v. Jones*, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706, holding that review of the action of a trial court in directing a verdict involves a review of an error of law, and that such action may be reviewed without a motion for a new trial.

Distinguished in *Satterlee v. Modern Brotherhood of America*, 15 N. D. 92, 106 N. W. 561, where the appeal was not from the refusal to direct verdict but from a subsequent refusal to order judgment notwithstanding verdict.

Overruled in *Dahl v. Stakke*, 12 N. D. 325, 96 N. W. 353, holding that appeal from denial of new trial after directed verdict brings up the sufficiency of evidence to support the verdict although no exception was taken to the direction of verdict.

Necessity for assignment of error.

Cited in *State v. Rhodes*, 90 Iowa, 496, 24 L.R.A. 245, 58 N. W. 887 (reholding that court will not review errors not assigned in brief.

1 N. D. 425, STATE EX REL. BARTLETT v. FRASER, 3 INTERS. COM. REP. 577, 48 N. W. 343.**Regulation of liquor traffic.**

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667, opinion of liquor traffic proper exercise of police power.

State regulation of intoxicating liquors brought from other state.

Cited in *State v. Markuson*, 5 N. D. 147, 64 N. W. 934, holding suppress-

versed in 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664), holding that the "Wilson Law" makes imported intoxicating liquors the subject of state legislation the moment they enter the state.

Favoring constitutionality of statute.

Cited in *State ex rel. Stoesser v. Brass*, 2 N. D. 482, 52 N. W. 408, holding that state court will give benefit of doubt in favor of constitutionality of statute.

What are public nuisances.

Cited in note in 107 Am. St. Rep. 229, on what are public nuisances.

1 N. D. 434, RE ARGUS PRINTING CO. 12 L.R.A. 761, 26 AM. ST. REP. 639, 48 N. W. 347.

Who entitled to vote corporate stock.

Cited in *Smith v. San Francisco & N. P. R. Co.* 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582, holding that one may be a bona fide stockholder within Cal. Civ. Code, § 312, and therefore entitled to vote for directors of the corporation without being the owner of the stock; *Royal Consol. Min. Co. v. Royal Consol. Mines Co.* 157 Cal. 737, 137 Am. St. Rep. 165, 110 Pac. 123, holding that test of right to vote as stockholder is ownership of stock as disclosed by books of corporation; *Canadian Improv. Co. v. Lea*, 74 N. J. Eq. 234, 69 Atl. 455, holding it duty of corporation to recognize right to vote of registered holder of stock shown on its transfer books; *McMullan v. Dickinson Co.* 63 Minn. 405, 65 N. W. 663, holding that a corporate stockholder does not, by pledging his shares to secure a debt, cease to be a stockholder within the meaning of a contract of employment whereby his employment was to continue only so long as he owned and held his own name a prescribed number of shares of stock.

Cited in note in 121 Am. St. Rep. 196, on rights, remedies, and liabilities of pledgees of corporate stock.

Right to vote stock by proxy.

Cited in note in 29 L.R.A. 849, on right to vote by proxy in private corporations.

Stock books as evidence of who are stockholders.

Cited in *Haynes v. Griffith*, 16 Idaho, 280, 101 Pac. 728, holding that the owner of stock as appearing upon the stock books of a corporation is prima facie entitled to vote the same; *Herrick v. Humphrey Hardware Co.* 73 Neb. 809, 119 Am. St. Rep. 917, 103 N. W. 685, 11 A. & E. Ann. Cas. 201, holding that stock books are prima facie evidence of who are stockholders in corporation and a wrongful refusal to make transfer on the books amounts to conversion of the stock.

Sufficiency of transfer of corporate stock.

Cited in *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200, holding that an assignment of stock in blank to one who was bona fide holder for value was a sufficient transfer to give priority over liens subsequently arising in favor of the corporation.

Cited in note in 57 Am. St. Rep. 390, on extent to which transfers of stock may be restricted.

What constitutes a quorum.

Cited in note in 21 L.R.A. 175, on what constitutes a quorum for a meeting of stockholders.

Judicial supervision of corporation election.

Cited in *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892, holding that if the result of a corporation election has been illegally announced because of illegal admission on rejection of certain votes the court may announce the true result.

1 N. D. 455, *BRAITHWAITE v. AIKIN*, 48 N. W. 354, Later phases of same case in 1 N. D. 475, 48 N. W. 361; 2 N. D. 57, 49 N. W. 419; 3 N. D. 365, 56 N. W. 133; 5 N. D. 196, 31 L.R.A. 238, 65 N. W. 701.

What constitutes a partnership.

Cited in notes in 115 Am. St. Rep. 131, on what constitutes a partnership; 18 L.R.A.(N.S.) 986, 991, 1086, on effect of agreement to share profits to create partnership.

1 N. D. 475, *BRAITHWAITE v. AIKIN*, 48 N. W. 361, Later phases of same case in 2 N. D. 57, 49 N. W. 419; 3 N. D. 365, 56 N. W. 133; 5 N. D. 196, 31 L.R.A. 238, 65 N. W. 701.

Intervention.

Cited in note in 123 Am. St. Rep. 313, on intervention.

1 N. D. 479, *CAPITAL BANK v. SCHOOL DIST. NO. 53*, 48 N. W. 363.

Followed without special discussion in *Gull River Lumber Co. v. School Dist. No. 39*, 1 N. D. 500, 48 N. W. 427.

Validity of school warrants.

Followed in *Rochford v. School Dist. No. 6*, 19 S. D. 435, 103 N. W. 763, holding certain school warrants to be void and without consideration because issued in violation of the code.

Cited in *Hamilton County v. Sherwood*, 11 C. C. A. 507, 27 U. S. App. 458, 64 Fed. 103, holding that county warrants are merely prima facie evidence of indebtedness, and do not bar a reinvestigation of the merits of the claim on which the warrant is founded when a suit is brought on the warrant.

Validity of bonds to fund debts evidenced by void warrants.

Distinguished in *Flagg v. School Dist. No. 70*, 4 N. D. 30, 25 L.R.A. 363, 58 N. W. 499, holding that bonds issued by a school district to fund debts for which school warrants have been given are not void in the hands of an innocent purchaser for cash, although the warrants themselves were void.

Ratification of ultra vires contract.

Cited in *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161, holding that an ultra vires contract cannot be validated by ratification; *State ex rel. Diebold Safe & Lock Co. v. Getchell*, 3 N. D. 243, 55 N. W. 585, holding that the county commissioners cannot ratify a contract for work on the county

jail entered into by them without submitting the question of expenditure to the voters, for an amount in excess of the annual revenue of the county for the year, as they cannot ratify a contract which they had no power to make.

Validity of contract by school district.

Cited in *McGillivray v. Joint School Dist.* No. 1, 112 Wis. 354, 58 L.R.A. 100, 88 Am. St. Rep. 969, 88 N. W. 310, holding that a direct and positive prohibition upon a school district from incurring indebtedness beyond 5 per cent of the assessed valuation cannot be evaded by substituting the fiction of an implied contract to pay quantum meruit.

1 N. D. 497, BROWNE v. WOLCOTT, 48 N. W. 426.

Breach of warranty in conveyance.

Cited in *Bull v. Beiseker*, 16 N. D. 290, 14 L.R.A.(N.S.) 514, 113 N. W. 870, holding that mere color of title without possession cannot ripen into prescriptive title and that hence a breach of covenants of warranty takes place immediately upon conveyance by one who has neither title nor possession.

Implied covenant against incumbrances.

Cited in *Dun v. Dietrich*, 3 N. D. 3, 53 N. W. 81, holding that express covenant against encumbrances limited to grantor's "heirs, executors and administrators," restrains implied covenant against encumbrances otherwise arising from use of word "grant" in deed.

Cited in note in 125 Am. St. Rep. 448, on covenants of seisin.

Covenants running with the land.

Cited in note in 82 Am. St. Rep. 685, on what covenants run with the land.

1 N. D. 500, GULL RIVER LUMBER CO. v. SCHOOL DIST. NO. 39, 48 N. W. 427.

Necessity for findings by court.

Cited in *Garr, S. & Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867, holding that the provision of § 5067, that the decision of the court must be in writing and filed with the clerk, is mandatory; *Security Improv. Co. v. Cass County*, 9 N. D. 553, 84 N. W. 477, holding it the duty of the trial court to consider all the evidence, excluding that which is incompetent, and deduce therefrom the ultimate facts on all the issues involved; *McKenna v. Whittaker*, 9 S. D. 442, 69 N. W. 587, holding a finding on each material issue of fact involved, and not merely a recital of evidential facts or the language of the pleadings required by Dak. Comp. Laws, § 5067; *Kierbow v. Young*, 21 S. D. 180, 110 N. W. 116, holding under code in action by court without jury judgment rendered without finding ultimate facts material to issue was unauthorized, though there was no request for express findings.

Disapproved in *Brown v. Brown*, 12 S. D. 506, 81 N. W. 883, holding that judgment whose recitals show nontrial of issue of fact and that all facts essential to only point on which decision turns were settled by stipulation will not be disturbed for failure to find fact.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 2 N. D.

2 N. D. 1, LYONS v. MILLER, 48 N. W. 514.

Waiver of justice's lack of jurisdiction.

Cited in *Benoit v. Revoir*, 8 N. D. 226, 77 N. W. 605, holding jurisdiction of person by justice of peace if lost by continuance restored by appearance on adjourned day attempted to appear specially and moved for dismissal for loss of jurisdiction and participation in trial on merits after denial of such motion.

Cited in note in 34 L.R.A. (N.S.) 666, on waiver of lack of, or defects in, service of process, by de novo on trial appeal from justice's court.

Distinguished in *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343, holding objection to jurisdiction of justice of peace for insufficiency of summons not waived by appeal to district court and subsequently to supreme court for sole purpose of reviewing sufficiency of summons.

2 N. D. 3, SANDAGER v. NORTHERN P. ELEVATOR CO. 48 N. W. 438.

Rights of chattel mortgagee.

Cited in *Ilfeld v. Ziegler*, 40 Colo. 401, 91 Pac. 825, holding that on an absolute sale of mortgaged property by mortgagor the mortgagee is entitled to immediate possession without demand; *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809, holding mortgagee of chattels having present right of possession entitled to maintain action for conversion against wrongdoer.

Cited in notes in 109 Am. St. Rep. 441, on mortgagees' right of action against third persons for invasion of their rights; 9 N. D. 634, on evidence in action for trover and conversion; 23 L.R.A. 781, on effect of "danger," "safety" or "insecurity" clause in a chattel mortgage.

Presumption from absence of evidence in record on appeal.

Cited in *Whitney v. Akin*, 19 N. D. 638, 125 N. W. 470, holding that absence of evidence from record raises presumption that all material facts alleged in complaint were supported by competent proof.

2 N. D. 6, SANFORD v. DULUTH & D. ELEVATOR CO. 48 N. W. 434.**Who may maintain trover.**

Cited in *Ellestad v. Northwestern Elevator Co.* 6 N. D. 88, 69 N. W. 44, sustaining right of chattel mortgagee of crop to maintain trover against one with constructive notice of mortgage purchasing the grain before maturity of the note secured where the mortgage authorized mortgagee to take possession at once in event of disposition of grain; *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809, holding mortgagee of chattels having present right of possession, entitled to maintain action for conversion against wrongdoer.

Cited in note 9 N. D. 631, on who may maintain trover.

Necessity for demand and refusal to a conversion of mortgaged property.

Cited in *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608, holding demand on innocent bailee without notice of party's ownership necessary to render him liable for conversion; *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 280, 91 N. W. 436, holding that a purchaser of mortgaged grain is only liable to mortgagee for a conversion after demand and a refusal to deliver.

What constitutes a conversation.

Cited in *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266, holding that storage or purchase of grain covered by chattel mortgage does not of itself constitute conversion.

Distinguished in *Nichols & S. Co. v. Minnesota Thresher Mfg. Co.* 70 Minn. 528, 73 N. W. 415, holding that although one cannot be held guilty of conversion from the mere fact that he purchased the property from a mortgagor thereof for an adequate consideration which implies good faith, a subsequent sale of the property without reference to the mortgage, implying a warranty against encumbrances, is a conversion.

Title to mortgaged property.

Cited in *Blyth & F. Co. v. Houtz*, 24 Utah, 62, 66 Pac. 611, holding that in a sale of mortgaged property by mortgagor the latter does not act as the agent of the mortgagee, the title after mortgage still remaining in mortgagor.

Rights of chattel mortgagee generally.

Cited in notes in 109 Am. St. Rep. 443, 445, 452, on mortgagees' right of action against third persons for invasion of their rights; 96 Am. St. Rep. 683, on title and rights of holder of chattel mortgage after condition broken.

Errors reviewable on appeal from judgment alone.

Cited in *Edwards & M. Lumber Co. v. Baker*, 2 N. D. 289, 50 N. W. 718,

holding motion for new trial not necessary for purpose of reviewing on appeal errors of law; *Ness v. Jones*, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706, holding no question of fact involved in review of ruling of trial court on motion to direct a verdict; *Satterlee v. Modern Brotherhood of America*, 15 N. D. 92, 106 N. W. 561, holding unnecessary a motion for new trial in case of erroneous direction of verdict, which can be reviewed upon appeal from the judgment without such motion; *Murphy v. Foster*, 15 N. D. 556, 109 N. W. 216, holding review of refusal to direct verdict not authorized until examination of all material evidence is had which cannot take place until it becomes identified by a settled statement of the case and becomes a part of the judgment roll.

Construction of adopted statute.

Cited in *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, holding legislature presumed to have adopted statutes of other states with construction there given them.

2 N. D. 8, **KEITH v. HAGGART**, 48 N. W. 432.

Chattel mortgage entitled to be filed.

Cited in *Pease v. Magill*, 17 N. D. 166, 115 N. W. 260, holding that a chattel mortgage not having been acknowledged or witnessed is not constructive notice though filed, it not being entitled to be filed.

Necessity for witnesses to chattel mortgage.

Distinguished in *J. I. Case Threshing Machine Co. v. Olson*, 10 N. D. 170, 86 N. W. 718, holding witnesses to chattel mortgage unnecessary to validity as between the parties.

Sufficiency of delivery.

Cited in note in 54 L.R.A. 960, on delivery of deed to third person or record, or delivery for record, by grantor.

Evidence in trover.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

2 N. D. 26, **WOOD v. NISSEN**, 49 N. W. 102.

Proper record on appeal.

Cited in *Brynjolfson v. Thingvalla*, 8 N. D. 106, 77 N. W. 284, holding that transcript of evidence with annexed certificate of the trial court that the transcript is settled and allowed and transmitted in lieu of a statement of a case on account of the brevity of the testimony cannot be substituted for a proper record upon which the appellate court may determine whether the findings of fact are justified by the evidence.

Distinguished in *Goose River Bank v. Gilmore*, 3 N. D. 88, 54 N. W. 1032, holding papers used on motion for new trial, made part of the record on appeal from order thereon by their identification by the judge and certification by clerk of the court.

2 N. D. 20, **MILLS v. HOWLAND**, 49 N. W. 412.

2 N. D. 36, STATE EX REL. DAKOTA HAIL ASSO. v. CAREY, 49 N. W. 164.

When mandamus lies.

Cited in *Sawyer v. Mayhew*, 10 S. D. 18, 71 N. W. 141, denying right to mandamus to compel drawing of warrant for payment of account for expenses by state auditor after allowance of claim until claimant furnishes satisfactory evidence of amount paid by him.

Cited in note in 98 Am. St. Rep. 877, 879, on mandamus as proper remedy against public officers.

Nature of mandamus proceedings.

Cited in *Ford v. Manchester*, 136 Iowa, 313, 113 N. W. 846, holding that mandamus is ordinarily classed as a special proceeding when it is the sole relief sought, but still remains triable at law.

Parties to writ of mandamus.

Cited in *Dean v. Dimmick*, 18 N. D. 397, 122 N. W. 245, holding that mandamus to compel location of county seat must be maintained in name of state or on behalf of citizens of county; *Davis v. Caruthers*, 22 Okla. 323, 97 Pac. 581, holding that a writ of mandamus to require a judge to transfer documents and records to succeeding court must issue in the name of the state on the relation of the judge of the latter court; *State ex rel. Weinberg v. Pacific Brewing & Malting Co.* 21 Wash. 451, 47 L.R.A. 208, 58 Pac. 584, holding that under a statute providing that every action must be prosecuted in the name of the real party in interest, a mandamus proceeding is properly brought in the name of the state and on the relation of the party beneficially interested; *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706, holding that mandamus to compel county board of canvassers to reconvene and prepare new abstract of vote cast upon proposition to divide certain county may be maintained on relation of elector and tax payer of such county.

Cited in note in 105 Am. St. Rep. 122, 123, on necessary parties to proceedings in mandamus.

Distinguished in *Chandler v. Starling*, 19 N. D. 144, 121 N. W. 198, holding prior incumbent in office not necessary party defendant in mandamus proceeding to compel recognition of right to office.

2 N. D. 46, DUNSTAN v. NORTHERN P. R. CO. 49 N. W. 427.

Reservation in deed of right of way.

Cited in *Biles v. Tacoma, O. & G. H. R. Co.* 5 Wash. 509, 32 Pac. 211, holding that a deed by a railroad company reserving and excepting a strip of land to be used for a right of way or other railroad purposes in case the grantor or any of its branches has been or shall be located on or over or within less than 200 feet of the premises sold, reserved a mere easement in the land, the ownership of which passed to the purchaser.

2 N. D. 53, JOSYLN v. SMITH, 49 N. W. 352.

Effect of failure to make findings.

Cited in *Naddy v. Dietze*, 15 S. D. 26, 86 N. W. 753, holding failure of

court to make findings on alleged issue not ground for reversal where the additional findings if made must have been adverse to appellant.

Waiver of lien.

Cited in *Rosenbaum v. Hayes*, 10 N. D. 311, 86 N. W. 973, holding that a factor's lien is not necessarily lost by taking collateral security.

Discretion as to granting new trial.

Cited in *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589, holding that order granting new trial for insufficiency of evidence will be disturbed only for manifest abuse of discretion.

2 N. D. 57, BRAITHWAITE v. AIKEN, 49 N. W. 419, Later phases of same case in 3 N. D. 365, 56 N. W. 133; 5 N. D. 196, 31 L.R.A. 238, 65 N. W. 701.

Newly discovered evidence warranting new trial.

Cited in *Donahue v. State*, 165 Ind. 148, 74 N. E. 996, holding application for new trial on ground of newly discovered evidence properly denied where with proper diligence such evidence could have been had at first trial and when it is doubtful that such evidence would change the result; *Grigsby v. Woven*, 20 S. D. 623, 108 N. W. 250, holding application for new trial for newly discovered evidence properly denied where attorney for the applicant had access before trial to books containing the evidence newly discovered and could with proper diligence have presented it on trial; *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding denial of new trial for newly discovered evidence discretionary, where diligence or materiality is challenged; *Heyrock v. McKenzie*, 8 N. D. 601, 80 N. W. 762, holding that new trial will be granted for newly discovered evidence only where it is of such character as will probably change result.

Reversal of order granting new trial.

Cited in *Tyler v. Haggart*, 19 S. D. 167, 102 N. W. 682, holding that when a new trial has been granted by a judge who took no part in the trial of the case the rule that order will not be reversed except in case of abuse of discretion does not apply.

2 N. D. 66, NATIONAL GERMAN AMERICAN BANK v. LANG, 49 N. W. 414.

Pleading and proof of foreign statutes.

Cited in *Gibson v. Chicago G. W. R. Co.* 225 Mo. 473, 125 S. W. 453, holding that a demurrer to a defense containing conclusions of law as to what is the statute law of another state does not admit such conclusions; *Kephart v. Continental Casualty Co.* 17 N. D. 380, 116 N. W. 349, holding that proof that a contract was made in a foreign state for the purpose of invoking its statutes is fruitless on a failure to allege or prove the law of that state.

Cited in note in 67 L.R.A. 42, 52, as to how case is determined when proper foreign law not proved.

Dak. Rep.—11.

Presumption as to foreign law.

Cited in note in 21 L.R.A. 472, on presumption as to the law of other states.

Liability of principal on contract of agent.

Cited in note in 21 L.R.A. (N.S.) 1047, 1048, 1070, 1081, on liability of principal on negotiable paper executed by agent.

Direction of judgment by appellate court.

Cited in *Cass County v. American Exch. State Bank*, 11 N. D. 238, 91 N. W. 59, holding that the supreme court can direct entry of judgment where all the material facts are stipulated and both parties moved court below for judgment on the evidence and plaintiff also moved for a directed verdict.

Parol evidence to vary the terms of written instrument.

Cited in *First Nat. Bank v. Prior*, 10 N. D. 146, 86 N. W. 362, holding that a prior or contemporaneous oral agreement, made by a mortgagee or his agent, that upon payment of two notes the mortgage would be released, is not admissible in evidence when the mortgage provided absolutely that it should be security for four notes; *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576, holding that parol evidence tending to show that a mortgage was not given as security in the usual way is not admissible; *Small v. Elliott*, 12 S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92, holding parol evidence admissible to explain the capacity in which one signed a guaranty on a note with the letters "Pt." following his signature.

Cited in note in 20 L.R.A. 708, on admissibility of extrinsic evidence to show who is liable as the maker of a note.

2 N. D. 72, YERKES v. CRUM, 49 N. W. 422.

2 N. D. 82, VERMONT LOAN & T. CO. v. WHITHED, 49 N. W. 318.

General and special legislation.

Cited in *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915, defining a general law; *Picton v. Cass County*, 13 N. D. 242, 100 N. W. 711, 3 A. & E. Ann. Cas. 345, holding that a tax collection statute which may be put in operation in any county in the state, when put in operation operates in each county alike is a general law and valid; *Angell v. Cass County*, 11 N. D. 265, 91 N. W. 72, holding that a statute giving officers of certain counties power to enforce tax collection not given to officers of other counties to be special legislation for the collection of taxes and unconstitutional; *State ex rel. McCue v. Lewis*, 18 N. D. 125, 119 N. W. 1037, upholding act requiring each county to maintain its own indigent persons in state institution for feeble minded.

Cited in note in 2 L.R.A. (N.S.) 814, on constitutionality of statutory discrimination in interest rates.

Basis of classification for purposes of legislation.

Cited in *Edmonds v. Herbrandson*, 2 N. D. 270, 282, 14 L.R.A. 725, 50 N. W. 970, holding that constitutional inhibition against special legisla-

tion does not prevent classification although such classification must be neutral and not arbitrary; *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883, holding North Dakota prohibition statute not lacking in uniformity in operation by confining sales of liquor for lawful purposes to druggists; *Livingston Loan & Bldg. Asso. v. Drummond*, 49 Neb. 200, 68 N. W. 375, holding that the legislature may not arbitrarily and without possible reason create a class to be affected by a law, where the result would be an infringement upon a constitutional prohibition of special legislation; *Plummer v. Borsheim*, 8 N. D. 565, 80 N. W. 690, holding that classification for purposes of legislation must be based on such differences in situation, constitution or purposes different persons included in and excluded from class as fairly suggest propriety of and necessity for different or exclusive legislation; *Plummer v. Borsheim*, 8 N. D. 565, 80 N. W. 690, holding distinction between incorporated villages and cities for reorganization for independent school townships, not natural and proper classification for legislative purposes; *State ex rel. Mitchell v. Mayo*, 15 N. D. 327, 108 N. W. 36, holding a statute conferring privileges on city tax payers of cities organized under the general law is class legislation based on an arbitrary distinction and invalid; *Re Connolly*, 17 N. D. 546, 117 N. W. 946, holding that a different rule regarding the removal of county seats based on difference in population is unreasonable and invalid; *Beleal v. Northern P. R. Co.* 15 N. D. 318, 108 N. W. 33, holding that railroad work proper is of such a peculiarly hazardous nature that it may be properly placed in a class by itself for purpose of imposing extra liability in master as to employees engaged therein; *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703, holding that the allowance of a material and labor lien on buildings erected on government land held under Federal laws is a distinction made on a reasonable basis.

— Loan association laws.

Cited with special approval in *Cramer v. Southern Ohio Loan & T. Co.* 72 Ohio St. 395, 69 L.R.A. 415, 74 N. E. 200, 2 A. & E. Ann. Cas. 990, upholding validity of statute declaring that loans made in excess of legal amount of interest shall not be usurious when made by loan associations.

Cited in *Spithover v. Jefferson Bldg. & L. Asso.* 225 Mo. 660, 26 L.R.A. (N.S.) 1135, 125 S. W. 766, holding that the fact that loan institutions are profit sharing and confined to shareholders is sufficient grounds for classification for purposes of legislation; *Julien v. Model Bldg. L. & Invest. Asso.* 116 Wis. 79, 61 L.R.A. 668, 92 N. W. 561, upholding validity of priority of lien law in favor of building associations; *Sheldon v. Birmingham Bldg. & L. Asso.* 121 Ala. 278, 25 So. 820, holding that the legislature may confer on building and loan associations the right to contract for more than the legal rate of interest as fixed by the general usury law; *Livingston Loan & Bldg. Asso. v. Drummond*, 49 Neb. 200, 68 N. W. 375, holding that the Nebraska act of 1873, providing for the incorporation of building and loan associations and exempting them from certain features of the general interest laws, does not violate the constitutional provisions against the passage of special laws regulating interest, or the granting of special

privileges, immunities, or franchises to any corporation, association, or individual; Iowa Sav. & L. Asso. v. Heidt, 107 Iowa, 297, 43 L.R.A. 689, 70 Am. St. Rep. 197, 77 N. W. 1050, holding that statutes exempting building and loan associations from the operation of the usury law are not unconstitutional as class legislation; People's Bldg & L. Asso. v. Billing, 104 Mich. 186, 62 N. W. 373, holding that Mich. Laws 1887, § 50, for the incorporation and regulation of building and loan associations is not unconstitutional as class legislation; Cook v. Equitable Bldg. & L. Asso. 104 Ga. 814, 30 S. E. 911, holding that a statutory provision that no fines, interest, or premiums on loans in any building and loan associations shall be deemed usurious, is not unconstitutional as special legislation exempting from a general usury law.

Cited in note in 26 L.R.A. (N.S.) 1138, on constitutionality of exemption of building and loan associations from general usury laws.

Construction of statute according to intent.

Cited in State ex rel. Flaherty v. Hanson, 16 N. D. 347, 113 N. W. 371, holding that the letter of a section of a statute will be disregarded where if taken by letter it conflicts with another section; State ex rel. Scovil v. Moorhouse, 5 N. D. 408, 67 N. W. 140, holding public mischief which would result from such construction of statute as would defeat taxation throughout entire state entitled to great weight.

What constitutes usury.

Limited in Folsom v. Kilbourne, 5 N. D. 402, 67 N. W. 291, holding loan of money evidence by notes and mortgage not rendered usurious by failure to state rate of interest.

— By loan association.

Cited in Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley, 38 Or. 319, 58 L.R.A. 816, 84 Am. St. Rep. 793, 63 Pac. 489, holding contract with loan association usurious, where rate of interest, added to premium at fixed rate on face of loan, exceeds legal interest.

Cited in notes in 35 L.R.A. 244, on fixed premiums or fixed minimum of premiums in building and loan associations; 18 L.R.A. 133, on usury in loans by building associations.

2 N. D. 103, CLARK v. KING, 13 L.R.A. 233, 49 N. W. 416.

2 N. D. 108, BAUER v. BAUER, 49 N. W. 418.

Separate maintenance of wife.

Cited in note in 77 Am. St. Rep. 233, on wife's right to maintain separate suit for maintenance independent of suit for divorce.

2 N. D. 112, BENNETT v. NORTHERN P. R. CO. 13 L.R.A. 465, 49 N. W. 408, Later appeals in 3 N. D. 91, 54 N. W. 314; 4 N. D. 348, 61 N. W. 18.

Liability for injury to employee.

Cited in notes in 98 Am. St. Rep. 301, 307, 319, on liability to servant for injuries due to defective machinery and appliances; 37 L. ed. U. S. 150,

on liability for injuries received by employee in coupling cars; 41 L.R.A. 103, on knowledge as an element of an employer's liability to an injured servant; 16 L.R.A.(N.S.) 134, on furnishing servant article in general use as measure of master's duty.

Disobedience of rules as contributory negligence.

Cited in *Smith v. Centennial Eureka Min. Co.* 27 Utah, 307, 75 Pac. 749, holding that person injured as a proximate result of a disobedience of employer's rules is precluded from recovery.

Admissibility of expressions of present pain.

Cited in *Western Steel Car & Foundry Co. v. Bean*, 163 Ala. 255, 50 So. 1012, holding question as to what plaintiff had to say about his injury is not prejudicial where the answer was that plaintiff complained every day of his leg hurting him; *Puls v. Grand Lodge A. O. U. W.* 13 N. D. 559, 102 N. W. 165, holding that evidence expressing the nature and degree of pain a person was at the time under going is admissible.

Cited in note in 24 L.R.A.(N.S.) 262, on admissibility of expressions or statements, subsequent to injury, of present pain.

2 N. D. 128, BOSS v. NORTHERN P. R. CO. 33 AM. ST. REP. 756, 49 N. W. 655.

Assumption of risk by employee.

Cited in note in 119 Am. St. Rep. 441, on recovery for injury due to nonrepair of machinery due to master's failure to perform promise to repair.

—From insufficient train clearance.

Cited in *Pittsburg, C. C. & St. L. R. Co. v. Parish*, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514, holding assumption of risk from branches of a tree extending over top of freight train a question for jury where evidence shows that injured person knew of existence of tree but does not show knowledge of danger there from; *Potter v. Detroit, G. H. & M. R. Co.* 122 Mich. 179, 81 N. W. 80, 82 N. W. 245, holding that a railroad brakeman does not, as matter of law, assume the risk of injury from coming in contact with a telegraph pole negligently placed near the track where, although he had walked by such pole and ridden by it on the tops of cars before the accident, the other poles were not so placed, and it does not appear that he had actual knowledge of the dangerous proximity of the pole in question; *Leach v. Oregon Short Line R. Co.* 29 Utah, 302, 110 Am. St. Rep. 708, 81 Pac. 90, holding that a brakeman does not assume risk of being knocked off train by reason of a too narrowly constructed bridge, he having a right to expect proper construction or be supplied with necessary warning.

Negligence as question for jury.

Cited in note in 26 L.R.A.(N.S.) 602, on negligence in use of switch of particular type or construction as question for jury.

Time for excepting to instructions.

Distinguished in *Uhe v. Chicago, M. & St. P. R. Co.* 4 S. D. 505, 57 N. W. 484, holding that there is no distinction as to time when exceptions

may be taken between instructions given at request of counsel and those given by the judge on its own motion.

2 N. D. 141, POWER v. LARABEE, 49 N. W. 724.

Sufficiency of description of land to support tax proceedings.

Followed in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding "N. E. 4 of N. W. 4" an unintelligible abbreviation of land description invalidating tax title based thereon; *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212, holding same as to description "S2NE4 and SE4NW4;" *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336, holding same as to "S. E. 4."

Cited in *Cooper v. Lee*, 59 Ark. 460, 27 S. W. 970, holding void for insufficient description a tax sale of land described as "N. NE. Section 2, Township 15, Range 6, 87.19 acres"; *Turner v. Hand County*, 11 S. D. 348, 77 N. W. 589, holding void, tax sale of property where land is described in tax list as the "s 2 s e & s 2 s w" of specified section, township, and range; *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97, holding insufficient description of property in notice of tax sale as "s w 4 of s e 4" of specified section, township, and range; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, holding insufficient, description of property in tax assessment books as "S. E. 4 S. W. 2 and S. W. 4" and "N. W. 4 N. W. 4;" *Power v. Bowdle*, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404, 407, holding insufficient, description in tax list as "N. W. 4" "N. W. 4 of N. E. 4" "N. E. S. W." and "W. 2 S. W."; *Brown v. Reeves*, 31 Ind. App. 517, 68 N. E. 604, holding that a description of a lot in advertisement for tax sale as "Lot 1, Col. W. Co.," where it should have been described as "Lot 1, (1) in the Columbus Wheel Co. and M. F. Reeves addition to city of Columbus" invalidates the tax sale; *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding that a description of a lot in an assessment roll as "N. 23x200 feet deep Lot 2 block 25" might mean any tract along the north side of lot 2 and is too indefinite to support assessment; *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, holding that a description of land for assessment as S. W. $\frac{1}{4}$ E. 2 and S. W. $\frac{1}{4}$ N. E. 4 Sec. 7, Twp. 139, R. 63" is insufficient to support a valid tax deed; *Finlayson v. Peterson*, 11 N. D. 45, 89 N. W. 855, holding tax deeds void where based on assessments in which the property was insufficiently described; *Iowa & D. Land Co. v. Barnes County*, 6 N. D. 601, 72 N. W. 1019, holding void, sale by county treasurer of lands described by other county officials on assessment rules and tax duplicates delivered to him by county clerk by arbitrary signs and symbols similar to those afterwards judicially declared insufficient.

Distinguished in *Stoddard v. Lyon*, 18 S. D. 207, 99 N. W. 1116; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322,—holding that description of land as "N. W. part of section" having 160 acres, plainly means the North West one quarter of the section and is sufficient to indicate land meant in the assessment role; *Auditor General v. Sparrow*, 116 Mich. 574, 74 N. W. 881, holding the description in a tax roll of the different quarters of a

quarter section of land sufficient to authorize the foreclosure of tax liens thereon where the first quarter on a page is identified by the abbreviations "N. E. N. E." under the heading "Description" and by the appropriate figures under the respective headings "Sec.," "town," "range," and "acres," and the other quarters in their order by the abbreviations "N. W.," "S. W.," and "S. E.," respectively, placed directly under the first "N. E." and by the findings "40" repeated in each instance under the heading "acres," although the second "N. E." (indicating the quarter sections) and the number of the section, town, and range are not repeated or indicated by ditto marks; *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267, where there is a statute authorizing the use of letters and figures to describe land for assessment purposes.

Validity of tax and assessment generally.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding valid assessment essential to valid tax; *Hubbard v. Goss*, 167 Ind. 485, 62 N. E. 36, holding that the increase of a taxpayer's assessment by the county board of review at a meeting held therefor at the time specified by the statute without any other notice thereof than that given by the statute itself, is not a taking of property without due process of law; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90, holding that a tax for public improvements based on a special assessment is void, where no hearing has been permitted the taxpayers.

Curing invalidity of assessment.

Cited in *Evans v. Fall River County*, 9 S. D. 180, 68 N. W. 195, holding void, statute attempting to cure invalidity of tax assessments for previous years consisting of failure of board of equalization to meet as required by statute.

Rights of purchaser at void tax sale generally.

Cited in *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049, holding grantee in void tax deed not entitled to recover from owner taxes paid by him after obtaining deed.

Necessity for tender or payment of back tax by one seeking to avoid tax deed.

Cited in *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570, holding payment or tender of taxes unnecessary as condition precedent to action to recover land sold for nonpayment of taxes where defendant's claim of title is without foundation and the tax deed on which he relies is void; *Jory v. Palace Dry Goods & Shoe Co.* 30 Or. 196, 46 Pac. 786, holding that Hill's Ann. Laws § 2823, requiring the payment of the amount of taxes for which the land was sold, and interest and fees thereon, as the condition of the recovery of the land from a purchaser at a tax sale whose title fails, does not apply where the description in the assessment roll and in the tax deed is so vague and indefinite that it does not identify any land, as the purchaser thereunder acquires no lien.

Distinguished in *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, where the assessment was not void but merely irregular.

Effect of void tax deed.

Cited in *Stiles v. Granger*, 17 N. D. 502, 117 N. W. 777, holding that a tax deed delivered before decision in cited case although invalid for reasons stated in cited case was sufficient to give color of title to subsequent conveyances which also passed prior to cited case; *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. 434, holding that a tax deed which has been set aside for irregularities in the sale does not possess any evidential force, and that in order to show the validity of the tax it is necessary to show by common-law proof that the steps essential to a valid tax were taken by the officials; *Title Trust Co. v. Aylsworth*, 40 Or. 20, 86 Pac. 276, unconditionally removing as a cloud on title a certificate issued upon a tax sale, where the assessment was absolutely void for failure to comply with the requirements of Hill's (Or.) Ann. Laws, § 2770, prescribing the necessary procedure in the assessment and levy of a tax.

2 N. D. 167, ILLSTAD v. ANDERSON, 49 N. W. 659.**Waiver of motion to dismiss by submission of evidence.**

Cited in *Haggarty v. Strong*, 10 S. D. 585, 74 N. W. 1037; *Brace v. Van Eps*, 12 S. D. 191, 80 N. W. 197,—holding motion for judgment or direction of verdict for defendant at close of plaintiff's case waived by failure to renew after all evidence is in; *Cincinnati Traction Co. v. Durack*, 78 Ohio St. 343, 85 N. E. 38, 14 A. & E. Ann. Cas. 218, holding that submission of evidence by defendant after motion to dismiss at close of plaintiff's case waives the motion unless renewed after the submission; *Nashville R. & Light Co. v. Henderson*, 118 Tenn. 284, 99 S. W. 700, holding that introduction of evidence subsequent to motion for dismissal waives objections to overruling of motion unless motion is renewed at end of all the evidence.

Specification of errors.

Cited in *Williams v. Alaska Commercial Co.* 2 Alaska, 43, holding that a mere statement of grounds of error without further specification is insufficient; *Schmitz v. Heger*, 5 N. D. 165, 64 N. W. 943, holding alleged errors of law corrected on the trial not reviewable on appeal from order denying motion for new trial made on bill of exceptions containing no specification of error.

When motion for new trial properly denied.

Cited in *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687, holding denial of motion for new trial authorized where notice of intention merely states as grounds the insufficiency of the evidence and errors in law occurring at trial.

2 N. D. 175, LITTLE v. LITTLE, 49 N. W. 736.**Extinguishment of partner's credits against firm on dissolution.**

Cited in *Burrows v. Williams*, 52 Wash. 278, 100 Pac. 340, holding that unless a partner can show beyond a doubt that a credit due him from the firm was not included in the amount he received in dissolution he cannot recover therefor.

Distinguished in *Lay v. Emery*, 8 N. D. 515, 79 N. W. 1053, holding partners concluded by settlement of accounts in whole or part reduced to writing.

2 N. D. 184, RE EVINGSON, 33 AM. ST. REP. 768, 49 N. W. 733.

Loss of jurisdiction by justice of peace.

Cited in *Sluga v. Walker*, 9 N. D. 108, 81 N. W. 282, holding jurisdiction lost by justice's indefinite adjournment at close of trial.

Time of entry of justice's judgment.

Cited in *Peterson v. Hansen*, 15 N. D. 198, 107 N. W. 528, on necessity of entering justice's judgment "at once" on return of verdict.

Questions reviewable on certiorari.

Cited in note in 40 Am. St. Rep. 35, on questions reviewable upon certiorari.

2 N. D. 195, FIRST NAT. BANK v. ROBERTS, 49 N. W. 722.

Application of payments.

Cited in note in 96 Am. St. Rep. 72, on application of payments.

2 N. D. 202, STATE v. HAAS, 50 N. W. 254.

Followed without special discussion in *State ex rel. Larabee v. Barnes*, 3 N. D. 319, 55 N. W. 883.

Title of acts.

Cited in *Martin v. Tyler*, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392, holding provisions for appointment of commission with specified powers to provide for levying assessments for drains and issuance of bonds to meet expenses and creation of sinking fund, covered by title, "an act to provide for establishing, constructing and maintaining drains;" *Richard v. Stark County*, 8 N. D. 392, 79 N. W. 863, holding statute treating merely of change in boundaries of certain counties and making no reference to revenues of the state, void because in conflict with the title "increase on revenues of the state by changing and increasing the boundaries of" such counties; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841, holding that an amendatory act entitled "an act to amend a section of Revised Codes" relating to establishment, construction and maintenance of drains does not violate constitutional provision that no bills shall embrace more than one subject which shall be expressed in the title; *State v. Minneapolis & N. Elevator Co.* 17 N. D. 23, 114 N. W. 482, holding same as to an act entitled "an act requiring elevator companies doing local business to return certificates of inspection and weight to the local buyer" which also provides for posting of certificates in a conspicuous place in the elevators; *State ex rel. Kol v. North Dakota Children's Home Soc.* 10 N. D. 493, 88 N. W. 273, holding that generality of title of act does not render it objectionable if it offered no cover to incongruous and unconnected legislation.

Distinguished in *State ex rel. Standish v. Nomland*, 3 N. D. 427, 44

Am. St. Rep. 572, 57 N. W. 85, holding provisions of statute not covered by title "an act creating the office of board of state auditors and prescribing the duties thereof."

2 N. D. 206, GRANDIN v. LABAR, 50 N. W. 151, Decision on final hearing in 3 N. D. 446, 57 N. W. 241.

When receiver may be appointed.

Cited in note in 72 Am. St. Rep. 36, as to when appointment of receiver is proper.

Ex parte appointment of receiver.

Cited in *Continental Clay & Min. Co. v. Bryson*, 168 Ind. 485, 81 N. E. 210, holding that an application for appointment of receiver for corporation property without notice to corporation is insufficient where it fails to allege facts showing that irreparable injury or loss of property would have resulted if notice had been given; *Henderson v. Reynolds*, 168 Ind. 522, 11 L.R.A.(N.S.) 960, 81 N. E. 494, 11 A. & E. Ann. Cas. 977, holding that a receiver will not be appointed without notice when court has the power to grant a temporary restraining order which is ample to protect property until notice and hearing can be had on appointment; *Cole v. Price*, 22 Wash. 18, 60 Pac. 153, holding that a receiver may be appointed without notice upon an order returnable within a reasonable time in cases of pressing emergency, where it appears that immediate interference is necessary to prevent property being wasted, destroyed, or lost, or where the giving of notice will imperil the delivery of the property.

Cited in note in 11 L.R.A.(N.S.) 960, on dispensation with notice of application for appointment of receiver of growing crop.

— On information and belief.

Cited in *Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024, holding that a complaint verified on information and belief furnishes no proof upon which a court can appoint a receiver without notice.

2 N. D. 216, GOULD v. DULUTH & D. ELEVATOR CO. 50 N. W. 970.

New trial on motion of court.

Cited in *Long v. Kingfisher County*, 5 Okla. 133, 47 Pac. 1063, holding it error for court to set aside verdict and order new trial on its own motion without assignment of cause or application of other party.

— Time for motion.

Cited in *Scott v. Ford*, 52 Or. 288, 97 Pac. 99, holding that court cannot of its own motion set aside its findings and grant new trial after filing of motion for judgment by one of the parties, in the absence of a showing of fraud or collusion between the parties; *Clement v. Barnes*, 6 S. D. 483, 61 N. W. 1126, holding that power of court to vacate verdict on own motion when in plain disregard of instructions or evidence must be exercised promptly on entry of verdict; *Mizener v. Bradbury*, 128 Cal. 340, 60 Pac. 928, as to whether the court may, on its own motion, grant a new trial at

any time before entry of judgment for disregard by the jury of the instructions and the evidence.

—Time of entry of ruling.

Cited in *Hensley v. Davidson Bros. Co.* 135 Iowa, 106, 112 N. W. 227, 14 A. & E. Ann. Cas. 62, holding that the court's own motion granting new trial for verdict against the law, must be entered promptly on the return of the verdict.

Waiver of failure to serve notice of motion for new trial.

Cited in *Fletcher Bros. v. Nelson*, 6 N. D. 94, 69 N. W. 53, holding failure to serve notice of intention to move and notice of motion for new trial waived by not objecting in the court below.

Necessity for exception.

Cited in *Traxinger v. Minneapolis, St. P. & S. Ste. M. R. Co.* 23 S. D. 90, 120 N. W. 770, holding erroneous instructions, not excepted to at trial, not ground for new trial.

1 N. D. 220, FULLER v. NORTHERN P. ELEVATOR CO. 50 N. W. 359.

Sufficiency of evidence to submit case to jury.

Cited in *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A. (N.S.) 952, 118 N. W. 826, holding that court did not err in directing verdict for plaintiff where his grain was lost through leak in car door and the only evidence that he improperly fastened the door was guesswork.

Reversal of verdict for insufficiency of evidence.

Cited in *Rosenbaum v. Hayes*, 8 N. D. 461, 79 N. W. 987, holding verdict not sustainable on a mere scintilla of evidence; *McMillan v. Aitchison*, 3 N. D. 183, 54 N. W. 1030, holding that verdict which must be either without support in evidence or contrary to instructions will be set aside on appeal.

2 N. D. 225, SECOND NAT. BANK v. SWAN, 50 N. W. 357.

Mortgage of crops.

Cited in note in 23 L.R.A. 466, on sale or mortgage of future crops.

1 N. D. 229, ST. PAUL F. & M. INS. CO. v. UPTON, 50 N. W. 702.

Liability for unpaid premiums.

Cited in *Boston Safe Deposit & T. Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472, holding beneficiaries under a trust deed liable for unpaid premiums.

1 N. D. 232, LINTON v. MINNEAPOLIS & N. ELEVATOR CO. 50 N. W. 357.

2 N. D. 234, TRAVELERS' INS. CO. v. MAYER, 50 N. W. 706.

What is a judge's order.

Disapproved in *Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co.* 2 S. D. 546, 51 N. W. 342, holding an injunction order granted

by a circuit judge within his circuit on the return of an order to show cause returnable before himself, concluding with the words "done at chambers," and reciting that "the judge of said court having considered the return" and concluding with the words "done at chambers," a judge's order.

Time for issuing peremptory writ of mandamus.

Cited in *State ex rel. McGregor v. Young*, 6 S. D. 406, 61 N. W. 165, holding issuance of peremptory writ of mandamus by court before rendition of judgment as basis therefor, premature and irregular.

2 N. D. 239, TRAVELERS' INS. CO. v. WEBER, 50 N. W. 702,
Later phases of same case in 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523, 4 N. D. 135, 59 N. W. 529.

What is a judge's order.

Cited in *Travelers' Ins. Co. v. Mayer*, 2 N. D. 234, 50 N. W. 706, holding order dismissing answer to alternative writ of mandamus on demurrer after hearing parties, a court order; *Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co.* 2 S. D. 546, 51 N. W. 342, holding an injunction order granted by a circuit judge within his circuit on the return of an order to show cause returnable before himself, concluding with the words "done at chambers," and reciting that "judge of said court having considered the return" and concluding with the words "done at chambers," a judge's order.

What orders are appealable.

Cited in *Green v. Thatcher*, 31 Colo. 363, 72 Pac. 1078, holding under statute that an appeal will not lie from an order to set aside a final judgment which is itself appealable; *Re Weber*, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523, holding not appealable, order refusing to set aside an order of the district court dismissing an appeal from a justice's judgment; *Re Weber*, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523, holding that if an order dismissing an appeal from a justice's judgment as unauthorized is appealable the appeal must be taken from such order instead of from an order refusing to set it aside; *Anderson v. Matthews*, 8 Wyo. 307, 57 Pac. 156, holding that within the limitations of Wyo. Laws 1895, chap. 21, empowering a district judge by consent of the parties to try any case not requiring a jury at other times than during the regular terms, and providing that his judgment upon such trial shall be the judgment of the court and should be so entered, the act of the judge in vacation is the act of the court as much as the same would be if performed during the session of a regular term; *Vert v. Vert*, 3 S. D. 619, 54 N. W. 655, holding that supreme court will not entertain appeal from order of circuit court refusing to set aside its former order.

2 N. D. 246, HAXTUN STEAM HEATER CO. v. GORDON, 33 AM. ST. REP. 776, 50 N. W. 708.

Priority of mechanic's lien.

Cited in *Pacific States Sav. Loan & Bldg. Co. v. Dubois*, 11 Idaho, 319,

33 Pac. 513 (dissenting opinion), on mechanic's lien law as entitling liens to relate back to the beginning of building though no labor or materials are at the time furnished; *Kay v. Towsley*, 113 Mich. 281, 71 N. W. 490, holding that a mechanic's lien has priority over a mortgage upon the premises executed after the actual commencement of the building, although no part of the labor performed or materials furnished for which the lien is claimed was done or performed until after the execution and recording of the mortgage; *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340, holding lien for erection of passenger elevators superior to liens of mortgagors taken during progress of construction.

Distinguished in *James River Lumber Co. v. Danner*, 3 N. D. 470, 57 N. W. 343, holding lien for materials for reconstruction of partially destroyed building not superior to mortgage recorded before commencement of reconstructive work; *Bastien v. Barras*, 10 N. D. 29, 84 N. W. 559, holding possible priority of lien for labor and materials over that of mortgage recorded while work was in progress but before furnishing labor and materials for which lien is claimed lost by failure to claim sum in lien when filed or in proceeding to foreclose same.

Sufficiency of title of act.

Cited in *Martin v. Tyler*, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392, holding provisions for appointment of commission with specified powers to provide for levying assessments for drains and issuance of bonds to meet expenses and creation of sinking fund, covered by title, "an act to provide for establishing, constructing and maintaining drains."

2 N. D. 255, *PIRIE v. GILLITT*, 50 N. W. 710.

When verdict should be directed.

Cited in *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193, holding that controverted question of fact should not be taken from jury where there is reasonable doubt on the state of the evidence; *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A. (N.S.) 520, 122 N. W. 1000 (dissenting opinion), on right to submission of facts to jury where evidence is disputed; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960,—on the direction of verdict only where the undisputed evidence of the opposite party would fail to sustain a verdict in his favor; *Nystrom v. Lee*, 16 N. D. 561, 114 N. W. 478, holding that a *prima facie* case is made as against direction of verdict where under favorable construction a material point is made by the evidence offered; *Merchants Nat. Bank v. Stebbins*, 15 S. D. 280, 89 N. W. 674, holding that to authorize direction of verdict for either party evidence of opposite party must be considered as undisputed and given most favorable construction for him which it will properly bear; *Warnken v. Langdon Mercantile Co.* 8 N. D. 243, 77 N. W. 1000, holding that evidence will be construed most favorably to plaintiff on motion to direct verdict for defendant.

Proof of partnership.

Cited in note in 20 L.R.A. 595, on proof against one person of declarations by another to show partnership.

2 N. D. 260, FORE v. FORE, 50 N. W. 712.**Who entitled to homestead.**

Cited in note in 30 L.R.A.(N.S.) 921, as to when homestead deemed "otherwise disposed of according to law" within statute providing for continuance until that time.

Distinguished in McCanna v. Anderson, 6 N. D. 482, 71 N. W. 769, holding single man not entitled to homestead exemption.

— Homestead exemption in favor of surviving family.

Cited in Rosholt v. Mehus, 3 N. D. 513, 23 L.R.A. 239, 57 N. W. 783, holding that family homestead will on dissolution of marriage remain in possession of holder of legal title discharged from all homestead rights in absence of other disposition by decree; Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684, recognizing the continuity of the homestead exemption in favor of decedent's family; Funk v. Baker, 21 Okla. 402, 129 Am. St. Rep. 788, 96 Pac. 608, holding that the homestead set apart for use of wife and family of deceased does not terminate on settlement and is not subject to partition by the heirs as long as widow occupies it as a homestead.

Cited in note in 56 L.R.A. 44, on rights of child or children in homestead of parent.

Liability of homestead to partition.

Cited in Holmes v. Holmes, 27 Okla. 140, 30 L.R.A.(N.S.) 920, 111 Pac. 220, holding homestead not liable to partition at suit of heirs of deceased husband, where it was set aside by order of probate court as home for widow and occupied as such.

2 N. D. 270, EDMONDS v. HERBRANDSON, 14 L.R.A. 725, 50 N. W. 970.**Special legislation.**

Cited in Sasser v. Martin, 101 Ga. 447, 29 S. E. 278, holding that Ga. Code 1882, § 529, fixing the county license fee for the sale of liquors, and § 1419, prescribing the method of obtaining license to retail liquors, the latter section being made inapplicable by § 1422 to incorporated towns or cities which, by charter, had power to grant licenses, do not constitute a general law on the subject within the constitutional provision that no special law shall be enacted in any case for which provision has been made by an existing general law; Murnane v. St. Louis, 123 Mo. 479, 27 S. W. 711, holding the provisions of Mo. Const. 1875, art. 3, § 53, that the general assembly shall not pass any local or special law regulating the affairs of cities, or incorporating cities, or changing their charters, violated by a law applicable only to cities "now" having a certain population, fixing a particular mode of levying improvement taxes, where there is at the time only one city having such population; Henderson v. Koenig, 168 Mo. 356, 57 L.R.A. 659, 68 S. W. 72, holding that an amendment of a general law allowing fees to probate judges as compensation for their services, which declares that in all cities of a certain class such judges shall be compensated by a salary, violates a constitutional provision that the general

assembly shall not indirectly enact a special or local law by the partial repeal of a general one; *Weaver v. Davidson County*, 104 Tenn. 315, 59 S. W. 1105, holding that Tenn. Const. art. 11, § 8, forbidding partial legislation, prevents partial legislation as to counties as well as to citizens; *Groves v. Grant County Ct.* 42 W. Va. 587, 26 S. E. 460, holding that a statute is within the constitutional inhibition of local or special legislation when its necessary operation and effect confines it to the relocation of the county seat of but one county, notwithstanding the appearance of generality used to disguise its true character; *Angell v. Cass County*, 11 N. D. 265, 91 N. W. 72, holding that a statute giving officers of certain counties power to collect taxes not given to officers of other counties similarly situated to be special legislation for collection of taxes which is unconstitutional; *De Hay v. Berkeley County*, 66 S. C. 229, 44 S. E. 790, denying right of the legislature to pass special act amending a special act passed before constitutional amendment forbidding special legislation; *McGarvey v. Swan*, 17 Wyo. 120, 96 Pac. 697, holding that a special assessment act to apply to cities of a certain population being heretofore incorporated under a special charter is not local special legislation where the constitution forbids incorporation of cities under special act in future; *Codlin v. Kohlhousen*, 9 N. M. 565, 58 Pac. 499, holding a law forbidding the removal of a county seat from a city, town, or village situated on a railroad to one not so situated reasonable, and not within 24 U. S. Stat. at L. 170, chap. 818, forbidding local or special laws in case of locating or changing county seats, or regulating county and township affairs; *Minneapolis & N. Elevator Co. v. Traill County*, 9 N. D. 213, 50 L.R.A. 266, 82 N. W. 727, holding provision against special laws not violated by statute taxing all grain in name of person owning and operating elevator though grain is owned by another person; *State ex rel. Dorval v. Hamilton*, 20 N. D. 592, 129 N. W. 916, upholding primary election law; *Codlin v. Kohlhousen*, 9 N. M. 565, 58 Pac. 499, holding that a statute authorizing an incorporated city to join with the county in paying the expenses for the public buildings upon the establishment of the county seat therein after its passage does not violate the constitutional provision against special legislation, because the county seats of some counties had already been established in such cities.

Cited in note in 93 Am. St. Rep. 108, on constitutional inhibition against special legislation where general law can be made applicable.

—Basis of classification.

Cited in *Sasser v. Martin*, 101 Ga. 447, 29 S. E. 278, holding that the legislature may classify the subjects of legislation ad infinitum and legislate with respect to each division of such classification without entering the realm of local legislation if the said classification is natural, and not arbitrary, being reasonable according to the character of the legislation, and the law operates uniformly upon and coextensively with the entire class; *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714, holding that Oregon Laws 1901, p. 317, which regulates primary elections in cities of 10,000 or more population, "as shown by the last state or Federal census," is not special legislation, although it applies only to the city of Portland; *Standard*

Cattle Co. v. Baird, 8 Wyo. 144, 56 Pac. 598, holding tax legislation affecting range cattle as distinguished from cattle having a fixed situs not special legislation, as it is based on a natural classification of property; *Kraus v. Lehman*, 170 Ind. 408, 83 N. E. 714, 15 A. & E. Ann. Cas. 849, holding a law providing certain conditions and formalities for counties of population over 25,000 before letting of a court house construction contract to be classification on an unreasonable basis; *Re Connolly*, 17 N. D. 546, 117 N. W. 946, holding that a different rule as to counties regulating the removal of county seats based on a difference in population is unreasonable; *State ex rel. Mitchell v. Mayo*, 15 N. D. 332, 108 N. W. 36, holding that a statute conferring privileges on the tax payers of cities organized under the general law is class legislation based on an arbitrary distinction of tax payers; *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703, holding that the allowance of a material and labor line on buildings erected on government land held under Federal laws is not an arbitrary classification such buildings and owners being in a class by themselves; *Beale v. Northern P. R. Co.* 15 N. D. 318, 108 N. W. 33, holding that railroad work proper is of such a peculiarly hazardous nature that it may be properly placed in a class by itself for purpose of imposing extra liability on the master as to employees engaged therein; *Plummer v. Borscheim*, 8 N. D. 565, 80 N. W. 690, holding distinction between incorporated villages and cities for reorganization for independent school townships, not natural and proper classification for legislative purposes.

Applicability of a special or general law.

Cited in *Oklahoma City v. Shields*, 22 Okla. 265, 100 Pac. 559, holding question as to the applicability of a general or a special law to a given subject to be purely for the legislature; *State ex rel. Smith v. Brown*, 24 Okla. 433, 103 Pac. 762, to point that whether purpose can be better accomplished by general or special legislation is pure legislative question.

Sufficiency of vote for county seat.

Distinguished in *State ex rel. Little v. Langlie*, 5 N. D. 594, 32 L.R.A. 723, 67 N. W. 958, holding an admission by demurrer on which no judgment was rendered, that a specified place did not receive two thirds of the votes cast for a county seat, made for the special purpose of determining the constitutionality of such chapter 56 which did not require so large a vote, not conclusive, in a subsequent proceeding, that such place did not in fact receive a two-thirds vote as required by another statute.

2 N. D. 282, MOE v. NORTHERN P. R. Co. 50 N. W. 715.

Extension of time to settle bills of exceptions or statement of case.

Cited in *Woods v. Walsh*, 7 N. D. 376, 75 N. W. 767, holding that an extension of time within which to settle a statement of the case cannot against proper objection be lawfully made by the trial court in absence of any show of cause therefor; *Gardner v. Gardner*, 9 N. D. 192, 82 N. W. 872; *McDonald v. Beatty*, 9 N. D. 293, 83 N. W. 224,—holding discretion of trial court in extending time to settle statement of case reviewable where extension was granted without good cause being shown; *Smith v.*

Haff, 20 N. D. 419, 127 N. W. 1047, holding it abuse of discretion to deny reasonable extension of time for settlement of case where it appears that appeal is being prosecuted bona fide upon meritorious grounds and that appellant has reasonable excuse for failure to take preliminary steps within time limited; *McGillycuddy v. Morris*, 7 S. D. 592, 65 N. W. 14, denying right to extend statutory time for serving and settling bill of exceptions after expiration of statutory and extended time except with consent of adverse party; *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428, holding that a party is not entitled to the execution of time for filing bill of exceptions and transcript under court's discretion where no good cause is shown and the delay has been for 18 months on a small case.

When case is pending in court.

Cited in *Glaspell v. Northern P. R. Co.* 144 U. S. 211, 36 L. ed. 409, 12 Sup. Ct. Rep. 593, holding that the case was not "pending" in the Dakota courts when after judgment a bill of exceptions had not been settled and filed, nor motion for a new trial made, within the time required by Dakota procedure.

Ignorance as ground for relief.

Cited in note in 55 Am. St. Rep. 499, 506, on ignorance of one's rights as a ground of relief.

1 N. D. 289, EDWARDS & M. LUMBER CO. v. BAKER, 50 N. W. 718.

Assent to seller's price.

Cited in notes in 11 L.R.A.(N.S.) 254, on acceptance before agreement as to price, as assent to seller's price; 15 L.R.A.(N.S.) 369, on retention of goods after notice of mistake in quoted price.

1 N. D. 295, JOHNSON v. DAY, 50 N. W. 701.

Effect of failure to file certificate of judicial sale.

Cited in *Martin v. Hawthorne*, 5 N. D. 66, 63 N. W. 895, holding a sale on foreclosure of a thresher's lien not invalidated by the officer's failure to file a report of the sale within the time specified by law; *Emmons County v. Lands of First Nat. Bank*, 9 N. D. 583, 84 N. W. 379, holding the provision of N. D. Laws 1897, chap. 67, § 1, requiring county treasurers to file a correct list of delinquent taxes immediately after its passage, directory only.

- Mortgage foreclosure sale.

Cited in *Grove v. Great Northern Loan Co.* 17 N. D. 352, 116 N. W. 345, holding that failure to file certificate of foreclosure sale within the stipulated time is not fatal, the requirement not being mandatory; *Trenery v. American Mortg. Co.* 11 S. D. 506, 78 N. W. 991, holding time allowed to redeem from foreclosure sale not increased by officer's failure to file duplicate of certificate of sale within statutory period.

Curing defect in certificate of sale.

Cited in *McCardia v. Billings*, 10 N. D. 373, 88 Am. St. Rep. 729, 87 Dak. Rep.—12.

N. W. 1008, holding that a defect in a deputy sheriff's acknowledgment of a certificate of sale is cured by N. D. Rev. Codes, § 3585.

Stipulation for excessive attorney's fees.

Cited in *First M. E. Church v. Fadden*, 8 N. D. 162, 77 N. W. 615, holding that grantee assuming mortgage cannot on foreclosure be required to pay excessive attorney's fees stipulated for therein.

Legal significance of middle initial of name.

Cited in *State Finance Co. v. Halstenson*, 17 N. D. 145, 114 N. W. 724, holding that the dropping of the middle initial of grantor's name where it appeared in the grant to mine does not constitute a misnomer.

Cited in notes in 132 Am. St. Rep. 566, 567, on proceedings against persons by less or other than full Christian names; 15 L.R.A. (N.S.) 130, on summons or notice to person by wrong initial.

2 N. D. 300, DAVIS v. BRONSON, 16 L.R.A. 655, 33 AM. ST. REP. 783, 50 N. W. 836.

Right to withdraw from contract.

Cited in *Dunham v. Crawford*, 130 Iowa, 363, 106 N. W. 930, holding that one of number of joint purchasers of a horse is not bound by the acceptance of it on delivery to the other joint purchasers who accept it as a partnership by bill of sale to them as such; *Ward v. American Health Food Co.* 119 Wis. 12, 96 N. W. 388, holding that a party to an advertising contract may, while it is executory, explicitly countermand performance and thereby limit its liability to damages for breach.

Cited in note in 94 Am. St. Rep. 121, on countermand of executory contract of sale.

Distinguished in *Chicago Bldg. & Mfg. Co. v. Peterson*, 133 Ky. 596, 118 S. W. 384, holding that subscribers to stock of a butter factory who bind themselves and agree with building company to form a corporation and operate the factory cannot withdraw and escape liability for amount subscribed after construction of plant; *Martin v. Meles*, 179 Mass. 114, 60 N. E. 397, denying right of one party to end right of other to continue performance where there is a common interest, and what has been done and what remains to be done are largely interdependent; *Poling v. Condon-Lane Boom & Lumber Co.* 55 W. Va. 529, 47 S. E. 279, holding that a purchaser of logs will not be relieved from liability for full performance of contract of purchase where it informs vendors that it does not intend to take any more logs, it having other use for its money.

Disapproved in *Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 757, holding that the parties to a subscription contract for the erection of a factory are united in interest in all respects except the obligation to pay, and cannot renounce the contract except by unanimous consent.

Nature of subscription contract.

Cited in note in 22 L.R.A. 83, as to whether a subscription contract is joint or several.

— Suit for breach.

Cited in *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 59 L.R.A. 122,

94 Am. St. Rep. 112, 42 S. E. 378, holding that on countermand of an order of goods the vendor cannot sue as on an open account but may recover only on breach of contract; *Official Catalogue Co. v. American Car & Foundry Co.* 120 Mo. App. 575, 97 S. W. 231, holding that on countermand of an advertising contract, the advertiser cannot go ahead and perform and sue therein but must sue for breach to recover expenditures up to time of notice and loss of profits; *Barker & S. Lumber Co. v. Edward Hines Lumber Co.* 137 Fed. 300, holding that a breach of an independent part of a contract is not actionable until time for performance thereon and the injured party must perform up to that time on the main part.

— Measure of damages for breach.

Distinguished in *Southern Cotton-Oil Co. v. Heflin*, 39 C. C. A. 546, 99 Fed. 339, holding that for breach of a contract of sale the difference between market value and contract price is the fairest and most certain measure of damages; *P. P. Emory Mfg. Co. v. Salomon*, 178 Mass. 582, 60 N. E. 377, holding the measure of damages for breach of an executory contract of sale to be the difference between the contract price and the market price on the day fixed for delivery, and not the difference at the time an anticipatory notice of breach was given.

Rights of other party after breach or rescission of contract.

Cited in *Davis v. State*, 146 Ala. 124, 41 So. 681, on the absence of right of contractor to go onto premises under contract after notice of rescission though a breach of contract occurs; *Woodman v. Blue Grass Land Co.* 125 Wis. 489, 103 N. W. 236, holding that vendee forfeits his right to earnest money where he repudiates purchase before date of performance by vendor; *McCall Co. v. Jennings*, 26 Utah, 459, 73 Pac. 639, holding that the vendor cannot recover purchase price of goods that would have been sold except for breach of contract by vendee; *Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756, holding that a party to an executory contract cannot recover the increase in damages for breach of contract which he has created by continuing performance after notice from the other party to stop performance; *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981, holding that a purchaser of rope to be manufactured who canceled his purchase and failed to retract his order of cancellation until it was too late for the rope to be made, thereby preventing the performance of the contract, cannot recover damages for breach of contract by the seller, although the latter had refused to accept the order of cancellation.

Distinguished in *Davis v. Ravenna Creamery Co.* 48 Neb. 471, 67 N. W. 436, denying right of contractor to erect creamery to enforce mechanic's lien against creamery in possession of corporation formed by subscribing parties when contract by subscribers to pay was several, and each was liable only to amount of his subscription.

What is a breach of contract.

Distinguished in *Stanford v. McGill*, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938, holding repudiation of contract before time for performance not a breach thereof.

2 N. D. 310, NORTHERN P. R. CO. v. BARNES, 51 N. W. 386.

Followed without discussion in *Northern P. R. Co. v. Barnes*, 2 N. D. 395, 51 N. W. 786; *Northern P. R. Co. v. Strong*, 2 N. D. 395, 51 N. W. 787; *Northern P. R. Co. v. Brewex*, 2 N. D. 396, 51 N. W. 787; *Northern P. R. Co. v. Tressler*, 2 N. D. 397, 51 N. W. 787; *Northern P. R. Co. v. McGinnis*, 4 N. D. 494, 61 N. W. 1032; *Northern P. R. Co. v. Benson*, 4 N. D. 506, 61 N. W. 1035.

Equality of taxation.

Cited in *State v. Northwestern Teleph. Exch. Co.* 107 Minn. 390, 120 N. W. 534, on the constitutionality of a gross earnings tax on railroads operating in or into state.

Disapproved in *Pryor v. Bryan*, 11 Okla. 357, 66 Pac. 348, holding that a statute exempting Indian reservation allotted to county for taxing purposes from all taxes except for specified funds constitutional where the territory participated in benefits from these funds only.

Exemption of railroad property from taxation.

Cited in *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242, holding all property of Northern Pacific Railroad Company including lands granted to aid in its construction outside of right of way and not used by it as carrier, except from taxation.

Cited in note in 57 L.R.A. 35, 59, on taxation of corporate franchises in the United States.

Overruled in *Northern P. R. Co. v. McGinnis*, 4 N. D. 494, 61 N. W. 1032, holding Dakota gross earnings law of 1883 unconstitutional.

When title to indemnity lands vests.

Overruled in *Grandin v. LaBar*, 3 N. D. 446, 57 N. W. 241, holding approval of secretary of interior expressed in some manner necessary to passing of title to land in indemnity belt of Northern Pacific Railroad Company.

Cited as overruled in *Southern P. R. Co. v. Wood*, 124 Cal. 475, 57 Pac. 388, holding that the Southern Pacific Railroad Company acquired no title to indemnity lands under 14 Stat. at L. 292, chap. 278, by merely filing the map of definite location, without a legal selection of lands in the indemnity belt under the direction of the Secretary of the Interior.

Construction of statutes.

Cited in *Brace v. Sohner*, 1 Alaska, 361, holding that school board is alone allowed to expend school fund denied from city license impositions where one section of statute provides that "it shall be used under direction of town council, for school purposes" and another section gives exclusive control of school property to the board.

Necessity for payment or tender of tax in action to restrain sale.

Cited in *Northern P. R. Co. v. McGinnis*, 4 N. D. 494, 61 N. W. 1032, holding judgment for tax substituted by North Dakota statute for payment or tender of such tax in action to restrain tax sale.

2 N. D. 395, NORTHERN P. R. CO. v. BARNES, 51 N. W. 786.

2 N. D. 395, **NORTHERN P. R. CO. v. STRONG**, 51 N. W. 787.

2 N. D. 396, **NORTHERN P. R. CO. v. BREWER**, 51 N. W. 787.

2 N. D. 397, **NORTHERN P. R. CO. v. TRESSLER**, 51 N. W. 787.

2 N. D. 397, **CLEARY v. EDDY COUNTY**, 51 N. W. 586.

Liability of county for unauthorized expenditures.

Cited in **Jacobson v. Ramsom County**, 15 N. D. 69, 105 N. W. 1107, holding that county cannot be held for clerk hire in excess of amount authorized by county commissioners under statute; **Tillotson v. Potter County**, 10 S. D. 60, 71 N. D. 754, holding that a county treasurer cannot recover from the county for compensation paid a deputy whose assistance was necessary to the proper transaction of the business when appointed by him without a prior resolution of the board of county commissioners.

Cited in note in 22 L.R.A. 399, on power of courts to provide the necessary places and equipment for business of county officers.

2 N. D. 401, **JASPER v. HAZEN**, 51 N. W. 583, Later appeal in 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454.

Misjoinder of causes of action.

Cited in **Benson v. Battey**, 70 Kan. 288, 78 Pac. 844, 3 A. & E. Ann. Cas. 283, holding that a cause of action for equitable accounting against two defendants cannot be joined to a cause in tort for damages against another defendant.

Sufficiency of pleading.

Cited in **Ramsey v. Johnson**, 8 Wyo. 476, 80 Am. St. Rep. 948, 58 Pac. 755, holding that where the execution of a contract of lease is fully set forth in the statement of the cause of action based upon the indebtedness arising therefrom an allegation in a second cause of action set out in the same complaint based upon the lien securing the indebtedness, that it was agreed, under "the terms and conditions of said agreement of lease," sufficiently sets out the execution of the lease; **First Nat. Bank v. Laughlin**, 4 N. D. 391, 61 N. W. 473, holding answer setting up as counterclaim to purchase money note payment of another purchase money note without knowledge of material alteration, insufficient, without allegation therein of facts showing that it would be against good conscience for plaintiff to keep the money paid on such note.

2 N. D. 408, **CONRAD v. SMITH**, 51 N. W. 720, Later appeal in 6 N. D. 337, 70 N. W. 815.

Necessity for change of possession of chattels sold.

Subsequent appeal in 6 N. D. 337, 70 N. W. 815, holding that one who attached chattels sold without immediate delivery of possession as the property of the seller, while § 4657 was in force, obtained a vested right

which could not be affected by the subsequent passage of an act converting the presumption of fraud into a rebuttable presumption only.

Cited in note in 24 L.R.A. (N.S.) 1154, as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome.

2 N. D. 414, GARR, S. & CO. v. SPAULDING. 51 N. W. 867.

Vacation of irregular judgment.

Cited in *Braseth v. Bottineau County*, 13 N. D. 344, 100 N. W. 1082, on vacation of irregularly entered judgment; *Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836, holding that an order vacating a judgment cannot be disturbed where discretion of trial court in making the order was not abused, such court having discretion by statute.

—Time for asking relief.

Distinguished in *Martinson v. Marzolf*, 14 N. D. 301, 103 N. W. 937, holding that statute granting relief from irregular entry of judgment does not limit the time in which aggrieved party may name for relief where irregularity is not caused by his own default.

—Remedy by motion.

Cited in *Prondzinski v. Garbutt*, 90 N. D. 239, 83 N. W. 23, holding that an irregularity in entering judgment without findings of fact or conclusions of law may be attacked by motion in the trial court; *Nichells v. Nichells*, 5 N. D. 125, 139, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73, holding that a decree of divorce will be set aside on defendant's motion as a matter of strict legal right, where it was rendered on default after a withdrawal in bad faith by defendant's attorney of an appearance and answer served by him without notice of his intention to do so.

Distinguished in *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709, holding that irregularity in entry of a judgment may be corrected by motion in the trial court.

—Where motion should be made.

Cited in *Ingwaldson v. Skrivseth*, 8 N. D. 544, 80 N. W. 475, holding that application to correct a mere irregularity in the entry of judgment should be made in the district court instead of by appeal to the supreme court.

Presumption of regularity of judgment.

Cited in *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512, holding that the trial court will be presumed to have proceeded regularly in hearing issue raised by demurrer; *Gould v. Duluth & D. Elevator Co.* 3 N. D. 96, 54 N. W. 316, holding that in the absence of a contrary showing in the record, an appellate court will assume, in support of a judgment for costs, that the appellant had notice of the proceedings for the adjustment of such costs; *State v. Campbell*, 7 N. D. 58, 72 N. W. 935, holding that modification of request for instruction will be presumed on appeal to have been made with the consent of counsel making the request.

2 N. D. 421, YEATMAN v. KING, 33 AM. ST. REP. 797, 51 N. W. 721.

Statute impairing contracts.

Cited in *National Bank v. Jones*, 18 Okla. 560, 12 L.R.A. (N.S.) 310, 91 Pac. 191, 11 A. & E. Ann. Cas. 1041, holding void an act of legislature which subrogates an existing void mortgage lien to a subsequently created lien.

2 N. D. 430, CLEMENT v. SHIPLEY, 51 N. W. 414.

Rights of mortgagor and purchaser in possession.

Cited in *Little v. Worner*, 11 N. D. 382, 92 N. W. 456, holding that statute requiring statement of value of use of mortgaged premises during period of redemption does not apply to purchaser in possession; *Tardy v. Herriott*, 11 Wash. 460, 39 Pac. 958, holding that a purchaser at a foreclosure sale cannot be required to account at the suit of the mortgagor to redeem, for the rents and profits arising from his use and occupation of the premises; *Knipe v. Austin*, 13 Wash. 189, 44 Pac. 531 (dissenting opinion), in which the majority hold that a purchaser on foreclosure is not bound to account for rents and profits accruing after date of purchase and before redemption, under Wash. Code Proc. § 519, to the same effect as § 5159, Dak. Comp. Laws; *Whithed v. St. Anthony & D. Elevator Co.* 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238, holding that share or interest of owner in crop raised during redemption period under contract with tenant to receive crop as rent, constitutes rent.

Disapproved in *Rudolph v. Herman*, 4 S. D. 283, 291, 56 N. W. 901, holding provision of Dakota statute that rents and profits of property sold on execution or value of use and occupation belong to purchaser from time of sale, not applicable to sales on mortgage foreclosure.

2 N. D. 433, NORTHRUP v. CROSS, 51 N. W. 718.

Selection of exempt property.

Cited in *Webster v. McGauvran*, 8 N. D. 274, 78 N. W. 80, holding selection by execution debtor of specific property claimed to be exempt not required where no appraisal is made by levying officer after delivery to him of debtor's sworn schedule.

Right to maintain claim and delivery.

Cited in *Taylor v. Jones*, 3 N. D. 235, 55 N. W. 593, holding that the owner of property taken on may, where the sheriff refuses to recognize his claim that it is exempt, preserve the property, and also a right of action against the sheriff for selling the same; *Huston v. Benjamin*, 21 S. D. 318, 112 N. W. 842, holding fact that one received property as bailee from purchaser at execution sale, does not preclude him from recovering its value in action for claim and delivery.

Damages for wrongful detention of property.

Cited in *Ocala Foundry & Mach. Works v. Lester*, 49 Fla. 199, 38 So. 51, holding owner of train engine entitled to market value of use of such engine during time of its detention as damages for its wrongful detention

subject to reduction of amount of "deterioration from use" where it is not used; *Ecker v. Lindskog*, 12 S. D. 428, 48 L.R.A. 155, 81 N. W. 905, holding value of use of exempt property during wrongful detention by sheriff under levy, proper measure of damages.

Cited in note in 9 N. D. 636, on damages in actions for trover and conversion.

Distinguished in *Benjamin v. Huston*, 16 S. D. 569, 94 N. W. 584, holding that the owner of wrongfully detained property will not be limited to recovery of the expense incurred in recovery of the property where his possession on recovery is merely qualified and not absolute.

2 N. D. 440, BOSTWICK v. MINNEAPOLIS & P. R. CO. 51 N. W. 781.

Followed without discussion in *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864.

Duty to avoid injury to trespassing stock on track.

Cited in *Hodgins v. Minneapolis, St. P. & S. S. M. R. Co.* 3 N. D. 382, 56 N. W. 139, holding it the duty of those in charge of a railroad engine to exercise reasonable care to prevent injury to an animal which they have observed upon the track; *Wright v. Minneapolis, St. P. & S. Ste. M. R. Co.* 12 N. D. 159, 96 N. W. 324, holding that company's employees in operating trains are not required to keep a lookout for trespassing stock; *Atchison, T. & S. F. R. Co. v. Davis*, 26 Okla. 359, 109 Pac. 551, holding that obligation rests upon railroad company to exercise ordinary care after discovery of animals trespassing without owner's actual fault.

Last clear chance.

Cited in *O'Leary v. Brooks Elevator Co.* 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919, holding a landowner liable for failure to use ordinary diligence to protect a trespasser from injury after the trespass is known and the danger perceived; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, upholding instructions declaring defendant responsible for injury to stock where on a discovery of its dangerous position ordinary efforts to avoid injury to it are not used.

Proximate cause of injury.

Cited in *Black v. New York, N. H. & H. R. Co.* 193 Mass. 448, 7 L.R.A.(N.S.) 148, 79 N. E. 797, 9 A. & E. Ann. Cas. 485, holding that the placing of a drunken passenger in a dangerous position causing injury to him is the proximate cause of injury, the train employees having knowledge of his condition; *Lake Shore & M. S. R. Co. v. Wilson*, 11 Ind. App. 488, 38 N. E. 343 (dissenting opinion), in which the majority hold that the failure of the engineer to stop his train upon discovering that a switch light was not burning does not relieve the company from liability for the death of the fireman on such train, resulting from its negligence in leaving the switch open; *Krenzer v. Pittsburg, C. C. & St. L. R. Co.* 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220 (dissenting opinion), in which the majority hold that special findings that plaintiff (a boy seven and a half years old) went to sleep on a railroad track, and

that he knew that trains were run on such track, and had sufficient understanding that if he remained on the track he was liable to be run over and injured, showing contributory negligence so conclusively that they will prevail over a general verdict in his favor.

2 N. D. 456, MERCHANTS' NAT. BANK v. MANN, 51 N. W. 946.

Mortgage of crops to be planted.

Cited in *Hostetter v. Brooks Elevator Co.* 4 N. D. 357, 61 N. W. 49, holding that chattel mortgage on unplanted crop attaches thereto as soon as it comes into existence by mortgagor's agency; *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809, holding that valid mortgage may be made on unplanted crop which will attach thereto as a lien as soon as it comes into existence by mortgagor's agency; *Payne v. McCormick Harvesting Mach. Co.* 11 Okla. 318, 66 Pac. 287, holding that a mortgage executed to cover specifically the crop to be raised in a named year is enforceable and the lien attaches ipso facto as soon as an interest is acquired therein by mortgagor.

Cited in note in 23 L.R.A. 459, on sale or mortgage of future crops.

Mortgage of future earnings.

Cited in *Sykes v. Hannawalt*, 5 N. D. 335, 65 N. W. 682, sustaining right of owner of threshing rig to mortgage future earnings.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

2 N. D. 461, STATE EX REL. EDWARDS v. DAVIS, 51 N. W. 942.

Right of appeal.

Cited in *State v. Markuson*, 5 N. D. 147, 64 N. W. 934, holding judgment of fine and imprisonment for contempt of court in violating injunction reviewable by writ of error; *Carruth v. Taylor*, 8 N. D. 166, 77 N. W. 617, holding final order in habeas corpus proceeding not appealable; *Merchant v. Pielke*, 9 N. D. 245, 83 N. W. 18, holding appealable, order dismissing proceeding to punish a party to a decree for violating its restraining provisions and thereby impairing or prejudicing the rights of the moving party; *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905, holding that the procedure necessary to obtain a statutory injunctive order is not such a proceeding as comes within statute giving right of appeal.

Distinguished in *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84, 15 Sup. Ct. Rep. 34, holding that the United States district court should not grant a writ of habeas corpus to discharge a person convicted in an inferior state court, where the validity of the law and of the sentence can be tested by the supreme court of the state or a writ of error from the United States Supreme Court may be applied for; *Laramie Nat. Bank v. Steinhoff*, 7 Wyo. 464, 53 Pac. 299, holding a judgment in a civil contempt proceeding appealable; *Snow v. Snow*, 13 Utah, 15, 43 Pac. 620, holding that an appeal

will lie from an adjudgment of contempt in refusing to pay alimony and costs ordered by the court, as the proceedings are remedial in nature.

Nature of contempt or disbarment proceedings.

Cited in *Re Eaton*, 7 N. D. 269, 74 N. W. 870, holding no costs or disbursements recoverable in a disbarment proceeding, although it is a special proceeding in the sense that it is neither a civil nor criminal action; *Ex parte Whitmore*, 9 Utah, 441, 35 Pac. 524, holding that contempt proceedings for a vindication of the court's authority are not special proceedings within Utah C. L. § 3635, subd. 1, and that an appeal does not lie from an order of commitment therein; *Ex parte Whitmore*, 9 Utah, 441, 35 Pac. 524, holding contempt proceedings for a violation of the express command of the court criminal in nature; *State ex rel. Mears v. Barnes*, 5 N. D. 350, 65 N. W. 688, where it was assumed that proceedings against the president of a corporation for refusal to obey an order to execute a conveyance to a receiver thereof, are civil in their nature.

Cited in note in 13 L.R.A.(N.S.) 592, on character of contempt for violation of injunction to protect private right.

Effect of refusal to recognize a void order of court.

Cited in *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283, holding that resistance of a search under a warrant is not a contempt of court where the sustaining affidavit does not show facts required to be shown by statute.

2 N. D. 473, *PARLIN v. HALL*, 52 N. W. 405.

Right of third person to sue on contract made for his benefit.

Cited in *Brower & T. Lumber Co. v. Miller*, 28 Or. 565, 52 Am. St. Rep. 807, 43 Pac. 659, holding that an action will not lie against a contractor or his bondsmen for labor or material furnished a subcontractor under a provision of the principal contract that the contractor shall pay all money due or to become due for materials used and labor performed in connection with the work, and a provision of the bond that the contractor would faithfully perform all the stipulations of the contract.

Cited in notes in 39 Am. St. Rep. 534, on promise for benefit of third person; 71 Am. St. Rep. 185, 25 L.R.A. 263,—on right of third person to sue on contract made for his benefit; 2 L.R.A.(N.S.) 784, on right of action on contract made for benefit of stranger.

Distinguished in *Friese v. Friese*, 12 N. D. 82, 95 N. W. 446, where the contract could not be shown to have been made for benefit of plaintiffs who were not parties.

**2 N. D. 482, *STATE EX REL. STOESER v. BRASS*, 52 N. W. 408,
Affirmed in 153 U. S. 391, 4 Inters. Com. Rep. 670, 38 L. ed.
757, 14 Sup. Ct. Rep. 857.**

Regulation of corporations.

Cited in *State v. Duluth Bd. of Trade*, 107 Minn. 506, 23 L.R.A.(N.S.) 1260, 121 N. W. 395, on the right of the state to regulate grain storage; *State v. Loomis*, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350 (dissenting

opinion), in which the majority hold that Mo. Rev. Stat. 1889, §§ 7058, 7076, prohibiting any corporation, person, or firm engaged in manufacturing or mining, from issuing for payment of wages any order payable otherwise than in lawful money, unless negotiable and redeemable at its face value, is violative of the constitutional guaranty of due process of law.

Cited in notes in 33 L.R.A. 178, on legislative power to fix tolls, rates, or prices; 6 L.R.A.(N.S.) 836, on businesses affected with public interest subjecting them to regulation and control in respect to rates or prices.

2 N. D. 510, STATE v. FALLON, 52 N. W. 318.

Evidence of other crimes.

Cited in *Wallace v. State*, 41 Fla. 547, 26 So. 713, holding that where the crime in question is one of several in the pursuit of the same criminal purpose, evidence of such other acts is admissible, even though they constitute other criminal offenses; *State v. Miller*, 20 N. D. 509, 128 N. W. 1034, holding proof of sale of intoxicating liquors within two months before time alleged in prosecution for illegal importation of intoxicating liquors for sale, admissible only as bearing on intent with which liquors were imported.

Cited in note in 62 L.R.A. 291, on evidence of other crimes in criminal cases.

2 N. D. 515, STATE v. SMITH, 52 N. W. 320.

Indictment charging more than one offense.

Followed in *State v. Mattison*, 13 N. D. 391, 100 N. W. 1091, holding that an information which purports to charge defendant for shooting with intent to kill which also charges maiming is duplicitous and charges two substantive crimes.

Cited in *State v. Mareks*, 3 N. D. 532, 58 N. W. 25, holding void for duplicity, information charging defendant with aggravated assault with dangerous weapons and also in same count with assault and battery; *State v. Belyea*, 9 N. D. 353, 83 N. W. 1, holding only one offense charged by information which in charging accused with murder in commission of a felony sets out the facts and circumstances constituting such felony.

Ingrafting exceptions into statute.

Cited in *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 352, 118 N. W. 826, holding that a carrier cannot interpose a common law exception to its liability under a statute with enumerated exceptions.

3 N. D. 521, STATE v. HAZLEDAHL, 16 L.R.A. 150, 52 N. W. 315, Later appeal in 3 N. D. 36, 53 N. W. 430.

Discharge of jury and its effect.

Cited in *State v. Bronkol*, 5 N. D. 507, 57 N. W. 680, holding discharge of jury at close of evidence for state because accused had not been arraigned and given opportunity to plead, not bar to subsequent prosecution.

Cited in note in 25 L.R.A.(N.S.) 39, on right to proceed with criminal trial after substituting another for disabled or incompetent juror.

Distinguished in *People v. Zeigler*, 135 Cal. 462, 56 L.R.A. 882, 67 Pac. 754, holding that, under Cal. Penal Code, § 1123 (same as Dak. Comp. Laws, § 7401), when an accepted juror is excused for sickness after the jury are partially impaneled, the jurors chosen should be discharged and recalled for further examination and challenge, the defendant again having his entire number of peremptory challenges.

Time of trial or of motion to change venue.

Cited in *State v. Kent*, 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, holding a change of venue made in time, when a motion is made therefor by defendant when the case is called for trial, which motion is then denied with leave to renew it later, and is granted on a request by defendant and his counsel for a change of venue in response to a suggestion by the court after exhausting the legal panel without obtaining a single juror that he felt inclined to grant the motion if renewed; *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504, holding that a case is not tried after July 1, where testimony was introduced and the case submitted January 30, although it was subsequently retained to admit further testimony which was not introduced and the findings were not filed until October.

Sufficiency of showing that is by and in name of state.

Cited in note in 26 L.R.A.(N.S.) 1034, on necessity that indictment or information show on face that prosecution carried on in name and by authority of state.

Distinguished in *State v. Kerr*, 3 N. D. 523, 58 N. W. 27, holding prosecution in name and by authority of state sufficiently shown by indictment entitled "the state of North Dakota against" designated defendant and showing on face proper presentment by "grand jury of the state of North Dakota;" *State v. Thompson*, 4 S. D. 95, 55 N. W. 725, holding prosecution in name and by authority of state sufficiently shown by indictment entitled in name of "state of South Dakota" reciting that it is found and presented by grand jury of the state in and for the proper county.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 3 N. D.

3 N. D. 1, GAUTHIER v. RUSICKA, 53 N. W. 80.

Procedure of party seeking to vacate judgment.

Cited in *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 391, holding the moving party must in addition to an affidavit of merits set forth a defense which goes to the merits of the action; *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581, holding counter affidavits denying allegations of proposed answer not admissible on motion to vacate judgment though affidavits controverting excuse of negligence given in support of motion may be considered; *Sargent v. Kindred*, 5 N. D. 8, 20, 63 N. W. 151, holding affidavit for merits necessary notwithstanding service of verified answer by one seeking relief from judgment by default; *Racine-Sattley Mfg. Co. v. Pavlicek*, 130 N. W. 228, 21 N. D. 222, holding proper procedure is by motion to vacate based on affidavit of merits and proposed verified answer.

Grounds for vacation of judgment.

Cited in *Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87, holding failure of discharged attorney to appear and interpose defense even though valid one exists no ground for a judgment.

3 N. D. 3, DUN v. DIETRICH, 53 N. W. 81.

Implied covenants as restrained by express covenants.

Cited in *Smith v. Gaub*, 19 N. D. 337, 123 N. W. 827, holding that covenants in deed cannot be asserted personally against grantor where he covenants only for his heirs, executors and administrators.

3 N. D. 9, DOTY v. FIRST NAT. BANK, 17 L.R.A. 259, 53 N. W. 77.

Transfer of corporate stock.

Cited in notes in 57 Am. St. Rep. 396, on extent to which transfers of stock may be restricted; 27 L.R.A. 273, on restrictions by by-law or articles of association on the right to sell shares of stock; 67 L.R.A. 674, on validity of pledge of other transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers.

— Liability for refusal to transfer on books.

Cited in Second Nat. Bank v. First Nat. Bank, 8 N. D. 50, 76 N. W. 504, holding the wrongful refusal of a corporation to transfer its stock on demand to one entitled to such transfer renders it liable.

3 N. D. 17, SMITH v. NORTHERN P. R. CO. 53 N. W. 173.

Presumptions as to negligence.

Cited in Los Angeles Traction Co. v. Conneally, 69 C. C. A. 92, 136 Fed. 104, holding where there is evidence upon the question of alleged contributory negligence the case should be determined upon the evidence and not upon the presumption that arises only in the absence of all evidence.

Rebuttal of presumption of negligent setting of fire by locomotive.

Cited in Woodward v. Chicago, M. & St. P. R. Co. 75 C. C. A. 591, 145 Fed. 577, holding the statutory presumption of negligence created by the starting of a fire from a locomotive may be overcome by evidence of the employees to the effect that there was no defect in the locomotive and that it was operated with ordinary skill and care; Chenoweth v. Southern P. Co. 53 Or. 111, 99 Pac. 86, on the weight to be given to evidence of proper construction, equipment and management of locomotive in an action for the negligent setting of a fire from a locomotive.

Distinguished in Woodward v. Chicago, M. & St. P. R. Co. 58 C. C. A. 402, 122 Fed. 66, holding where in addition to evidence of due care the defendant introduced evidence of an expert that the starting of a fire at a given distance from the track was not evidence of defects in the appliances of the engine, the plaintiff might introduce evidence of an expert to rebut such evidence.

— Questions for jury.

Cited in United States v. Homestate Min. Co. 54 C. C. A. 303, 117 Fed. 481, 22 Mor. Min. Rep. 365, holding the presumption that the taking of timber from government land was wilful and intentional, one of fact which may be so overcome by evidence that it becomes the duty of the court to instruct that it cannot prevail; Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054, holding that question whether statutory presumption has been fully met and overcome is in first instance question of law.

— As to negligent setting of fire by locomotive.

Cited in Osburn v. Oregon R. & Nav. Co. 15 Idaho, 478, 19 L.R.A.(N.S.) 742, 98 Pac. 627, 16 A. & E. Ann. Cas. 870, holding a verdict was properly

directed for a railroad company in an action for the destruction of property by fire communicated by a locomotive where the plaintiff rested on the statutory presumption arising from the setting of the fire and the railroad company showed proper construction and care in the operation of the locomotive; *Dolph v. Lake Shore & M. S. R. Co.* 149 Mich. 278, 112 N. W. 981, holding on proof that a locomotive was as properly equipped and managed and in as good condition as good railroading required the question of negligence was for the court under a statute providing that railroads should not be liable for fires on proof of the good condition and management of the engine; *McTravish v. Great Northern R. Co.* 8 N. D. 333, 79 N. W. 443, holding question whether statutory presumption of negligence of railway company from proof of fire caused by sparks from locomotive is overcome by rebutting evidence, for the court; *Great Northern R. Co. v. Coates*, 53 C. C. A. 382, 115 Fed. 452 (dissenting opinion), majority holding that question whether engine was properly managed when sparks setting fire were emitted should not be withdrawn from jury merely because testimony of employees in charge that it was properly managed is not directly contradicted.

Cited in note in 5 L.R.A.(N.S.) 100, on presumption of negligence from setting of fire by locomotive as necessarily making negligence question for jury.

Disapproved in *Continental Ins. Co. v. Chicago & N. W. R. Co.* 97 Minn. 467, 5 L.R.A.(N.S.) 99, 107 N. W. 548, holding court improperly directed a verdict for the defendants in an action against a railroad company for the negligent setting of a fire on the mere proof that engine could not be practically so operated as not to cause fires and that it was operated in a careful manner.

— As to negligent killing of stock by train.

Cited in *Hodgins v. Minneapolis, St. P. & S. S. M. R. Co.* 3 N. D. 382, 56 N. W. 139, holding question whether constructive negligence of railroad company arising from killing of stock has been overcome by testimony, question of law for court.

3 N. D. 26, NORTHERN DAKOTA ELEVATOR CO. v. CLARK, 53 N. W. 175.

Right to follow property intermingled with that of another.

Cited in *Ober & Sons Co. v. Cochran*, 118 Ga. 396, 98 Am. St. Rep. 118, 45 S. E. 382, holding where a bank directed to collect a note and remit the proceeds used the money collected in its own business, funds collected by its receiver are not impressible with a trust for the payment of the money so collected; *Lowe v. Jones*, 192 Mass. 94, 6 L.R.A.(N.S.) 487, 116 Am. St. Rep. 225, 78 N. E. 402, 7 A. & E. Ann. Cas. 551, holding the real owner of stock which had been pledged by one holding it in trust as security for a loan could not compel the estate of such trustee to use the general assets to exonerate such pledged stock; *Bank Comrs. v. Security Trust Co.* 70 N. H. 536, 49 Atl. 113, holding that one whose money or property has been misapplied by an insolvent trust company is not entitled to a preference in payment over other creditors, where it cannot

be traced to specific property; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 242, 58 N. W. 383, holding one for whom a bank has collected money not entitled to a preference in the assets of the bank upon its insolvency, where no part of the money so collected, and none of the proceeds, has come into the hands of the assignee, such money having been used in payment of the bank's indebtedness; *Holden v. Piper*, 5 Colo. App. 74, 37 Pac. 34, holding that property passing into the possession of a general assignee for creditors cannot be impressed with a trust for money received by the assignor as administrator and misappropriated by him, in the absence of evidence as to what part of such money, if any, passed to the assignee, either in the form of the original money so received or of other funds into which it had been transmuted, or as to what property passed by the assignment into which such money had gone; *Evangelical Synod v. Schoeneich*, 143 Mo. 652, 45 S. W. 647, holding that where a trustee or bailee wrongfully mixes trust money with his own so that it cannot be determined what particular part is trust money and what part is private money, equity will follow such money by taking out of the insolvent estate of such trustee or bailee the amount due the cestui que trust, even though it cannot be identified or separated from other funds with which it has been mixed; *State v. Bank of Commerce*, 54 Neb. 729, 75 N. W. 28, holding that where a county treasurer wrongfully deposited county funds to his own credit in a bank which was aware that they were county funds, and which afterwards became insolvent, the county was entitled to have its claim decreed a first lien upon the cash assets of the insolvent bank at the time of its failure, unless it affirmatively appeared that such cash assets were no part of the trust fund; in dissenting opinion in *Wallace v. Stone*, 107 Mich. 196, 65 N. W. 113, the majority holding that a bank is merely agent of the owner of paper sent it for collection and remittance of the proceeds, as to money collected thereon and retained pending correspondence relating to the matter of a credit between the creditor and the debtor; and that the creditor is entitled to a preference for the amount thereof over the general creditors in the assets in the hands of a receiver of the bank although it had been mingled with the funds of the bank before the receiver's appointment.

Cited in note in 1 L.R.A.(N.S.) 252, on claim of preference of special or trust deposit out of funds of insolvent bank.

Distinguished in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb. 786, 69 N. W. 115, holding that a receiver of an insolvent bank may be required to pay in full the amount the bank collected upon a note which it did not remit to the payee, although the canceled note was returned to the maker, and the bank had a greater amount of cash on hand when the receiver took possession, as the amount collected was a trust fund incapable of being commingled with the general assets of the bank.

3 N. D. 34, FARGO & S. W. R. CO. v. BREWER, 53 N. W. 117.

Taxation of corporate franchises.

Cited in note in 57 L.R.A. 45, on taxation of corporate franchises in the United States.

3 N. D. 36, STATE v. HASLEDAHL, 53 N. W. 430.

Embezzlement.

Cited in note in 87 Am. St. Rep. 39, on embezzlement.

3 N. D. 43, STATE EX REL. NORTHERN P. R. CO. v. DISTRICT JUDGE, 53 N. W. 433.

Superintending control over inferior court.

Cited in note in 51 L.R.A. 64, on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

3 N. D. 47, O'NEIL v. TYLER, 44 AM. ST. REP. 577, 53 N. W. 434, 49 N. W. 724.

Selling different parts of same lot separately for taxes.

Cited in *House v. Gumble*, 78 Miss. 259, 29 So. 71, holding void a tax sale separately of adjoining parts of two lots which have been jointly assessed; *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528, holding that parts of several lots are properly sold together for taxes, where they have been so conveyed on several occasions and inclosed by a fence; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049, holding that lot may be subdivided and part thereof sold for subsequent taxes on whole lot, but not for operation of the tax upon the whole.

Right to set aside a tax sale.

Cited in *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, holding it necessary to the maintenance of an action to set aside a tax sale because of the invalidity of the levy that a tender of the amount of the taxes believed to be justly due, be made; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90, holding "substantial injury" invalidating tax suffered by one against whose property heavy tax is laid under assessment in pursuance of repealed law though no pecuniary loss has resulted.

—Payment or tender of tax as prerequisite.

Cited in *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570, holding payment or tender of taxes unnecessary as condition precedent to action to recover land sold for nonpayment of taxes where defendant's claim of title is without foundation and the tax deed on which he relies is void; *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, denying necessity for repaying illegal and void taxes as condition of relief in action against tax deed.

Nature of action to set aside tax certificates.

Cited in *Powers v. First Nat. Bank*, 15 N. D. 466, 109 N. W. 361, holding an action seeking to cancel and annul tax certificates issued on a tax sale for delinquent taxes is an equitable action.

Right to recover back taxes paid.

Cited in *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049, holding grantee in void tax deed not entitled to recover from owner taxes paid by him after obtaining deed.

Sufficiency of assessment roll.

Cited in *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, holding in an Dak. Rep.—13.

equitable action to set aside a tax sale and cancel an assessment the absence of the assessor's affidavit from the assessment roll did not invalidate the sale or levy.

— **Sufficiency of description.**

Cited in *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528, holding a city assessment and sale of land described as the "north 46½ feet of" specified lots in a designated block and addition in a specified city, county and state, not void for indefiniteness and uncertainty of description; *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336, holding "S. E. 4" insufficient description to support assessment and tax.

Necessity for valid assessment.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding valid assessment essential to valid tax.

Validity of adjournment of public body by less than a quorum of the members.

Cited in *C. B. Nash Co. v. Council Bluffs*, 174 Fed. 182, refusing to question the legality of the adjournment of a meeting of the city council by less than a quorum of the members where at the adjourned meeting all the members were present and participated.

Statutory requirement that yeas and nays be called and recorded.

Cited in *Madison v. Daley*, 58 Fed. 746, expressing the opinion, but not deciding, that the provision of Ind. Rev. Stat. 1881 § 3099, requiring the yeas and nays to be taken and entered upon the record, is mandatory and is not complied with by a recital in the record that all the members voted "Aye;" *New Albany Gaslight & Coke Co. v. Crumbo*, 10 Ind. App. 360, 37 N. E. 1062, holding the provision of Ind. Rev. Stat. 1894, § 3534, that on the passage of any by-law, ordinance, or resolution, the yeas and nays shall be taken "and entered on the record" mandatory; and a substantial compliance therewith shown by a record stating that a resolution and an order for advertisement for bids for sewer construction, "the yeas and nays being taken under the regular rule, were unanimously adopted by a full vote of the council;" *Payne v. Ryan*, 79 Neb. 414, 112 N. W. 599, holding a statutory provision that on the adoption of an ordinance the yeas and nays shall be called and recorded is mandatory; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90, holding mandatory, provision of city charter that yeas and nays on passage of all ordinances shall be entered upon record.

Presumption of doing of official duty.

Cited in *Swenson v. Greenland*, 4 N. D. 532, 62 N. W. 603, holding the general legal presumption that public officers have done their duty not available in favor of one seeking to enforce a disputed tax.

3 N. D. 69, WAGNER v. OLSON, 54 N. W. 286.

When replevin maintainable.

Cited in note in 80 Am. St. Rep. 761, as to when replevin or claim and delivery is sustainable.

What is a conversion.

Cited in note in 9 N. D. 632, on what amounts to conversion.

3 N. D. 76, MORRISON v. OIUM, 54 N. W. 288.

Sufficiency of transfer of possession on sale of personalty.

Cited in *Western Min. Supply Co. v. Quinn*, 40 Mont. 156, 23 L.R.A. (N.S.) 214, 135 Am. St. Rep. 612, 105 Pac. 732, holding there was a sufficient delivery and transfer of possession on the sale of personalty to prevent it being fraudulent as to creditors where the seller delivered to the purchaser the key of the warehouse in which the property was stored; *Rosenbaum v. Hayes*, 8 N. D. 461, 79 N. W. 987, holding possession of a herd of sheep by the owner not conclusively shown by the continuance in control by the same herders after the sheep had been taken charge of by an agent of the owner's factors, under a motion which in terms turns over the herd to such factors; *Wright v. Lee*, 10 S. D. 263, 72 N. W. 895, holding a sufficient delivery and change of possession under an assignment for creditors shown, where the assignee immediately moved to a house on the ranch on which the assigned property was, paid a foreman in charge, and otherwise asserted his authority, and caused the barns in which the property was kept to be locked.

Cited in note in 26 L.R.A. (N.S.) 28, on sufficiency of selection or designation of goods sold out of larger lot.

Sufficiency of possession to entitle to lien.

Cited in *Rosenbaum v. Hayes*, 10 N. D. 311, 86 N. W. 973, holding that possession by a factor, as against his principal or an attaching creditor of the principal, so as to entitle him to a lien, is established by a memorandum delivered to his agent by the principal, providing that "I this day turn over to [the factor] all of my sheep" and given for the purpose of establishing the transfer of possession, followed by an inspection of the flock by the agent, and the explanation of the transfer, in the presence of both parties, to the chief herder, who thereupon took and followed the orders of the agent.

3 N. D. 81, MINNESOTA THRESHER MFG. CO. v. HANSON, 54 N. W. 311.

What necessary to recover for breach of warranty.

Cited in *James v. Bekkedahl*, 10 N. D. 120, 86 N. W. 226, denying right of purchaser of gloves on express condition for return and replacement if unsatisfactory to counterclaim damages for breach of warranty in action for purchase price; *Kingman v. Watson*, 97 Wis. 576, 73 N. W. 438 (dissenting opinion), holding that under contracts of sale with conditional warranties calling for notice of defects by a particular method, notice given and acted upon in any other way constitutes a waiver of such method and substitutes that adopted in lieu of it, leaving the warranty entirely freed from the condition.

3 N. D. 87, PARKER v. FIRST NAT. BANK, 54 N. W. 313.**Statement of claim of thresher's lien.**

Cited in *Moher v. Rasmusson*, 12 N. D. 71, 95 N. W. 152, holding the omission of a lien claimant to set forth the quantity of grain threshed by him for the defendant as required by statute, is fatal to his lien.

Possession to support action for conversion.

Cited in *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 513, 75 N. W. 809, holding mortgagee of chattels having present right of possession entitled to maintain action for conversion against wrongdoer; *Clen-deney v. Hawk*, 8 N. D. 419, 79 N. W. 878, holding ownership of grain sufficient to support action for its conversion not shown by previous assignment to plaintiff of contract upon enforcement of which he would be entitled to only a money judgment against defendant and of a lease subsequent to the conversion entitling him to the grain itself; *Richmire v. Andrews & G. Elevator Co.* 11 N. D. 453, 92 N. W. 819, holding a bare possession for the owner was not sufficient to support action by possessor who after conversion claimed a lien.

Distinguished in *Ellestad v. Northwestern Elevator Co.* 6 N. D. 88, 69 N. W. 44, sustaining right of chattel mortgagee of crop to maintain trover against one with constructive notice of mortgage purchasing the grain before maturity of the note secured where the mortgage authorized mortgagee to take possession at once in event of disposition of grain.

Necessity for findings of fact.

Cited in *First Nat. Bank v. McCarthy*, 13 S. D. 356, 83 N. W. 423, holding that no finding of fact is required as to facts alleged in the answer which are specifically admitted by the reply; *Anderson v. Alseth*, 6 S. D. 566, 62 N. W. 435, holding judgment enforcing threshing lien not justified in absence of finding that alleged lienor owned and operated the threshing machine or that the account was filed as required by statute.

Pleading and evidence in trover.

Cited in notes in 9 N. D. 633, on pleading in actions for trover and conversion; 9 N. D. 633, 634, on evidence in actions for trover and conversion.

**3 N. D. 91, BENNETT v. NORTHERN P. R. CO. 54 N. W. 314,
Later appeal in 4 N. D. 348, 61 N. W. 18.****3 N. D. 96, GOULD v. DULUTH & D. ELEVATOR CO. 54 N. W.
316.****Mode of dismissing appeal.**

Cited in *Re Weber*, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523, holding that the dismissal of an appeal from a justice's judgment was not intended, by Dak. Comp. Laws, § 6136, to be made by order instead of judgment.

Entry of judgment.

Cited in *Re Weber*, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523, holding that judgment has no force as such until entered in judgment book; *Taylor v. Taylor*, 5 N. D. 58, 63 N. W. 893, holding that in an action tried

in the supreme court under the provisions of N. D. Laws 1893, chap. 82, final judgment will not be entered in that court, but the record will be remanded to the trial court; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151, holding entry of judgment on order therefor granted by court a duty devolving upon the clerk.

Right to make chamber order.

Cited in *Farleigh v. Kelly*, 24 Mont. 369, 62 Pac. 495, holding that a district judge who is lawfully called in to hold court in another district may make, after his return to his own district, and before the holding of another term of court in the other district, a chamber order extending the time to serve a statement of the case in a cause which was tried before him while such substitute judge.

3 N. D. 107, POWER v. BOWDLE, 21 L.R.A. 328, 44 AM. ST. REP. 511, 54 N. W. 404.

Relief available to parties in action to determine adverse claims to land.

Cited in *Buxton v. Sargent*, 7 N. D. 503, 75 N. W. 811, holding mere lien on land not enforceable against wishes of either party to action in action to quiet title.

Disapproved in *Murphy v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614, holding in an action to determine an adverse claim to land a quit claim deed may be foreclosed as a mortgage.

Waiver of objections on appeal.

Cited in *State ex rel. Kelly v. McMaster*, 13 N. D. 58, 99 N. W. 58, holding the failure to claim on the trial of a cause that the appearance of a party in the proceedings was an admission of partnership amounted to waiver of the right to make such a claim on appeal.

Necessity for reply.

Cited in *United States Security & Bond Co. v. Wolfe*, 27 Colo. 218, 60 Pac. 637, suggesting, but not deciding, that the new matter in an affirmative defense set up in defendant's plea, if sufficient, stands admitted in the absence of a reply thereto; *Betts v. Signor*, 7 N. D. 399, 75 N. W. 781, holding counterclaim calling for reply set up in action to quiet title by answer alleging that defendant is the owner of the land and praying that title may be quieted in time.

Waiver of reply.

Cited in *Kinney v. Brotherhood of American Yeoman*, 15 N. D. 21, 106 N. W. 44, holding a defendant cannot take advantage of the want of a reply after all the evidence is in without objection.

Nature of lien interest in land.

Cited in *McHenry v. Kidder County*, 8 N. D. 413, 79 N. W. 875, holding that validity of lien for taxes as distinguished from adverse estates and interests cannot be determined in action to determine rights arising from purchase at tax sale; *Tracy v. Wheeler*, 15 N. D. 248, 6 L.R.A. (N.S.) 516, 107 N. W. 68, dissenting opinion, on a lien as not being an adverse estate of interest.

Sufficiency of description of land in assessment roll.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding valid assessment essential to valid tax; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, holding insufficient, description of property in tax assessment books as "S. E. 4 S. W. 2 and S. W. 4" and "N. W. 4 N. W. 4;" *Lee v. Crawford*, 10 N. D. 82, 88 N. W. 97, holding insufficient description of property in notice of tax sale as "s w 4 of s e 4" of specified section, township, and range; *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding where the assessment roll described the land meant to be assessed by means of symbols and abbreviations the tax and the tax sale were invalid because of inadequacy of description; *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding an assessment void for indefiniteness where it described the part of the lot assessed as the "N 23 x 200 ft.," and it appeared that the lot was six hundred feet long and extending in a northeasterly direction; *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, holding an assessment of land by abbreviations and symbols was void for uncertainty; *Stokes v. Allen*, 15 S. D. 421, 89 N. W. 1023, holding insufficient, description in duplicate tax list as "S. W. 4 N. E. 4 and W. 2 S. E. 4 less R. W. D. C. Ry." without giving section, township, or range, although immediately under description of other property of another person, specifying section, township, and range; *Stoddard v. Lyon*, 18 S. D. 207, 99 N. W. 1116, on the sufficiency of the description of land in the assessment thereof; *Iowa & D. Land Co. v. Barnes County*, 6 N. D. 601, 72 N. W. 1019, holding void, sale by county treasurer of lands described by other county officials on assessment rules and tax duplicates delivered to him by county clerk by arbitrary signs and symbols similar to those afterwards judicially declared insufficient; *Richardson v. Simpson*, 82 Md. 155, 33 Atl. 457, holding an advertisement of a sale for taxes of "a tract of land called the Three Brothers, containing 64 18-100 acres, more or less," and referring for further description to a specified deed, insufficient for uncertainty, when such deed shows that "Three Brothers" contained 103 acres, and it is not evident which 64 18-100 acres of the 103 acres are referred to.

Distinguished in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, where the abbreviation "N. W." in the column headed "part of section" was sufficient to identify the part of the section named in the assessment roll; *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267, where by reason of statute it was held that the description of land in an assessment by means of abbreviations, letters and figures, was sufficient.

Disapproved in *Auditor General v. Sparrow*, 116 Mich. 574, 74 N. W. 881, holding a properly headed assessment roll valid when the descriptions are by abbreviation and the fractions are omitted, and a description "N. E.-N. E. sec. 1 town 45, range 44, 40 acres" sufficient to indicate a particular quarter section.

Certainty of description as necessary to tax titles.

Cited in *Finlayson v. Peterson*, 11 N. D. 45, 89 N. W. 855, declaring assessment on which tax deed depended for their validity void because of the insufficiency of the description of the land in the assessor's return;

Gouaux v. Beaulieu, 123 La. 684, 49 So. 285, on certainty of description as necessary to the validity of tax titles.

Parol evidence to supply omissions in tax assessment.

Cited in *Paine v. Willson*, 77 C. C. A. 44, 146 Fed. 488; *Paine v. Germantown Trust Co.* 69 C. C. A. 303, 136 Fed. 527,—holding parol evidence inadmissible to show that a township named in an assessment for taxes embraced a certain specified government surveyed township of a certain range.

Cited in note in 11 Eng. Rul. Cas. 235, on parol evidence to contradict written instrument.

Judicial notice.

Cited in *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13, 9 A. & E. Ann. Cas. 1193, on court's taking judicial notice of matters of common knowledge or usage.

Cited in note in 124 Am. St. Rep. 47, on facts of which courts will take judicial notice.

3 N. D. 129, *ENGLISH v. GOODMAN*, 54 N. W. 540.

Amendment by court of defective verdict.

Cited in *Sonnesayn v. Akin*, 14 N. D. 248, 104 N. W. 1026, dissenting opinion, on the right of the court to order judgment for the amount admitted by the pleadings where the verdict fails to assess damages.

3 N. D. 131, *STATE EX REL. PETERSON v. BARNES*, 54 N. W. 541.

Sufficiency of criminal complaint in preliminary proceedings.

Cited in *State v. Rozum*, 8 N. D. 548, 80 N. W. 477, holding statutory requirement that complaint "particularly describe" place where property is found not applicable to prosecutions or informations for maintaining common nuisance; *Smith v. Jones*, 16 S. D. 337, 92 N. W. 1084, holding the fact that the complaint upon which the plaintiff was arrested failed to allege that the criminal act was done wilfully did not render the justice liable for malicious prosecution where he had jurisdiction of the person and the subject-matter; *State v. Anderson*, 35 Utah, 496, 101 Pac. 385, holding a criminal complaint is sufficient to sustain a preliminary examination where it states the name of the crime charged, the time and place of its commission, the name of the accused and the nature of the acts constituting the crime, although averments not sufficient to sustain an indictment; *State v. Stevens*, 19 N. D. 249, 123 N. W. 888, as containing rule for testing sufficiency of information in prosecution for illegal liquor sales.

Lack of verification of information.

Cited in *Re Talley*, 4 Okla. Crim. Rep. 398, 31 L.R.A.(N.S.) 805, 112 Pac. 36, holding want of verification in information, not jurisdictional defect authorizing relief by habeas corpus.

Time for holding preliminary examination.

Cited in *State v. Weltner*, 7 N. D. 522, 75 N. W. 779, holding a pre-

liminary examination and holding to bail after the filing in due time of an affidavit for a change of the action to another justice inoperative as a preliminary examination; *State v. McCaffery*, 16 Mont. 33, 40 Pac. 63, holding that Mont. Const. art. 3, § 8, requiring an examination before an information is filed, is complied with if one accused of crime has the privilege of an examination upon a complaint to which he interposes no objection, even though such complaint is not properly verified.

3 N. D. 138, WASHBURN MILL CO. v. BARTLETT, 54 N. W. 544.

Validity and enforceability of contracts of unlicensed foreign corporations.

Cited in *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809, holding that the prohibition of Tenn. act March 26, 1891, against the acquisition of property by a foreign corporation not complying with the provisions of the act, does not render a conveyance to such corporation by a corporation lawfully doing business in the state inoperative; *State Mut. F. Ins. Asso. v. Brinkley S. & H. Co.* 61 Ark. 1, 29 L.R.A. 712, 54 Am. St. Rep. 191, 31 S. W. 157, holding that the failure of a foreign insurance company to comply with statutory prerequisites to the right of doing business in a state does not prevent it from enforcing a claim for dues and liabilities as a member of the company, where the only penalty fixed by the statute is the payment of a specified fine; *Vermont Loan & T. Co. v. Hoffman*, 5 Idaho, 376, 37 L.R.A. 509, 49 Pac. 314, holding that to the general rule that an act in violation of a statute forbidding it is void, there is an exception when the statute is for the protection of the public revenue, and does not make the act itself void, and the act is not malum in se or detrimental to good morals; *Tolerton & S. Co. v. Barck*, 84 Minn. 497, 88 N. W. 19, holding that Minn. Laws 1895, chap. 332, requiring foreign corporations to appoint resident agents to accept service of process before doing any business, does not render a contract with a noncomplying foreign corporation void and unenforceable; *American Bldg. & L. Asso. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493, holding that Neb. Comp. Stat. chap. 16, §§ 148a-148r, making it unlawful for any foreign building and loan association to transact business in the state without having performed specified acts, and making it a misdemeanor for any person to do business as agent for an association which has not complied with such provisions, does not render void the transactions of an association which fails to comply with its demands; *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 893, affirming that in the absence of statutory provisions contracts of foreign corporations which have not complied with the statutory requirements for doing business in the state are not thereby rendered void and non-enforceable; *State v. American Book Co.* 69 Kan. 1, 1 L.R.A.(N.S.) 1041, 76 Pac. 411, 2 A. & E. Ann. Cas. 56, denying that the contracts of a foreign corporation made before it had obtained permission under the statutes to do business in the state was subject to cancellation at the suit of one of the contracting parties; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203,

holding right to sue on contract not affected by failure of foreign corporation to comply with statutory requirements; *United States Sav. & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006, sustaining right of foreign loan association to enforce note and mortgage executed by member notwithstanding noncompliance with statutory requirements as to doing business in state; *National Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 285, holding right to sue on contract not affected by failure of foreign corporation to comply with statutory requirements; *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317, holding the mortgagor liable to the assignee of the mortgagee, after having received the benefits of the mortgage, although the mortgagee, a foreign corporation, had not complied with the statutory requirements; *Citizens' Bank v. Jones*, 117 Wis. 446, 94 N. W. 329, on effect of failure of corporation to comply with statutory requirements as to doing business on its right to contract.

Distinguished in State use of *Hart-Parr Co. v. Robb-Lawrence Co.* 15 N. D. 55, 106 N. W. 406, explaining the effect of later statutes on the validity of contracts of foreign corporations "doing business" in the state without a license.

Effect of failure generally to comply with statutory requirements on right to recover on contracts.

Cited in *Vermont Loan & T. Co. v. Hoffman*, 5 Idaho, 376, 37 L.R.A. 509, 95 Am. St. Rep. 186, 49 Pac. 314, holding statute making it a misdemeanor to engage in the business of loaning money at interest without taking out a license, did not prevent the recovery of a loan by one who failed to take out such a license.

Right to question right of a foreign corporation to do business in the state.

Cited in *A. Booth & Co. v. Weigand*, 30 Utah, 135, 10 L.R.A.(N.S.) 693, 83 Pac. 734; *Blackwell's Durham Tobacco Co. v. American Tobacco Co.* 145 N. C. 367, 59 S. E. 123,—denying the right of a private citizen to question in a collateral action the right of a foreign corporation to do business in the state because of its alleged failure to comply with the statutory requirements.

Distinguished in *Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327, holding a party to a contract with an insurance company made in violation of the statute under which the corporation was organized was not stopped to show the illegality of the contract.

3 N. D. 150, STATE v. JOHNSON, 54 N. W. 547.

Conviction of lesser crime than charged.

Cited in *State v. Tough*, 12 N. D. 425, 96 N. W. 1025, holding an indictment for burglary in the third degree for breaking and entering a railroad car with intent to steal would sustain a conviction for the minor offense of entering a railroad car with intent to steal.

—Felonious and lesser assaults.

Cited in *State v. Marks*, 3 N. D. 532, 58 N. W. 25, holding that one charged with assault with dangerous weapon with intent to do bodily

harm cannot be found guilty of assault and battery; *Birker v. State*, 118 Wis. 108, 94 N. W. 643, holding an information charging defendant being armed with a dangerous weapon and making an assault on another with intent to kill and murder would sustain a conviction of an assault with intent to do great bodily harm.

— Statutory felonious assaults.

Cited in *State v. Cruikshank*, 13 N. D. 337, 100 N. W. 697, holding a verdict finding the accused guilty of "assault with a dangerous weapon with intent to do bodily harm" did not warrant a sentence as for an attempt to shoot with intent to do bodily harm.

Sufficiency of verdict in criminal case.

Cited in *State v. Belyea*, 9 N. D. 353, 83 N. W. 1, holding insufficient verdict that jury find defendant guilty of crime of "unlawfully procuring an abortion as charged in the information" illegal and unauthorized where information charges murder in procuring abortion; *State v. Peterson*, 23 S. D. 629, 122 N. W. 667, holding that verdict of assault with intent to do bodily harm, upon charge of assault to kill, warrants conviction for assault only.

Distinguished in *State v. Maloney*, 7 N. D. 119, 72 N. W. 927, holding sufficient verdict that jury find defendant guilty of assault and battery with sharp and dangerous weapon with intent to do bodily harm without addition of statutory words "without justifiable cause or excuse."

3 N. D. 154, NATIONAL BANK v. LEMKE, 54 N. W. 919.

Effect of repeal of usury statute on acquired rights.

Cited in *McCann v. Mortgage, Bank & Invest. Co.* 3 N. D. 172, 54 N. W. 1026, holding that repeal of North Dakota Laws 1889, chap. 70, imposing penalties for usury by laws of 1890, chap. 184, without savings clause does not operate to extinguish any penalty, forfeiture, or liability previously incurred; *Seawell v. Hendricks*, 4 Okla. 435, 46 Pac. 557, holding in the absence of an express provision a statute providing for the repeal of a statute declaring a forfeiture of usurious interest does not affect the right to recover such interest there being a statute providing that such a repeal would not affect prior rights; *Wallace v. Goodlett*, 104 Tenn. 670, 58 S. W. 343, holding that the repeal by Tenn. Acts 1899, chap. 172, of Acts 1897, chap. 81, giving a remedy upon contracts usurious upon their face, will not defeat a suit brought thereunder pending on the mortgagee's appeal at the date of the repeal, in view of Shannon's Code, § 61, providing that the repeal of any statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under and by virtue of the statute repealed.

Harmless error in instruction.

Cited in *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 857, holding an isolated sentence in an instruction which is erroneous but which when taken with the rest of the instruction is not misleading to the jury, is harmless error and does not warrant a reversal.

3 N. D. 160, WESSEL v. D. S. B. JOHNSTON LAND & MORTG. CO.
44 AM. ST. REP. 529, 54 N. W. 922.

Right to recover back voluntary payments.

Cited in *Kimpton v. Studebaker Bros. Co.* 14 Idaho, 552, 125 Am. St. Rep. 185, 94 Pac. 1039, 14 A. & E. Ann. Cas. 1126, holding a maker of a non-negotiable note who voluntarily pays with knowledge that he was paying more than was due cannot recover back such excess; *Sheibley v. Cooper*, 79 Neb. 232, 112 N. W. 363, holding fees voluntarily paid to a party after the expiration of his term of office with knowledge of the facts are not recoverable.

Cited in note in 94 Am. St. Rep. 410, 417, 420, on recovery back of voluntary payment.

Distinguished in *Wiles v. McIntosh County*, 10 N. D. 594, 88 N. W. 710, sustaining right of municipal corporation to recover back overpayment of salary voluntarily made by city treasurer.

What constitutes duress.

Cited in note in 2 L.R.A.(N.S.) 576, on payment of illegal bonus for discharge of mortgage pending foreclosure, as duress.

3 N. D. 165, PLANO MFG. CO. v. ROOT, 54 N. W. 924.

Burden of proving breach of warranty.

Cited in *Hoffman v. Hampton Independent Dist.* 96 Iowa, 319, 65 N. W. 322, holding the burden of proof to show a breach of guaranty of a heating apparatus upon the purchaser in an action upon a deferred payment of the purchase price.

Express terms forbidding implications.

Cited in *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903, holding a warranty in a contract only against defects in the materials excluded other warranties either express or implied as to quality.

Cited in note in 19 L.R.A.(N.S.) 1199, on right to show parol warranty in connection with contract of sale of personalty.

3 N. D. 170, EDWARDS & M. LUMBER CO. v. BAKER, 54 N. W. 1026.

3 N. D. 172, McCANN v. MORTGAGE, BANK & INVEST. CO. 54 N. W. 1026.

Denial by affidavit in proceedings to enjoin foreclosure of mortgage.

Cited in *Scott v. District Ct.* 15 N. D. 259, 107 N. W. 61, on the impropriety of setting up affidavits of denial in proceedings to enjoin the foreclosure of a mortgage where it would involve a trial of the merits on the motion.

Right to appeal from denial of injunctional order.

Cited in *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905, holding an order denying a motion to vacate an injunctional order is not appealable.

Right of judge to vacate his order.

Cited in *James River Lodge, No. 32, I. O. O. F. v. Campbell*, 6 S. D. 157, 60 N. W. 750, holding that a judge who has made an order for the transfer to the court of all further proceedings for the foreclosure of a mortgage commenced by advertisement may vacate the same on being satisfied that the cause for making it no longer exists.

3 N. D. 183, McMILLEN v. AITCHISON, 54 N. W. 1030.**Prejudicial error in admission of evidence.**

Cited in *State v. Kent*, 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, holding admission of improper testimony not ground for reversing conviction where the result could not have been changed thereby.

3 N. D. 188, GOOSE RIVER BANK v. GILMORE, 54 N. W. 1032.**Time for appeal from order denying or granting a new trial.**

Cited in *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085, holding an appeal from an order denying a motion for a new trial taken within the statutory period may be had after the expiration of the time for taking an appeal from the judgment.

Record on appeal.

Cited in *Oliver v. Wilson*, 8 N. D. 590, 80 N. W. 757, holding no statement of the case required on appeal from order based only on papers and documents transmitted by the clerk with the order appealed from; *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314, holding an order granting a new trial cannot be reviewed in the absence of a statement of the case where the motion is made upon the court's minutes.

3 N. D. 193, UNION NAT. BANK v. OIUM, 44 AM. ST. REP. 533, 54 N. W. 1034, Later phase of same case in 7 N. D. 201, 73 N. W. 527.**Sufficiency of description in chattel mortgage.**

Cited in *Russell & Co. v. Amundson*, 4 N. D. 112, 59 N. W. 477, holding sufficient description of engine in chattel mortgage as a "13-Horse S. S. S. B. engine complete number . . . manufactured by" designated firm; *Wilson v. Rustad*, 7 N. D. 330, 75 N. W. 260, holding sufficient, description of mortgaged property as mules of specified sex, age, color, weight, and name, purchased from mortgagee and then in mortgagor's possession in designated county and state; *Reynolds v. Strong*, 10 N. D. 81, 85 N. W. 987, holding sufficient, description in chattel mortgage which together with inquiries naturally suggested, will lead to identification of property.

Who may question validity of chattel mortgage.

Cited in *Fisher v. Kelly*, 30 Or. 1, 46 Pac. 146, holding that the validity of a chattel mortgage as to a general creditor of the mortgagor cannot be questioned by the said creditor until he has seized the property covered by the mortgage or secured some lien thereon; *Landis v. McDonald*, 88 Mo. App. 335, holding a general creditor or creditor at large within the protection of Mo. Rev. Stat. 1899, § 3404, providing that no chattel mortgage

is valid against "any other person" than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or the mortgage is recorded.

Cited as changed by statute in *Conrad v. Smith*, 6 N. D. 337, 70 N. W. 815, holding a creditor whose claim accrued before sale of personalty not followed by immediate delivery is a creditor within Dak. Comp. Laws, § 4657, although he did not alter his position to his detriment after such sale.

Disapproved in *First Nat. Bank v. Ludvigsen*, 8 Wyo. 230, 80 Am. St. Rep. 928, 56 Pac. 994, 57 Pac. 934, holding antecedent creditors within the meaning and protection of Wyo. Laws 1890-91, chap. 7, § 5, declaring chattel mortgages void as against "the creditors" of the mortgagor, unless filed, and § 11, providing that they shall cease to be valid as against "the creditors" of the mortgagor unless renewed as provided therein.

Effect of unrecorded chattel mortgage.

Cited in *Aultman & T. Mach. Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373, 87 N. W. 435, holding the lien of a chattel mortgagee under a mortgage upon chattels in Iowa, executed and recorded only in North Dakota, superior to that of an Iowa creditor who subsequently attached the same in that state on a debt which originated prior to the execution of the mortgage; *Harrison v. South Carthage Min. Co.* 95 Mo. App. 80, 68 S. W. 963, holding unrecorded chattel mortgage void by statute as to any subsequent creditor though withheld without collusion or fraudulent intent; *Forrester v. Kearney Nat. Bank*, 49 Neb. 655, 68 N. W. 1059, holding lien of chattel mortgage, the filing of which has been delayed without intention to defraud, good as against a creditor, who causes the property to be seized on attachment or execution after such mortgage is filed, or after the mortgagee has obtained actual possession, under Neb. Comp. Stat. chap. 32, § 14, providing that every chattel mortgage not accompanied by an immediate delivery and followed by an actual and continued change of possession shall be absolutely void as against the mortgagor's creditors, unless the mortgage or a copy thereof is filed.

Cited in note in 137 Am. St. Rep. 489, on effect of failure to execute and record chattel mortgage as prescribed by statute.

Distinguished in *Peabody v. Lloyds Bankers*, 6 N. D. 27, 68 N. W. 92, holding chattel mortgage on stock of goods withheld from record until just before levy of attachment by persons selling goods in reliance on mortgagor's apparent ownership unavailing as against such attaching creditors.

Disapproved in *Pierson v. Hickey*, 16 S. D. 46, 91 N. W. 339, holding under statute providing that a mortgage of personal property is void as against creditors of the mortgagor unless filed, such mortgage is void as against an execution levied on the property though the debt existed before the execution of the mortgage.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

3 N. D. 220, FAHEY v. ESTERLEY MACH. CO. 44 AM. ST. REP. 554, 55 N. W. 580.

Notice of breach of warranty.

Distinguished in *W. T. Adams Mach. Co. v. Turner*, 162 Ala. 351, 136 Am. St. Rep. 28, 50 So. 308, where it is held that a provision in a contract for the sale of machinery provided for the giving of notice of defects to the seller within ten days after the receipt of the machinery was not a condition precedent to a right to recover for a breach of warranty.

— To whom given.

Cited in *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. D. 466, 92 N. W. 826, holding where the terms of the contract of sale specified that if the machine did not work notice should be given to the main office of the defendant company, the giving of notice to a general agent who had no authority to waive any of the terms of the contract was not a sufficient compliance with the terms of the contract; *Nichols & S. Co. v. McCall*, 17 Pa. Dist. R. 957, holding that where the contract of sale provided that if the machine did not meet the warranty notice thereof would be given the manufacturer within five days, and omission to do so would constitute a waiver of the warranty, notice to the dealer was insufficient.

— Necessity for.

Cited in *Aultman & T. Machinery Co. v. Wier*, 67 Kan. 674, 74 Pac. 227, holding in an action for the purchase price of a threshing machine the failure of the machine to work properly was no defense where the purchaser failed to give notice directly to the plaintiff company within the time specified by the contract of sale it being provided that notice must be given directly to the company; *Gaar v. Green*, 6 N. D. 48, 68 N. W. 318, denying right of purchaser of threshing machine under warranty requiring notice of defect if it failed to operate as warranted to claim any defects where he failed to give notice within specified time and never returned or offered to return the machine; *Seiberling v. Rodman*, 14 Ind. App. 460, 43 N. E. 38, holding that a purchaser of a warranted machine under a contract providing that he should give the seller notice if it failed to do good work, and the seller was to have "a reasonable time to get to it and remedy the defect," cannot claim a breach of warranty until he has given the agreed notice and allowed a reasonable time for remedying the defect; *Minnesota Thresher Mfg. Co. v. Lincoln*, 4 N. D. 410, 61 N. W. 145, holding that failure to notify seller of machine under warranty requiring notice of nonfulfilment prevents recovery of damages from breach.

— Waiver of.

Cited in *Shearer v. Gaar, S. & Co.* 41 Tex. Civ. App. 39, 90 S. W. 684; *Murphy v. Russell*, 8 Idaho, 133, 67 Pac. 421,—holding the purchaser of a threshing machine waived the right to recover for defective condition of the machine by failing to give notice of such condition within six days after its receipt in accordance with the terms of the contract of sale that such failure is conclusive evidence that the warranty is fulfilled; *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335, holding the failure of a purchaser of a threshing machine to give the notice of

defects in the manner provided by the contract of sale was waived by the act of the company taking action upon the notice that was given by sending an expert to repair the machine.

Distinguished in *Briggs v. M. Rumely Co.* 96 Iowa, 202, 64 N. W. 784, holding that the seller of a warranted separator waives a right to insist that notice of its failure to do good work should have been sent to the place designated in the contract of sale, by acting upon a notice sent to an agent at another place in the same manner as if it had been sent to the place designated.

Rights and remedies of buyer on breach of warranty.

Cited in *Westbrook v. Reeves & Co.* 133 Iowa, 655, 111 N. W. 11, holding where the contract for the sale of machinery makes the return of the defective machinery the only remedy for a breach of warranty the purchaser has no right to return all the machinery and demand a surrender of his notes; *Canham v. Plano Mfg. Co.* 3 N. D. 229, 55 N. W. 583, sustaining right of maker of purchase money note rescinding sale for breach of warranty to recover amount thereof and interest without paying after negotiation to innocent purchaser for value; *Northwest Thresher Co. v. Mehlhoff*, 23 S. D. 476, 122 N. W. 428, holding return of entire threshing outfit without notice of defects ineffectual as rescission of contract containing separate warranties of parts and giving vendor option to remedy defective parts; *Wasatch Orchard Co. v. Morgan Canning Co.* 32 Utah, 229, 12 L.R.A.(N.S.) 540, 89 Pac. 1009, holding in an action for the purchase price of cans a counter-claim for the value of defective cans could not be set-up where by the terms of the contract the return of the defective cans was a condition precedent to the right to recover their value.

Recovery of amount of purchase money notes in action for breach of sale.

Cited in *Burgess v. Alcorn*, 75 Kan. 735, 90 Pac. 239, holding in an action for breach of warranty the amount of a note given as part of the purchase price may be recovered as damages notwithstanding it is not negotiable and in an action upon it the maker could set up such defenses as he has by reason of the failure of consideration therefor; *Delaney v. Great Bend Implement Co.* 79 Kan. 126, 98 Pac. 781, holding the maker of notes given as consideration for the purchase price of farm machinery is not prevented from maintaining an action for breach of warranty by reason of the fact that in an action on the notes he failed to set up such defenses; *Myrick v. Purcell*, 95 Minn. 133, 103 N. W. 902, 5 A. & E. Ann. Cas. 148, holding the maker of promissory notes given in payment on the purchase of property may where the notes have been transferred to an innocent purchaser for value, maintain an action for damages from the breach of the contract to the amount of the notes with interest.

Res judicata.

Cited in *Harris v. Mason*, 120 Tenn. 668, 25 L.R.A.(N.S.) 1011, 115 S. W. 1146, holding a judgment for a purchaser at a tax sale in an action by the owner alleging ownership in fee, because of failure of proof on the part of such owner, was not res judicata of the validity of the purchaser's

title although affirmed on appeal; *Nelson Bennett Co. v. Twin Falls Land & Water Co.* 13 Idaho, 767, 92 Pac. 980, 13 A. & E. Ann. Cas. 172 (dissenting opinion), on the right to set up a judgment in a former action as res judicata of the right to recover in the instant action; *Straw v. Illinois C. R. Co.* 73 Miss. 446, 18 So. 847, holding that a judgment sustaining a demurrer in an action for personal injuries, based on the ground of plaintiff's contributory negligence, is a bar to a subsequent action between the same parties for the same injury; *Marble Sav. Bank v. Williams*, 23 Wash. 766, 63 Pac. 511, holding that where the record does not disclose upon which of several issues the former case was litigated and decided, extrinsic evidence is admissible for the purpose of establishing that it was determined upon an issue not involved in the subsequent action.

Restrictions on power of selling agent.

Cited in *Reeves v. Corrigan*, 3 N. D. 415, 57 N. W. 80, holding a restriction on the power of an agent for the sale of machinery to change or abridge a written contract for the sale thereof which has been deliberately entered into, a legal and reasonable one binding on all persons dealing with such agent with knowledge of such restriction.

3 N. D. 229, CANHAM v. PLANO MFG. CO. 55 N. W. 583.

Remedy of maker for wrongful negotiation of note.

Cited in *Myrick v. Purcell*, 95 Minn. 133, 103 N. W. 902, 5 A. & E. Ann. Cas. 148, holding the maker of a promissory note which has been sold to an innocent purchaser in violation of the terms of the contract may sue for damages for the amount of the note with interest.

Waiver of notice of breach of warranty.

Cited in note in 1 L.R.A. (N.S.) 143, on waiver of stipulated notice of failure of machine to work properly.

3 N. D. 235, TAYLOR v. JONES, 55 N. W. 593.

Sufficiency of evidence to support verdict.

Cited in *Heyrock v. McKenzie*, 8 N. D. 601, 80 N. W. 762, holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; *Magnusson v. Linwell*, 9 N. D. 157, 82 N. W. 743; *Lang v. Bailes*, 19 N. D. 582, 125 N. W. 891,—holding that an appellate court will not review the action of the trial court in denying a motion for a new trial based on the insufficiency of the evidence to sustain the verdict, where there is substantial evidence in support of it; *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial; *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 109; *Acton v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225,—holding that denial of new trial will not be reversed, if verdict is supported by substantial evidence; *Drinkall v. Movius State Bank*, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724, refusing to overturn a verdict because of the insufficiency of the evidence where it appeared from the record there was substantial evidence to sustain the finding of the jury.

What constitutes conversion.

Cited in notes in 9 N. D. 631, on who may maintain trover; 9 N. D. 632, on what amounts to conversion.

3 N. D. 243, STATE EX REL. DIEBOLD SAFE & LOCK CO. v. GETCHELL, 55 N. W. 585.**Illegality of payment of salary of public officer.**

Cited in McDermont v. Dinnie, 6 N. D. 278, 69 N. W. 294, sustaining right of financial officer of city, on return of alternative writ of mandamus compelling him to show cause for nonpayment of salary to municipal office holder, to raise question as to constitutionality of statute for such payment; State ex rel. Dickson v. Williams, 6 S. D. 119, 60 N. W. 410, holding the allowance by a city council of a claim for salary for a period subsequent to the lawful removal of an officer illegal.

Ratification of void contract.

Cited in Fox v. Walley, 13 N. D. 610, 102 N. W. 161, holding no question of ratification existed where no power existed to make the original contract.

3 N. D. 249, COLER & CO. v. DWIGHT SCHOOL TWP. 28 L.R.A. 649, 55 N. W. 587, Overruled on second appeal in 7 N. D. 418, 75 N. W. 795; Reapproved on third appeal in 10 N. D. 86, 85 N. W. 988.**Collateral question of municipal territory or existence.**

Cited in Herring v. Modesto Irrig. Dist. 95 Fed. 705, holding that a de facto irrigation district cannot plead the illegality of the proceedings in its organization as a defense in an action upon its own obligations; Hatch v. Consumers' Co. 17 Idaho, 204, — L.R.A.(N.S.) —, 104 Pac. 670, denying the right of a public service corporation after the expiration of a period of five years to attack the validity of the act of a municipality in annexing territory where such action had been acquiesced in by all the parties interested; State v. Several Parcels of Land, 80 Neb. 11, 113 N. W. 810, holding the validity of annexation proceeding was not subject to collateral attack where acquiesced in for a period of years; School Dist. No. 21 v. Fremont County, 15 Wyo. 73, 86 Pac. 24, 11 A. & E. Ann. Cas. 1058, holding in proceedings to enjoin the payment of taxes collected for school purposes the validity of the organization of the school district was not subject to collateral attack; Ward v. Gradin, 15 N. D. 649, 109 N. W. 57, on the right of a municipal corporation to exercise authority over certain territory as not being subject to collateral attack.

Validity of school bonds.

Cited in Flagg v. School Dist. No. 70, 4 N. D. 30, 25 L.R.A. 363, 58 N. W. 499, holding that power to make certificate that school bonds are "issued in accordance with law" may be vested in any officer or body; Coler v. Rhoda School Twp. 6 S. D. 640, 63 N. W. 158, holding school district bonds voted by majority of electors present and voting at special meeting and containing recital of their regularity in issuance, not invalid Dak. Rep.—14.

because question of bonding was submitted without written petition of majority of voters as required by statute.

Effect of recitals in municipal bonds.

Cited in *Thompson v. Mecosta*, 127 Mich. 522, 86 N. W. 1044, holding that a bona fide purchaser for value of a municipal bond may rely upon a statement therein that it was properly issued under authority of a specified law and for the purpose prescribed thereby, although it was not in fact issued for such purpose; *State v. School Dist. No. 50*, 18 N. D. 616, 138 Am. St. Rep. 787, 120 N. W. 555, holding that recital that bonds are issued as authorized by specified act does not estop school district from setting up defense of illegal issuance.

Explained and held obiter in *Flagg v. School Dist. No. 70*, 4 N. D. 30, 25 L.R.A. 363, 58 N. W. 499, holding school district not estopped to deny ownership of school site by county clerk's certificate on bond that it is "issued in accordance with law and by authority of the majority of the legal officers."

3 N. D. 265, COLONIAL & U. S. MORTG. CO. v. STEVENS, 55 N. W. 578.

Liability of married woman on her contracts of suretyship.

Cited in *Colonial & U. S. Mortg. Co. v. Bradley*, 4 S. D. 158, 55 N. W. 1108, holding married woman liable on note executed by her with her husband for his individual debt; *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932, holding that a married woman who has incurred liability for medical attendance made necessary by an injury may recover as part of her damages the amount of such liability, although she has not paid therefor at the time of the trial; *Cooper v. Bank of Indian Territory*, 4 Okla. 632, 46 Pac. 475, holding that under Okla. Laws 1893, § 2968, copied from Dak. Comp. Laws, § 2590, a wife is bound by her contract in joining with her husband in making a promissory note for his own debt; *First Nat. Bank v. Leonard*, 36 Or. 390, 59 Pac. 873, holding that a wife who joins her husband in a mortgage on his property to secure his debt, which mortgage contains a covenant on the part of both to pay such debt, may be subjected to a personal decree, enforceable against her separate property.

Distinguished in *Bank of Commerce v. Baldwin*, 14 Idaho, 75, 17 L.R.A. (N.S.) 676, 93 Pac. 504, where by reason of statute a married woman was not held liable on a promissory note in which she joined as co-maker and for which neither she nor her separate estate received any benefit.

3 N. D. 270, HUTCHINSON v. OLEARY, 55 N. W. 729.

Admissibility of conversations with a decedent.

Cited in *Larson v. Newman*, 19 N. D. 153, 23 L.R.A.(N.S.) 849, 121 N. W. 202, holding in an action to enforce an alleged contract of sale with a decedent the testimony of the plaintiff that the decedent promised to go to a certain town on a certain day and fix up the terms of the sale was inadmissible; *Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183, holding husband incompetent in contested proceeding to probate wife's will

making him sole beneficiary to testify that before executing such will he took another will to her at her request and saw it in her hand at time of executing former will where question at issue is which will was executed last.

Cited in note in 7 L.R.A.(N.S.) 685, on effect of statute relating to competency of testimony in regard to transactions with deceased person, on admissibility of testimony as to transactions with attorney or agent.

Parol evidence as to terms of contract.

Cited in *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903, holding where a contract of sale only warranted against breakage caused by defects in materials, other warranties of quality were excluded.

3 N. D. 276, *COMASKEY v. NORTHERN P. R. CO.* 55 N. W. 732.

Necessity of specially pleading and proving damages.

Distinguished in *Gagnier v. Fargo*, 12 N. D. 219, 96 N. W. 841, where damages for mental suffering growing out of physical injuries were allowed without pleading pain or mental suffering.

Prejudicial error.

Cited in *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607, holding that prejudice will be presumed where error has been established unless it clearly appears that prejudice could not have resulted; *Western U. Teleg. Co. v. Morris*, 28 C. C. A. 56, 55 U. S. App. 211, 83 Fed. 992, holding an instruction authorizing the assessment of damages for permanent impairment of health cause for reversal, where there is no evidence upon which to base it.

3 N. D. 280, *CLARK v. SULLIVAN*, 55 N. W. 733.

Attorney's lien for compensation.

Cited in *Coombe v. Knox*, 28 Mont. 202, 72 Pac. 641, holding an attorney's lien for compensation extended to the securities for the judgment recovered for his client; *Stoddard v. Lord*, 36 Or. 412, 59 Pac. 710, holding that when an attorney's lien for compensation attaches to money in the hands of the adverse party, it is in effect an equitable assignment pro tanto by the client to his attorney of so much thereof as may be necessary to satisfy his demand for services performed in securing the fund; *Leighton v. Serveson*, 8 S. D. 350, 66 N. W. 938, holding that attorney proving lien for services obtains an interest in the judgment and also in the cause of action on bond given on appeal therefrom.

Cited in note in 51 Am. St. Rep. 278, 279, on lien of attorneys.

3 N. D. 290, *BRANSTETTER v. MORGAN*, 55 N. W. 758.

3 N. D. 293, *STATE v. McGAHEY*, 55 N. W. 753.

Redirect examination of witnesses.

Cited in *People v. Corey*, 8 Cal. App. 720, 97 Pac. 907, holding on redirect examination it might be shown by prosecutrix the reason for her wandering about the streets at night several weeks after the alleged rape

where on cross-examination it was made to appear that the condition of prosecutrix's organs indicated sexual intercourse which might have resulted from her conduct after the alleged rape; *Branstetter v. Morgan*, 3 N. D. 290, 55 N. W. 758, holding that plaintiff may rebut evidence drawn out on cross-examination although having no direct bearing on the issues.

Grounds for reversal.

Cited in *State v. Kent*, 5 N. D. 516, sub nom. *State v. Pancoast*, 35 L.R.A. 518, 67 N. W. 1052, holding admission of improper testimony not ground for reversing conviction where result could not have been changed thereby.

Cited in note in 46 L.R.A. 650, 651, on reversal of conviction because of unfair or irrelevant argument or statements of facts by prosecuting attorneys.

Curing error by instructions.

Cited in *Bishop v. Chicago, M. & St. P. R. Co.* 4 N. D. 536, 62 N. W. 605, holding error in admitting evidence that train killing colt at private crossing could have been stopped more quickly by airbrakes cured by instruction withdrawing it for lack of satisfactory evidence that airbrakes are in common use.

Calling of eye witnesses by prosecution.

Cited in *State v. Kapelino*, 20 S. D. 591, 108 N. W. 335, holding the trial court did not err in a criminal prosecution in refusing on the motion of the defendant to compel the prosecution to call all its eye witnesses to the transaction.

Cross-examination to show bias of witness.

Cited in note in 82 Am. St. Rep. 53, on evidence to show credibility or bias of witness.

Impeachment of witness as to collateral matters.

Cited in *Schnase v. Goetz*, 18 N. D. 594, 120 N. W. 553, holding that party cannot show falsity of answers on cross-examination as to witness's unlawful occupation.

Refusal of requests for instructions.

Cited in *State v. Kent*, 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, holding instruction properly refused where substance has already been given; *State v. Campbell*, 7 N. D. 58, 72 N. W. 935, holding it proper to refuse requests to charge when sufficiently covered by general charge.

3 N. D. 310, STATE EX REL. EDGERLY v. CURRIE, 55 N. W. 858.

3 N. D. 319, STATE EX REL. LARABEE v. BARNES, 55 N. W. 883.

Construction of "majority of legal votes cast."

Cited in *Green v. State Canvassers*, 5 Idaho, 130, 95 Am. St. Rep. 169, 47 Pac. 259, holding that where a majority of the electors voting on a constitutional amendment, vote in favor of it, it is ratified, although the majority vote cast is not a majority of the electors voting at the general

election; *South Bend v. Lewis*, 138 Ind. 512, 37 N. E. 986, holding a majority of the votes cast on the question of annexation to a city sufficient to authorize the annexation, under Ind. Rev. Stat. 1894, §§ 4208-4217, authorizing the annexation of an adjoining town to a city, if a majority of the qualified voters of the two political divisions vote in favor thereof; *Montgomery County Fiscal Ct. v. Trimble*, 104 Ky. 629, 42 L.R.A. 738, 20 Ky. L. Rep. 827, 47 S. W. 773, holding two-thirds of those voting for the proposition, irrespective of the number voting at the election at which it is submitted, sufficient, under Ky. Const. § 157, providing that for the creation of county indebtedness exceeding the income and revenue provided for the year the assent of "two thirds of the voters thereof voting at an election to be held for that purpose" shall be required.

Cited in note in 22 L.R.A.(N.S.) 482, on basis for computation of majority essential to adoption of proposition submitted at general election.

Distinguished in *State ex rel. McClurg v. Powell*, 77 Miss. 543, 48 L.R.A. 662, 27 So. 927, holding that a majority of all the electors voting at the election, and not simply all who vote on the constitutional amendment submitted at such election, is necessary for the adoption of a constitutional amendment, under Miss. Const. 1890, § 273, requiring "a majority of the qualified electors voting;" *Re Denny*, 156 Ind. 104, 138, 51 L.R.A. 722, 59 N. E. 359, the latter of which holds a constitutional amendment not ratified by a majority of "the electors of the state," within the meaning of Ind. Const. art. 16, § 1, requiring a majority of said electors to ratify an amendment, unless it receives a majority of the whole number of votes cast at the general election at which it is submitted.

Cruel and unusual punishment.

Cited in *State v. O'Neil*, 147 Iowa, 513, 33 L.R.A.(N.S.) 788, 126 N. W. 454, holding that \$100 fine or imprisonment for thirty days for illegal sale of liquor is not cruel or excessive punishment; *Weems v. Miller*, 217 U. S. 370, 54 L. ed. 800, 30 Sup. Ct. Rep. 544 (dissenting opinion), as to cruel and unusual punishments.

Cited in note in 35 L.R.A. 575, 579, on cruel and unusual punishments.

Enhanced penalty for habitual offenders.

Cited in note in 45 L. ed. U. S. 544, on construction of statutes enhancing penalty for habitual offenders.

3 N. D. 328, PRAIRIE SCHOOL TWP. v. HASELEU, 55 N. W. 938.

Liability of sureties on official bonds.

Cited in note in 91 Am. St. Rep. 502, 530, 560, on acts for which sureties on official bonds are liable.

3 N. D. 343, YORKE v. YORKE, 55 N. W. 1095.

Necessary averments of complaint in proceedings for equitable relief.

Cited in *Jones v. Vane*, 11 Idaho, 353, 82 Pac. 110 (dissenting opinion),

on what complainant must establish in order to show himself entitled to equitable relief.

Sufficiency of affidavit for publication of summons.

Cited in *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708, holding under the code an affidavit for publication of summons which fails to show that proper diligence was used to find the defendant in the state is fatally defective.

Equitable relief against judgments.

Cited in *Skjelbred v. Shafer*, 15 N. D. 539, 125 Am. St. Rep. 614, 108 N. W. 487; *Williams v. Fairmount School Dist.* 21 N. D. 198, 129 N. W. 1027,—holding relief might be had against a void judgment although the statutory year had expired; *Freeman v. Wood*, 11 N. D. 1, 88 N. W. 721, considering when equity would aid in avoiding or setting aside a judgment; *Campbell v. Coulston*, 19 N. D. 645, 124 N. W. 689 (dissenting opinion), on equitable relief against judgments.

Cited in notes in 54 Am. St. Rep. 221, on relief in equity against judgments and other judicial determinations; 60 Am. St. Rep. 658, on vacation of judgments on motion when not specially authorized by statute.

Notice of motion to vacate judgment.

Cited in *Phelps v. Heaton*, 79 Minn. 476, 82 N. W. 990, holding that notice of a motion to vacate a judgment in favor of a nonresident plaintiff may be served on his attorney of record, although such service is made after the lapse of the two years allowed by statute within which said attorney may collect and discharge such judgment.

Right to have relief against fraud.

Cited in *Gilbreath v. Teufel*, 15 N. D. 152, 107 N. W. 49, holding district court had inherent power to furnish relief against fraud.

— In divorce proceedings.

Cited in *Nichells v. Nichells*, 5 N. D. 125, 33 L.R.A. 515, 64 N. W. 73, holding judgment in divorce cases open to attack in some manner on same grounds within same time as other judgments; *Reeves v. Reeves*, — S. D. —, 25 L.R.A.(N.S.) 577, 123 N. W. 869, holding a decree of divorce would not be vacated on affidavits denying the bona fides of the residence of the wife because she left the state immediately after procuring the divorce and has since continued to reside in another state.

Waiver of jurisdictional defects by appearance.

Cited in *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672, holding that a general appearance after judgment will not operate to validate a void judgment; *Gans v. Beasley*, 4 N. D. 140, 59 N. W. 714, holding that a special appearance in attachment proceedings by motion to vacate the proceedings and the summons therein gives the court jurisdiction notwithstanding a defect in the summons, where one of the grounds of the motion was that the affidavit was fatally defective in failing to state the grounds of plaintiff's claim; *Henry v. Henry*, 15 S. D. 80, 87 N. W. 522, holding defects in the service of process are waived by the appearance of the party asking that the decree be set aside because of want of jurisdiction on the part of the court and that the decree was obtained by fraud; *Kilpatrick v. Horton*, 15 Wyo. 501, 89 Pac. 1035, holding the want of jurisdiction

in a court is waived by the appearance of the parties in the trial court for the purpose of having certain proceedings vacated as being without jurisdiction; *McGuinness v. McGuinness*, 71 N. J. Eq. 1, 62 Atl. 987, holding petition attacking divorce for want of jurisdiction but also seeking ratification of nonjurisdictional errors was general appearance.

Jurisdiction by failure to object.

Cited in note in 61 Am. St. Rep. 495, on effect of defects in service of process on jurisdiction.

Distinguished in *Vidger v. Nolin*, 10 N. D. 353, 87 N. W. 593, holding that jurisdiction of the subject-matter cannot be conferred upon a court by failure to object thereto.

3 N. D. 354, *HEGAR v. DE GROAT*, 56 N. W. 150.

Limitations on void tax deed.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding statute of limitations not set in motion by tax deed based on void tax; *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570, holding statute of limitations not set in operation by tax deed void on its face; *Batelle v. Knight*, 23 S. D. 161, 120 N. W. 1102, 20 A. & E. Ann. Cas. 456, holding that recorded tax deed void on face does not set statute of limitations running; *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049, holding that a tax sale of property on which there has been no assessment cannot set the statute of limitations running; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, affirming the necessity that tax deeds be valid in order to set in operation the statute of limitations; *Matthews v. Blake*, 16 Wyo. 116, 27 L.R.A. (N.S.) 330, 92 Pac. 242, holding a tax deed void on its face because of improper acknowledgment was insufficient to set in operation the statute of limitations; *Nind v. Myers*, 15 N. D. 400, 8 L.R.A. (N.S.) 157, 109 N. W. 335 (dissenting opinion), as denying that the statute of limitations is set in operation by a void tax deed.

Prejudicial error.

Cited in *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607, holding that where error has been established prejudice will be presumed, unless it clearly appears that it could not have resulted; *State v. Kent*, 5 N. D. 516, sub nom. *State v. Pancoast*, 35 L.R.A. 518, 67 N. W. 1062, holding admission of improper testimony not ground for reversing conviction where result could not have been changed thereby.

Cited in notes in 27 L.R.A. (N.S.) 348, 349, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes; 8 L.R.A. (N.S.) 161, on applicability of statute limiting time for attack on tax sale, to sale under proceedings void for jurisdictional defects, under which no possession taken.

3 N. D. 365, *BRAITHWAITE v. AKIN*, 56 N. W. 133, Later phase of same case in 5 N. D. 196, 31 L.R.A. 238, 65 N. W. 701.

Intervention.

Cited in note in 123 Am. St. Rep. 313, on intervention.

—Rights of intervener.

Distinguished in *Valley Bank v. Wolf*, 101 Iowa, 51, 69 N. W. 113,

holding the court without jurisdiction to render judgment against an intervener claiming property in attachment proceedings for the value of the property, under Iowa Code, § 3016, providing that any person other than defendant may, before the sale of any attached property, present his verified petition disputing the validity of the attachment or stating a claim to the property attached, "which claim" shall be in a summary manner investigated, and if it is found that he has title to or a lien or any interest in the property the court shall make such order as may be necessary to protect his rights.

Equitable set-off.

Cited in note in 30 L.R.A.(N.S.) 23, on nonresidence as ground of equitable set-off.

Right to defend by way of counterclaim.

Explained in *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90, holding under statute a mortgagor of chattels may upon their conversion by the mortgagee counter-claim for their conversion in an action upon the note secured by the mortgage.

Waiver of tort.

Distinguished in *Anderson v. First Nat. Bank*, 5 N. D. 80, 64 N. W. 114, holding a purpose to waive the tort of an agent in selling commercial paper to itself shown by an amendment to the complaint, which as originally drawn was for the recovery of an alleged balance in the agent's hands from a supposed sale to a third person, so as to allege a sale to the agent without alleging a wrongful conversion or characterising the act as a tort.

3 N. D. 382, HODGINS v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 56 N. W. 139.

Presumption of negligence by railroad company.

Cited in *Bishop v. Chicago, M. & St. P. R. Co.* 4 N. D. 536, 62 N. W. 605, holding that an admission of the killing of a colt in the answer of a railroad company sued for its value makes out a case of constructive negligence against the company; *Wright v. Minneapolis, St. P. & S. Ste. M. R. Co.* 12 N. D. 159, 96 N. W. 324, holding a presumption of negligence on the part of a railroad company created by virtue of statute by the mere fact of the killing of stock; *Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 462, 123 N. W. 281, holding that statutory presumption of negligence on finding of horse near tracks remains unrebutted, if jury disbelieves defendant's witnesses.

— Province of court.

Cited in *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1020, holding question whether one turning horse loose near track without anything to prevent it from getting thereon at time fast train is about due, is free from such contributory negligence as will prevent recovery, for jury.

Distinguished in *Atchison, T. & S. F. R. Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68, 1 A. & E. Ann. Cas. 812, where by virtue of statute it is held that it is a question of fact for the jury whether the presumption of

negligence on the part of a railroad company from the occurrence of a fire is overcome by the evidence of defendant company of care in the equipment and management of the engine; *Corbett v. Great Northern R. Co.* 19 N. D. 450, 125 N. W. 1054, holding that question whether statutory presumption has been rebutted is in first instance for court.

Duty owed by railroad company to trespassing stock.

Cited in *Wright v. Minneapolis, St. P. & S. Ste. M. R. Co.* 12 N. D. 159, 96 N. W. 324, holding no duty rested on railroad employees in the operation of the train to be on the lookout for trespassing stock; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, on the degree of care owed by railroad company to stock trespassing on the tracks.

3 N. D. 389, STATE EX REL. STANDISH v. BOUCHER, 21 L.R.A. 539, 56 N. W. 142.

Occurrence of vacancies in office.

Cited in *State ex rel. Chenoweth v. Acton*, 31 Mont. 37, 77 Pac. 305, holding under statute the fact that there was a tie vote for the office of county superintendent of schools did not render such office vacant, the present superintendent holding over; *Holtan v. Beck*, 20 N. D. 5, 125 N. W. 1048, holding that vacancy in office can never exist while incumbent of office is lawfully there; *State ex rel. Richardson v. Henderson*, 4 Wyo. 535, 22 L.R.A. 751, 35 Pac. 517, holding that upon the appointment by the governor of an officer to fill a vacancy "until the next meeting of the legislature," under a statute making no further provision as to the incumbency, the meeting of the legislature does not create another vacancy in the office within the meaning of Wyo. Const. art. 4, § 7, authorizing the governor to fill a vacancy when there is no other provision made therefor.

Validity of appointment to office.

Cited in *Atty. Gen. ex rel. Maybury v. Bolger*, 128 Mich. 355, 87 N. W. 386, upholding an appointment made by a municipal common council under Mich. Local Acts 1901, No. 417, delegating to such council the power to appoint a commission of parks and boulevards.

Powers of departments of government generally.

Cited in *State ex rel. Richardson v. Henderson*, 4 Wyo. 535, 22 L.R.A. 751, 35 Pac. 517, holding the power of the executive and judicial departments a grant, not a limitation, and the powers of the legislative department absolute, except as restricted and limited by the Constitution.

Power of governor to fill vacancies in office.

Cited in *Pruitt v. Squires*, 64 Kan. 855, 68 Pac. 643, holding where an act in effect postponed the election of certain county officers without making any provision for the filling of such offices during the interval, no authority existed in the governor to fill such vacancies; *Southern P. Co. v. Bartine*, 170 Fed. 725, denying the existence of any implied power in the governor to appoint officers in the absence of constitutional authority;

State ex rel. Holmes v. Finnerud, 7 S. D. 237, 64 N. W. 121, holding that vacancy in board of Regents can be filled by governor only.

Power of governor to remove from office.

Cited in State ex rel. Pollock v. Miller, 3 N. D. 433, 57 N. W. 193, holding that trustees of North Dakota Agricultural College and Experimental Station cannot be removed from office by governor.

3 N. D. 412, MARTIN v. HAWTHORN, 57 N. W. 87, Later appeal in 5 N. D. 66, 63 N. W. 895.

Requisites of valid thresher's lien.

Cited in Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152, affirming that it is necessary to the validity of a thresher's lien that the statutory requirement that a statement of the amount and quantity of the grain threshed be filed, be complied with; Gorthy v. Jarvis, 15 N. D. 509, 108 N. W. 39, upholding the necessity of compliance with the statutory requirements as requisite to the acquirement of a valid thresher's lien.

Evidence in trover.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

3 N. D. 415, REEVES v. CORRIGAN, 57 N. W. 80.

Waiver of notice of defects in warranted machine.

Cited in Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145, holding waiver by local agent making sale of machine under warranty of conditions contained therein as to notice of failure to fulfil warranty prevented by provision against waiver or change without special written agreement signed by seller; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826, holding a requirement in an order for a threshing machine that notice of defects be given to the main office of the defendant company was not waived by the notification of a general agent who sent an expert to remedy such defects.

Distinguished in Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614, holding that where defendant refused to accept a machine, under an offer to purchase which was to become an absolute sale upon acceptance, until he had a chance to test it and a new contract was entered into giving him such right before the completion of the sale there was no liability on his contract, he returning the machine on its failure to work.

3 N. D. 427, STATE EX REL. STANDISH v. NOMLAND, 44 AM. ST. REP. 572, 53 N. W. 434, 57 N. W. 85.

Sufficiency of title of act.

Cited in Richard v. Stark County, 8 N. D. 392, 79 N. W. 963, holding statute treating merely of change in boundaries of certain counties and making no reference to revenues of the state, void because in conflict with the title "increase on revenues of the state by changing and increasing the boundaries of" such counties; Turner v. Coffin, 9 Idaho, 338, 74 Pac. 962, holding an act entitled "An act to provide for the care and

keeping of moneys in the custody of of the treasurer of the state of Idaho and prescribing penalties" did not authorize legislation providing for the deposit of the funds of state in banks beyond the control of the state treasurer; *State ex rel. Olsen v. Board of Control of State Institutions*, 85 Minn. 165, 88 N. W. 533 (dissenting opinion), the court holding that state normal schools are "charitable institutions" within the title of Minn. Laws 1901, chap. 122, "to create a state board of control and to provide for the management and control of the charitable, penal and reformatory institutions of the state," etc; *State v. Gibson*, 30 Nev. 353, 96 Pac. 1057, holding an act whose title provided for the appointment of stenographers on the hearing of preliminary examination and the regulation of the compensation therefor would not allow the including of a provision for the subsequent use of the testimony at the trial; *Martin v. Tyler*, 4 N. D. 273, 25 L.R.A. 838, 60 N. W. 392, holding provisions for appointment of commission with specified powers to provide for levying assessments for drains and issuance of bonds to meet expenses and creation of sinking fund, covered by title, "an act to provide for establishing, constructing and maintaining drains;" *Divet v. Richland County*, 8 N. D. 65, 76 N. W. 993, holding provision as to right of private persons to recover taxes paid on exempt property not within title "an act prescribing the mode of making assessments of property, equalization of and the levy, and collection of taxes and for all other purposes relative thereto;" *State ex rel. Kol v. North Dakota Children's Home Society*, 10 N. D. 493, 88 N. W. 273, holding provision for investigation by county judges as to facts concerning children alleged to be abandoned within title "an act relating to societies organized for the purpose of securing homes for orphans or abandoned, neglected or grossly ill-treated children by adoption or otherwise and providing rules for the regulation of the same; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841, holding an amendatory act entitled "An act to amend section of the Revised Codes relating to the establishment, construction and maintenance of drains," was not unconstitutional as embracing more than one subject not expressed in the title; *State v. Minneapolis & N. Elevator Co.* 17 N. D. 23, 114 N. W. 482, holding an act whose title requires elevators doing business in the state to return certificates of inspection to their local agents and the posting of such certificates by such agents in conspicuous places is not objectionable as embracing more than one subject.

Cited in notes in 64 Am. St. Rep. 63, 73, 74, 75, on sufficiency of title of statute; 79 Am. St. Rep. 456, as to when title of statute embraces only one subject, and what may be included thereunder.

Distinguished in *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703, as not pertinent, where an act giving a lien to materialmen and builders upon buildings erected upon land occupied by persons pursuant to the land laws was held to be expressed in a title which recited the regulation of the filing and foreclosure of mechanic's liens upon lands held under a filing under the land laws.

— Construction.

Cited in *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703, on proper construction of the constitutional provision that no bill shall embrace more than one subject which shall be expressed in the title, but that a bill that violates such provision shall be invalidated only to as much as is not expressed in the title; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705, considering how the title of an act should be construed with reference to the constitutional requirement that the subject of the act be expressed in the title.

3 N. D. 433, STATE EX REL. POLLOCK v. MILLER, 57 N. W. 193.

Power of governor to remove from office.

Cited in *State ex rel. Holmes v. Shannon*, 7 S. D. 319, 64 N. W. 175, holding governor not authorized to remove from office any officer made subject of report of public examiner.

3 N. D. 446, GRANDIN v. LA BAR, 57 N. W. 241.

Jurisdiction between state courts and Federal land department.

Cited in *Zimmerman v. McCurdy*, 15 N. D. 79, 106, N. W. 125, 12 A. & E. Ann. Cas. 29, holding court had no jurisdiction to oust an occupying claimant at the instance of another claimant while the merits of their respective claims was still pending before the land department; *Healey v. Forman*, 14 N. D. 449, 105 N. W. 233, holding a demurrer to an answer basing a right to relief upon the erroneous rulings of the land department was properly sustained where the pleadings showed that the title of the land was still in the United States.

When title to public land passes.

Cited in *Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488, 46 Pac. 1902, holding that the purchaser of a desert-land entryman's interest after final proofs and payment, takes but an equitable interest, subject to the future action of the land department in approving or disapproving of the final proofs, or in canceling the entry on the ground of fraud.

— Indemnity lands of railroad company.

Cited in *Kreuger v. Schultz*, 6 N. D. 310, 70 N. W. 269, holding selection of lands within indemnity limits by Northern Pacific Railroad Company insufficient to pass title to such lands to the company; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241, holding the indemnity lands of the Northern Pacific Railroad Company not subject to taxes after selection by the company until the approval thereof by the Secretary of the Interior; *Southern P. R. Co. v. Wood*, 124 Cal. 475, 57 Pac. 388, holding that the title to indemnity lands vested from the date of selection under the direction of the Secretary of the Interior, and not from the date of the grant by 14 U. S. Stat. at L. 292, chap. 278, of lands to the Atlantic & Pacific and Southern Pacific Railroad Companies.

3 N. D. 465, MORTGAGE BANK & INVEST CO. v. HANSON, 57 N. W. 345.

3 N. D. 470, JAMES RIVER LUMBER CO. v. DANNER, 57 N. W. 343.

Priority between mortgage and mechanic's lien.

Cited in *Joralmon v. McPhee*, 31 Colo. 26, 71 Pac. 419, holding where mortgagors took a loan of money with the understanding that it was to be applied to the construction of a building and it was so applied the mortgage had priority over the lien of mechanics who had notice of the mortgage and that the money loaned was appropriated to the construction of the building; *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 288, holding obligation of contract not impaired where statute making mechanic's liens junior to prior mortgage is amended by statute applicable to existing liens and authorizing sale of land and improvements when for best interest of all parties.

3 N. D. 476, GRANHOUM v. SWEIGLE, 57 N. W. 509.

Violation of constitutional provision against imprisonment for debt.

Cited in *Rosenbloom v. State*, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053 (dissenting opinion), denying the constitutionality of a statutory provision for imprisonment to enforce the payment of a license tax; *Rosenbloom v. State*, 64 Neb. 342, 57 L.R.A. 922, 89 N. W. 1053 (dissenting opinion), the majority holding that the imposition of a fine and imprisonment as a means of enforcing the license tax imposed in Neb. Comp. Stat. 1901, chap. 77, art. 1, §§ 152-154, upon peddlers, does not violate the constitutional provision against imprisonment for debt.

Cited in note in 34 L.R.A. 636, 656, on constitutionality of imprisonment for debt.

- Contempt for non payment of costs.

Disapproved in *Burbach v. Milwaukee Electric R. & Light Co.* 119 Wis. 384, 96 N. W. 829, holding a statute providing on the failure of a guardian to pay costs an order may be issued to show cause why he should not be punished for contempt was not unconstitutional as authorizing imprisonment for debt.

3 N. D. 480, MINNEAPOLIS, ST. P. & S. STE. M. R. CO. v. NESTER, 57 N. W. 510.

3 N. D. 485, LUDLOW v. FARGO, 57 N. W. 506.

Negligence of municipality in care of streets and bridges.

Cited in *Gagnier v. Fargo*, 11 N. D. 73, 95 Am. St. Rep. 705, 88 N. W. 1030, holding a city not liable for injuries received by a person riding a bicycle because of the defective condition of the sidewalk although the riding on the sidewalk was lawful where the walks were in a reasonably safe condition for pedestrians.

Cited in note in 20 L.R.A.(N.S.) 518, 701, 703, on liability of municipality for defects or obstructions in streets.

Distinguished in *Vail v. Amenia*, 4 N. D. 239, 59 N. W. 1092, holding a township not liable for the acts or negligence of its officers in maintaining and repairing bridges therein, although empowered to raise revenue for the purpose.

3 N. D. 493, FISHER v. BOUISSON, 57 N. W. 505.

Requisites of complaint.

Cited in *Viets v. Silver*, 19 N. D. 445, 126 N. W. 239, to point that complaint must show that no other proceedings at law or otherwise have been had to recover mortgage debt.

3 N. D. 496, PEOPLE'S BANK v. SCHOOL DIST. NO. 52, 28 L.R.A. 642, 57 N. W. 787.

Necessity of strict compliance with statute authorizing the issuance of bonds.

Cited in *Stowell v. Rialto Irrig. Dist.* 155 Cal. 215, 100 Pac. 248, holding bonds of an irrigation district invalid where issued for a shorter period than that provided by the statute authorizing their issuance; *Livingston v. School Dist. No. 7*, 9 S. D. 345, 69 N. W. 15, holding invalid, school district bond in larger denominations than the five hundred dollars fixed by Dakota statute; *Livingston v. School District No. 7*, 11 S. D. 150, 76 N. W. 301, sustaining right to recover on quantum meruit by one building schoolhouse accepted and continuously used by school district where its bonds, issued by district as evidence of indebtedness, are adjudged void as of a denomination in excess of amount allowed by statute.

Cited in note in 51 Am. St. Rep. 851, on municipal bonds in hands of bona fide holders.

3 N. D. 502, POWER v. LARABEE, 44 AM. ST. REP. 577, 57 N. W. 789.

Effect of inadequacy of price on the right to set aside a judicial sale.

Cited in *Fraser v. Seeley*, 71 Kan. 169, 79 Pac. 1081, holding a mortgage foreclosure sale would not be set aside at the instance of the judgment debtor because of the inadequacy of the price for which the land was sold where it is not shown that the judgment debtor was prejudiced by such sale; *Northwestern Mortg. Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W. 648, holding sale on foreclosure by advertisement, for inadequate price, voidable only.

Distinguished in *Warren v. Stinson*, 6 N. D. 293, 70 N. W. 279, holding inadequacy of price accompanied by any circumstance indicating bad faith strong ground for cancellation of execution sale where purchaser is not a stranger.

Time for motion to set aside sale for inadequacy of price.

Cited in *Northwestern Mortg. Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W.

648, holding that a motion to set aside a foreclosure sale by advertisement for inadequacy of price or because the land was sold in gross, must be made within a reasonable time.

Sale on foreclosure in gross.

Cited in *Trenery v. American Mortg. Co.* 11 S. D. 506, 78 N. W. 991, holding that mortgaged land is properly sold in gross on foreclosure if no bids can be obtained for the lots when offered separately; *Northwestern Mortg. Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W. 648, holding a sale in gross in foreclosure proceedings by advertisement avoidable only.

Effect of foreclosure sale by one having other than the record title.

Cited in *Higbee v. Daeley*, 15 N. D. 339, 109 N. W. 318, considering but not deciding whether the foreclosure sale of land in the name of the mortgagee by the assignee whose assignment was unrecorded was anything more than a mere irregularity.

Rights and duties of redemptioner.

Cited in *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453, holding one assuming the attitude and obtaining the benefits of a redemptioner must also assume the obligations of a redemptioner; *McDonald v. Beatty*, 10 N. D. 511, 88 N. W. 281, holding that a mortgagor, by knowingly permitting a third party to redeem from a foreclosure sale under the mortgage, is estopped from showing an oral agreement with the purchasers at the foreclosure sale, by which they were to hold the sheriff's certificate as a mortgage.

Adjournment of judicial sale.

Cited in note in 97 Am. St. Rep. 657, on adjournment of execution and judicial sales.

3 N. D. 513, ROSHOLT v. MEHUS, 23 L.R.A. 239, 57 N. W. 783.

Effect of divorce on the homestead interests of the parties.

Cited in *Bedal v. Sake*, 10 Idaho, 270, 66 L.R.A. 60, 77 Pac. 638, holding a wife abandoning her husband and securing a divorce in another state where she remarries, cannot years afterwards return to the state and maintain an action to obtain her interest in the homestead of herself and her former husband; *Barkman v. Barkman*, 209 Ill. 269, 70 N. E. 652, holding a wife awarded a decree of divorce which made no mention of the homestead rights of the parties but did make provision for the wife, could not maintain a bill to have a homestead in the premises set off to her; *Goldsborough v. Hewitt*, 23 Okla. 66, 99 Pac. 907, holding where a decree of divorce is granted to a husband which does not make any arrangement with respect to the homestead, it is discharged of any interest of the wife therein; *Brady v. Kreuger*, 8 S. D. 464, 66 N. W. 1083, holding divorced wife not entitled to homestead rights in premises previously occupied as homestead by her husband and herself; *Moore v. Ward*, 107 Tenn. 731, 64 S. W. 1087, holding that under Shannon's Code § 3810, providing that where a wife obtains a divorce on account of the husband's fault and misconduct the title to the homestead shall be vested in her

"by the decree of the court granting the divorce," where no question of alimony or homestead was raised by the pleadings in such case or mentioned in the decree, the property will not be awarded to the wife in a subsequent independent action as against the vendee under a sale on execution prior to the divorce.

Cited in notes in 11 L.R.A.(N.S.) 104, on effect of divorce on community property in absence of adjudication; 16 L.R.A.(N.S.) 114, on continuance of family as condition of continuance of homestead where a condition of inception.

Conclusiveness of decree of divorce on the rights of the parties.

Cited in *Baird v. Connell*, 121 Iowa, 278, 96 N. W. 863, holding a decree in divorce proceedings which awarded alimony to the wife adjudicated the rights of the wife so as to be conclusive of her rights in lands in which both parties claimed the interest.

Partition of homestead.

Cited in note in 4 L.R.A.(N.S.) 786, on partition of homestead.

3 N. D. 532, STATE v. KERR, 58 N. W. 27.

Acts done in the "name" of another.

Cited in *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71, holding authority to "sell in my name" given to an agent gave the agent authority to contract for the sale of realty.

Sufficiency of averments of information.

Followed in *State v. Bednar*, 18 N. D. 484, 121 N. W. 614, 20 A. & E. Ann. Cas. 458, holding sufficient indictment entitled in name of state of North Dakota and designating such state as plaintiff.

Cited in *Caples v. State*, 3 Okla. Crim. Rep. 72, 26 L.R.A.(N.S.) 1033, 104 Pac. 493, holding the omission of the words "in the name and by the authority of the state" was not fatal to an information where it so appeared from the record of the case; *State v. Pirkey*, 22 S. D. 550, 118 N. W. 1042, 18 A. & E. Ann. Cas. 192, holding that information charging buying and receiving stolen property is not bad as charging two separate offenses.

Cited in note in 26 L.R.A.(N.S.) 1036, on necessity that indictment or information show on face that prosecution carried on in name and by authority of state.

3 N. D. 532, STATE v. MARCKS, 58 N. W. 25.

Duplicity in information.

Cited in *State v. Mattison*, 13 N. D. 391, 100 N. W. 1091, holding information for shooting with intent to kill was double in pleading facts suitable to charge maiming.

Distinguished in *State v. Climie*, 12 N. D. 33, 94 N. W. 574, where it was held that the fact that the offense charged in the information included another smaller constituent offense did not render the information bad for duplicity.

Felonious assaults and lesser offenses.

Cited in *State v. Cruikshank*, 13 N. D. 337, 100 N. W. 697, holding a verdict of "assault with a dangerous weapon with intent to do bodily harm" did not warrant a judgment for the offense defined in the code as an attempt to shoot with intent to do bodily harm; *State v. Belyea*, 9 N. D. 353, 83 N. W. 1, holding one charged in information with murder in commission of a felony cannot be convicted of such felony.

Disapproved in *Mulloy v. State*, 58 Neb. 204, 78 N. W. 525, holding that under an information for assault with intent to inflict great bodily injury, framed under Neb. Crim. Code, § 17b, the defendant may be convicted of an assault and battery.

3 N. D. 538, GLOBE INVEST. CO. v. BGYUM, 58 N. W. 339.

Followed without discussion in *Wilson v. Kartes*, 11 N. D. 92, 88 N. W. 1023; *Marck v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 86, 105 N. W. 1106.

Effect of failure to assign errors on appeal.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667; *Williams Bros. Lumber Co. v. Kelly*, 23 S. D. 582, 122 N. W. 646,—holding that failure to assign errors will entail affirmance of judgment; *O'Brien v. Miller*, 4 N. D. 308, 60 N. W. 841, holding that statutory requirements that the supreme court will "in its discretion" only regard errors assigned with requisite exactness will be strictly enforced in absence of assignment of errors; *Hostetter v. Brooks Elevator Co.* 4 N. D. 357, 61 N. W. 49, holding that assignments of error which do not refer to the abstract as required by statute will not be considered unless the rule has relaxed in furtherance of justice and on proper terms; *Nichols & S. Co. v. Stangler*, 7 N. D. 102, 72 N. W. 1089, holding that evidence in record cannot be re-examined on appeal where statement of the case does not specify the particulars in which the evidence is alleged to be insufficient.

3 N. D. 538, KELLOGG, J. & CO. v. GILMAN, 58 N. W. 339.**Right to complain of arrest of judgment against codefendant.**

Distinguished in *Birkel v. Chandler*, 26 Wash. 241, 66 Pac. 406, holding that a defendant in an action in tort cannot complain if the trial court set aside a verdict and arrest judgment against a codefendant.

3 N. D. 540, HAVERON v. ANDERSON, 58 N. W. 340.**3 N. D. 546, ROESLER v. TAYLOR, 58 N. W. 342.****Constitutional guaranty of homestead exemption.**

Cited in *Calmer v. Calmer*, 15 N. D. 120, 106 N. W. 684, on the scope of the constitutional guaranty of a homestead exemption.

Self-executing provision of constitution as to exemption.

Cited in *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577, holding that N. D. Const. § 176, which declares that the legislative assembly—Dak. Rep.—15.

bly shall, by a general law, exempt from taxation certain kinds of property, is not self-executing.

3 N. D. 549, MINER v. FRANCIS, 58 N. W. 343.

Effect of special appearance on time to answer.

Cited in *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591 (dissenting opinion), on the effect of a special appearance questioning the jurisdiction on the time of defendant to answer; *Benoit v. Revoir*, 8 N. D. 226, 77 N. W. 605, holding jurisdiction of person by justice of peace, if lost by continuance, restored by appearing on adjourned day, attempting to appear specially, and moving for dismissal for loss of jurisdiction, and participating in trial on merits after denial of such motion.

Sufficiency of designation of return day.

Cited in *Hanson v. Gronlie*, 17 N. D. 191, 115 N. W. 666, holding a docket entry made on Saturday that the case was adjourned till Monday, 1 o'clock p. m. was sufficiently definite as to the adjourned date as not to affect the jurisdiction of the justice.

Waiver of right to question the jurisdiction of court.

Cited in *Parsons v. Venzke*, 4 N. D. 452, 50 Am. St. Rep. 669, 61 N. W. 1036, holding that the jurisdiction of a commissioner of the general land office on proceedings to cancel an entry is not open to collateral attack for failure to serve the summons personally, where defendant appeared generally after his special appearance to object to the jurisdiction was overruled.

Cited in note in 16 L.R.A.(N.S.) 178, on contest on merits after special appearance, as waiver of objections to jurisdiction over person.

Distinguished in *Heard v. Holbrook*, 21 N. D. 348, 131 N. W. 251, holding that one who, after appearing specially for purpose of objecting to jurisdiction, thereafter moves for change of venue, and answers and goes to trial on merits, waives objection of jurisdiction.

Disapproved in *Corbett v. Physicians' Casualty Asso.* 135 Wis. 505, 16 L.R.A.(N.S.) 177, 115 N. W. 365, holding a defendant who after appearing solely to raise the question of jurisdiction submits to a trial upon the merits thereby waives the right to thereafter question the jurisdiction of the court as to his person.

3 N. D. 555, SMITH v. NORTHERN P. R. CO. 58 N. W. 345.

Opinions of witnesses.

Cited in *State v. Denny*, 17 N. D. 519, 117 N. W. 869, holding the opinion of a nonexpert witness as to the difference in certain letter paper should have been confined to facts.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 4 N. D.

4 N. D. 1, **JASPER v. HAZEN**, 23 L.R.A. 58, 58 N. W. 454.

Sufficiency of evidence to support finding.

Cited in *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792; *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462; *James River Nat. Bank v. Weber*, 19 N. D. 702, 124 N. W. 952,—holding that finding by court will not be distributed on appeal unless clearly against the preponderance of evidence; *Hostetter v. Brooks Elevator Co.* 4 N. D. 357, 61 N. W. 49, holding that finding by court supported by evidence though not wholly convincing will not be disturbed on appeal; *Re Eaton*, 4 N. D. 514, 62 N. W. 597, holding that finding on parol evidence on which disbarment proceedings are based will be reversed when clearly against the preponderance of evidence after supplementing it with all legitimate inferences and impressions; *Nichols & S. Co. v. Stangler*, 7 N. D. 102, 72 N. W. 1089, holding that evidence in record cannot be re-examined on appeal where statement of the case does not specify the particulars in which the evidence is alleged to be insufficient; *Roberts v. Little*, 18 N. D. 608, 120 N. W. 563 (dissenting opinion), on sufficiency of evidence to justify judgment in replevin.

Deed absolute as mortgage.

Cited in *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499, holding that agreement to convey on fixed terms does not necessarily show deed to be mortgage.

Parol defeasance of deed absolute.

Cited in *Forester v. Van Auker*, 12 N. D. 175, 96 N. W. 301, holding parol evidence is admissible to show that a deed absolute on its face is a mortgage in fact; *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714, hold-

ing conditional agreement for reconveyance on repayment of consideration paid insufficient to raise a presumption that a mortgage was intended; *Rubo v. Bennett*, 85 Ill. App. 473, holding that a deed absolute in form will be held a mortgage in a doubtful case, where it appears that negotiations for a loan were pending when the deed was given, which was for an inadequate consideration, and the grantor obtained an extension of mortgages thereon, and paid the interest and taxes.

— Burden of proof.

Cited in *Northwestern F. & M. Ins. Co. v. Lough*, 13 N. D. 601, 102 N. W. 160, holding burden of showing that deed in form was really a mortgage is upon the one so affirming and requires clear satisfactory and specific proof; *Anderson v. Anderson*, 17 N. D. 275, 115 N. W. 836, holding that one asserting duress in avoidance of a deed has the burden of proving the same not merely by preponderance of evidence but by proof of the clearest and most satisfactory character; *Riley v. Riley*, 9 N. D. 580, 84 N. W. 347, holding clear, strong, and convincing evidence required on part of one seeking to cancel deed for material alteration after execution; *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289, holding that to declare a deed and contract to reconvey a mortgage requires a showing that is clear, satisfactory and specific; *Carter v. Carter*, 14 N. D. 66, 103 N. W. 425, holding that in order to overthrow the presumption of title arising from a deed there must be more than a preponderance of the evidence and the proof must be of such a character as to leave no substantial doubt in the mind of the chancellor; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306, holding that in order to destroy the recitals in a deed or other contract the proof must leave in the mind of the chancellor no substantial doubt; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856, holding that to show a deed or other instrument absolute upon its face to have been intended only as a security requires clear, convincing and satisfactory evidence; *Little v. Braun*, 11 N. D. 410, 92 N. W. 800, holding the evidence not to constitute that high degree of proof required to establish a parol defeasance of a solemn instrument.

Presumption favoring court's findings of fact.

Followed in *Ruettell v. Greenwich Ins. Co.* 16 N. D. 546, 113 N. W. 1029; *Dowagiac Mfg. Co. v. Hellekson*, 13 N. D. 257, 100 N. W. 717,—on the weight to be given a finding of fact when properly challenged on appeal.

Cited in *Parkinson v. Thompson*, 164 Ind. 609, 73 N. E. 109, 3 A. & E. Ann. Cas. 677, holding that under statute providing for appeal from court's findings of fact a trial de novo is not intended but the presumption is in favor of the finding and the burden is upon the one alleging error to demonstrate its existence; *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479, on weight to be given findings of trial court.

Trial de novo on appeal.

Cited in *Re Burnette*, 73 Kan. 609, 85 Pac. 575, holding the supreme court in a disbarment case was not to try the case strictly de novo but was a reviewing court; *Christianson v. Farmers' Warehouse Asso.* 5 N.

D. 438, 32 L.R.A. 730, 87 N. W. 300, holding that duty of supreme court to try cause anew on judgment roll and render final judgment according to justice of the case does not require it to perform any functions not properly pertaining to appellate jurisdiction.

Construction of adopted statute.

Cited in *State v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, holding that legislature in adopting statute of another state is presumed to have adopted construction there given it.

4 N. D. 18, McGLYNN v. SCOTT, 58 N. W. 460.

Effect of compromise agreement.

Cited in *Thayer v. Buchanan*, 46 Or. 111, 79 Pac. 343, holding that in the absence of fraud or mistake the compromise of bona fide claims equally within the knowledge of the parties must be held final and conclusive as to matters going to make up the settlement.

— Basis of compromise.

Cited in *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544, holding that there must be a bona fide dispute between the parties before the principles applicable to compromise can be applied.

Cited in note in 25 L.R.A.(N.S.) 276, 281, 295, on void, invalid, or unfunded claim as subject of valid compromise.

— Consideration.

Cited in *Fryer v. Cetnor*, 6 N. D. 518, 72 N. W. 909, holding compromise of bona fide controversy not sufficient consideration for promise where no enforceable claim existed in favor of promisee; *Heath v. Potlatch Lumber Co.* 18 Idaho, 42, 27 L.R.A.(N.S.) 707, 108 Pac. 343, holding that compromise of bona fide disputed claim constitutes good consideration for promise; *Heath v. Potlatch Lumber Co.* 18 Idaho, 42, 27 L.R.A.(N.S.) 707, 108 Pac. 343, holding that an agreement to pay a compromise amount to avoid litigation upon a claim urged in good faith on the one hand and denied on the other is based upon sufficient consideration and is enforceable; *Sing On v. Brown*, 44 Or. 11, 74 Pac. 207, holding that where there was an honest difference between the parties as to the effect of a sale upon a lease of the property containing defeasance clause in case of sale a compromise agreement was based upon sufficient consideration.

Cited in note in 5 L.R.A.(N.S.) 726, on cancelation of invalid contract as consideration for a promise.

Burden of proving lack of consideration.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding that party seeking to invalidate instrument has burden of proving want of sufficient consideration.

4 N. D. 30, FLAGG v. SCHOOL DIST. NO. 70, 25 L.R.A. 363, 58 N. W. 499, Later appeal in 5 N. D. 191, 65 N. W. 674.

Exchange provision as affecting negotiability of negotiable instrument.

Cited in *Folsom v. Kilbourne*, 5 N. D. 402, 67 N. W. 291, holding that

a note is rendered non-negotiable by a provision therein for exchange on New York; *Tronson v. Colby University*, 9 N. D. 559, 84 N. W. 474, holding the negotiability of a note destroyed by a provision for current exchange on New York; *Nicely v. Commercial Bank*, 15 Ind. App. 563, 57 Am. St. Rep. 245, 44 N. E. 572, holding a promissory note to pay principal and interest, "with exchange," non-negotiable for uncertainty as to amount; *Nicely v. Winnebago Nat. Bank*, 18 Ind. App. 30, 47 N. E. 476, holding that when a promissory note provides for the payment of any undefined sum by way of exchange it is uncertain in amount and non-negotiable; *Culbertson v. Nelson*, 93 Iowa, 187, 27 L.R.A. 222, 57 Am. St. Rep. 266, 61 N. W. 854, holding a bill of exchange for a certain sum, "with exchange," uncertain in amount and non-negotiable.

Cited in notes in 125 Am. St. Rep. 212, on agreements and conditions destroying negotiability; 27 L.R.A. 224, on provision for exchange as affecting negotiability.

Disapproved in *Haslach v. Wolf*, 66 Neb. 600, 60 L.R.A. 434, 103 Am. St. Rep. 736, 92 N. W. 574, 1 A. & E. Ann. Cas. 384, holding that agreement for "exchange" to a point other than the place of payment does not render a promissory note non-negotiable.

Estoppel to question corporate authority.

Cited in *State v. School Dist. No. 50*, 18 N. D. 616, 138 Am. St. Rep. 787, 120 N. W. 555, holding innocent purchasers not estopped to question authority of public corporation to issue bonds, by mere recitals therein.

4 N. D. 66, ERSKINE v. NELSON COUNTY, 27 L.R.A. 696, 58 N. W. 348.

Legislative ratification of municipal contracts.

Cited in *Steele County v. Erskine*, 39 C. C. A. 173, 98 Fed. 215, affirming 87 Fed. 630, sustaining power of legislature to validate acts and contracts of municipalities which were void for want of authority.

Annotation cited in *Wharton v. Greensboro*, 149 N. C. 62, 62 S. E. 740, holding that the legislature may validate any contract of a municipal corporation which it could have previously authorized.

4 N. D. 92, CLYDE v. JOHNSON, 58 N. W. 512.

Service by mail.

Cited in *Griffin v. Walworth County*, 20 S. D. 142, 104 N. W. 1117, holding that notice of order made by the court and mailed to the attorney of a party was, in contemplation of law, served upon him whether he received it or not.

4 N. D. 100, PAULSON v. WARD, 58 N. W. 792, Later phases of same case in 6 N. D. 317, 70 N. W. 271, 6 N. D. 359, 71 N. W. 543; 6 N. D. 609, 72 N. W. 1013; 8 N. D. 97, 76 N. W. 1046; 19 N. D. 254, 83 N. W. 15.

Fraudulent conveyances.

Cited in *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271, hold-

ing evidence sufficient to warrant a finding of actual fraud, although there was also evidence that defendant took deeds absolute to save foreclosure in case of default and avoid foreclosure in the year given for redemption.

Distinguished in *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320, holding that the fact that conveyance in fraud of creditors was made upon valuable consideration does not relieve the transaction from illegality.

Prerequisites to right of creditor to have receiver appointed.

Cited in note in 23 L.R.A. (N.S.) 39, on conditions precedent to equitable remedies of creditors.

Held *obiter* in *Minkler v. United States Sheep Co.* 4 N. D. 507, 33 L.R.A. 546, 62 N. W. 594, holding a judgment creditor not entitled to have a receiver of his debtor's property appointed, without showing the issuance and return of execution unsatisfied.

4 N. D. 112, RUSSELL & CO. v. AMUNDSON, 59 N. W. 477.

Denial on information and belief.

Cited in *Massachusetts Loan & T. Co. v. Twichell*, 7 N. D. 440, 75 N. W. 786, holding insufficient, answer alleging that defendants have no "information" sufficient to form belief as to specified allegations of complaint; *Van Dyke v. Doherty*, 6 N. D. 263, 69 N. W. 200, holding that one cannot deny allegation by denying sufficient knowledge or information to form belief thereon when means of full and positive information in form of public records are readily accessible.

Cited in note in 133 Am. St. Rep. 108, as to when denials on information and belief are permissible.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

Pleadings and evidence in trover.

Cited in notes in 9 N. D. 633, on pleadings in actions for trover and conversion; 9 N. D. 635, on evidence in actions for trover and conversion.

4 N. D. 119, RE WEBER, 26 L.R.A. 621, 59 N. W. 523, Later phase of same case in 4 N. D. 135, 59 N. W. 529.

Costs on dismissal of appeal.

Cited in *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860, holding that sureties for appeal from district court were bound for costs adjudged by district court in dismissing appeal from justice court.

Entry of judgment.

Cited in *McTabish v. Great Northern R. Co.* 8 N. D. 333, 79 N. W. 443, holding direction by court that party "have and recover judgment" for specified amount ordering the clerk to enter judgment accordingly not an official judgment but mere order for judgment; *Christie v. Iowa L. Ins. Co.* 111 Iowa, 177, 82 N. W. 499, holding that a judge's finding of facts, with his conclusions of law, ending with the direction that judg-

ment be entered, as stipulated by the parties, never became a judgment, although filed with the clerk, if never spread upon the records of the court; *Rolette County v. Pierce County*, 8 N. D. 613, 80 N. W. 804, holding that although an order for judgment is not a judgment, the party against whom such order was granted cannot, after voluntarily paying the amount thereof and otherwise treating it as a judgment for more than ten years, have the order set aside and be permitted to amend the complaint; *McTavish v. Great Northern R. Co.* 8 N. D. 333, 79 N. W. 443, holding entry by clerk in judgment book of court's order that a party "have and recover judgment" for specified amount not an entry of judgment; *Locke v. Hubbard*, 9 S. D. 364, 69 N. W. 588, holding paper in form of judgment prepared and signed by court or judge not a judgment before entry by the clerk; *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37, holding that under the statutes there can be no judgment capable of being docketed or enforced until it is entered in the judgment book hence the judgment docket cannot be admitted on the best evidence of the judgment.

Distinguished in *Re Lemery*, 15 N. D. 312, 107 N. W. 365, holding that in county court the document filed by the judge is the original decree and the record book contains merely a copy.

Appealability of order.

Followed in *Lough v. White*, 13 N. D. 387, 100 N. W. 1084, holding that order of district court dismissing appeal from justice court is not appealable.

Cited in *Prondzinski v. Garbutt*, 9 N. D. 239, 83 N. W. 23, holding orders for judgment not appealable; *Re Eaton*, 7 N. D. 269, 74 N. W. 870, holding mere order for judgment not a final order for purposes of appeal; *Dibble v. Hanson*, 17 N. D. 21, 114 N. W. 371, 16 A. & E. Ann. Cas. 1210; *Larson v. Walker*, 17 N. D. 247, 115 N. W. 838,—holding order for judgment can only be reviewed on appeal from judgment; *Hanburg v. National Bank*, 8 N. D. 328, 79 N. W. 336, holding judgment upon an order to show cause why an action should not be dismissed not appealable; *Field v. Great Western Elevator Co.* 5 N. D. 400, 67 N. W. 147, holding that appeal will not lie from order of district court directing dismissal of appeal from judgment of the county court granted on motion by appellant even though entered in the minutes of the district court by its clerk; *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, holding order dismissing action at close of plaintiff's evidence for failure of proof which without change of form or terms is entered in the clerk's judgment book concluding as follows: "The plaintiff's action is hereby dismissed: "Done in open court," on specified date appealable as a final judgment though improper in form; *Hazeltine v. Browne*, 9 S. D. 351, 69 N. W. 579, holding formal judgment of dismissal necessary to dispose of appeal which is ineffectual for any purpose for nonjustification of sureties on undertaking within statutory period; *Travelers' Ins. Co. v. Weber*, 4 N. D. 135, 59 N. W. 529 (dissenting opinion), the majority holding the sureties on an appeal bond conditioned on the affirmation of the judgment not liable, on a dismissal of the appeal on the ground that the determination appealed from was an order instead of a judgment.

Distinguished in *Oliver v. Wilson*, 8 N. D. 590, 80 N. W. 757, holding order granting peremptory writ of mandamus appealable as a final order in a special proceeding affecting a substantial right.

When mandamus lies.

Cited in *Robertson v. Donelan*, 138 Ky. 149, 127 S. W. 754, holding that mandamus does not lie to correct erroneous judgment of justice of peace.

4 N. D. 135, TRAVELERS' INS. CO. v. WEBER, 59 N. W. 529.

4 N. D. 140, GANS v. BEASLEY, 59 N. W. 719.

Sufficiency of summons against firm.

Cited in *Springfield F. & M. Ins. Co. v. Gish*, 23 Okla. 824, 102 Pac. 708, holding summons in error designating defendants merely by firm name is not absolutely void but may be remedied by amendment.

Time of issuance of writ of attachment.

Cited in *Taughner v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 747, holding that writ issued by justice of peace before summons is issued in action, confers no authority to make attachment.

Amendment of affidavit for attachment.

Cited in *Ask v. Armstrong*, 9 S. D. 265, 68 N. W. 743, holding order permitting amendment of affidavit for attachment by incorporating superfluous statement therein not prejudicial error.

What is a general appearance and its effect.

Cited in *Flannery v. Trainor*, 13 Colo. App. 290, 57 Pac. 189, holding that by coupling, with a motion to dismiss for want of jurisdiction, a motion for a nonsuit because plaintiff had failed to make out a case on the merits, a defendant makes a general appearance and waives his rights to ask for a dismissal by reason of want of jurisdiction; *Raymond v. Nix*, 5 Okla. 656, 49 Pac. 1110, holding an attack on a proceeding of a court, upon nonjurisdictional as well as jurisdictional grounds, a general appearance, by which all jurisdictional defects over the person are waived, although it is stated in the motion that only a special appearance is made.

Distinguished in *Stewart v. Parsons*, 5 N. D. 273, 65 N. W. 672, holding that a general appearance after rendition of judgment against one not served with summons, for the purpose of vacating the judgment and being permitted to answer, and for further relief, does not validate the judgment.

Waiver of defects in service generally.

Cited in *Mars v. Oro Fino Min. Co.* 7 S. D. 605, 65 N. W. 19, holding defect in serving summons waived by inclusion, in notice of motion to quash service, of a motion to dismiss for insufficiency of complaint.

4 N. D. 156, ROBY v. BISMARCK NAT. BANK, 50 AM. ST. REP. 633, 59 N. W. 719.

Rights acquired by contract for deed.

Cited in *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623, holding that one in possession under contract for deed is the beneficial owner in equity.

— Wife's homestead rights.

Cited in *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245, holding that a wife has no superior homestead right to that of her husband in land held under forfeited contract for deed.

Cited in note in 95 Am. St. Rep. 931, on effect of conveyance or encumbrance of homestead by one spouse only.

4 N. D. 164, SIGMUND v. BANK OF MINOT, 59 N. W. 966.

When answer is frivolous.

Cited in *Sifton v. Sifton*, 5 N. D. 187, 65 N. W. 670, holding that general denial of complaint founded on written contract set out at length therein embracing certain conditions precedent to be performed by plaintiff, the complaint alleging full performance of "all the conditions" of the contract cannot be stricken out as frivolous.

4 N. D. 167, ROBERTS, T. & CO. v. LAUGHLIN, 59 N. W. 967.

Enforcement of guaranty.

Cited as leading case in *Smith v. Snow*, 16 N. D. 306, 112 N. W. 1062, on the rule that failure to first pursue the principal debtor is excused where it appears that a suit would be fruitless.

Cited in *Colby v. Farwell*, 71 N. H. 83, 51 Atl. 254, holding that creditor may first proceed against the guarantor of a note when the principal debtor is utterly insolvent and the security worthless.

Cited in note in 64 Am. St. Rep. 398, 399, 402, on guaranty of collection.

4 N. D. 175, BARRETT v. STUTSMAN, 59 N. W. 964.

Prerequisites to action on claim against county.

Cited in *Short v. White Lake Civil Twp.* 8 S. D. 148, 65 N. W. 432, holding presentation of claims against a township for audit not a condition precedent to action thereon.

4 N. D. 182, ANDERSON v. FIRST NAT. BANK, 59 N. W. 1029,
Later appeals in 5 N. D. 451, 67 N. W. 821; 6 N. D. 497, 72
N. W. 916.

4 N. D. 197, HOSMER v. SHELDON SCHOOL DIST. NO. 2, 25
L.R.A. 383, 50 AM. ST. REP. 639, 59 N. W. 1035.

Teachers' certificate as prerequisite to contract for employment.

Cited in *Bryan v. Fractional School Dist. No. 1*, 111 Mich. 67, 69 N. W. 74, holding that a contract to teach, with one whose certificate had been changed without authority from three to four years, cannot be made the

basis of a recovery, under 2 How. Stat. § 5065, providing that no contract with any person not holding a legal certificate of qualification then authorizing him to teach shall be valid; *Western U. Teleg. Co. v. Partlow*, 30 Tex. Civ. App. 599, 71 S. W. 584, on the necessity for a teachers' certificate in order to render valid a contract to teach.

4 N. D. 205, *CUTTER v. POLLOCK*, 25 L.R.A. 377, 50 AM. ST. REP. 644, 59 N. W. 1062, Reaffirmed on later appeal in 7 N. D. 631, 76 N. W. 235.

What is an assignment for creditors.

Cited in *Dyson v. St. Paul Nat. Bank*, 74 Minn. 439, 73 Am. St. Rep. 358, 77 N. W. 236, holding that if the members of a partnership, in good faith, solely to secure debts to a part of their creditors, transfer to them by bill of sale, or otherwise, all the firm property, reserving a right of redemption, the conveyance is not an assignment for creditors, but a mortgage and a valid security; *Smith v. Baker*, 5 Okla. 326, 49 Pac. 61, holding that mortgages of all insolvent debtor's personal property, executed contemporaneously in good faith in payment of bona fide indebtedness to a portion only of his creditors, do not amount to a voluntary assignment within the Oklahoma assignment law.

Cited in note in 58 Am. St. Rep. 87, on fraudulent assignments for creditors.

Costs in receivership.

Cited in *Patterson v. Ward*, 6 N. D. 609, 72 N. W. 1013, holding that the discretion of the trial court in fixing a receiver's fees will not be disturbed on appeal in the absence of a clear abuse of discretion; *Nutter v. Brown*, 58 W. Va. 237, 1 L.R.A. (N.S.) 1083, 52 S. E. 88, 6 A. & E. Ann. Cas. 94, on the propriety of decree for extraordinary costs in receivership in favor of one party and against another and holding such an allowance not discretionary and hence to be appealable.

Cited in note in 25 L.R.A. (N.S.) 416, on liability for cost of receivership where final judgment is against the moving party.

4 N. D. 219, *FARGO GAS & COKE CO. v. FARGO GAS & ELECTRIC CO.* 37 L.R.A. 593, 59 N. W. 1066.

False representations.

Cited in *Kelty v. McPeake*, 143 Iowa, 567, 121 N. W. 529, holding failure to examine records to ascertain indebtedness does not estop landlord from maintaining action to cancel lease because of tenant's false representations as to financial condition; *Holmes v. Rivers*, 145 Iowa, 702, 124 N. W. 801, holding failure to use available means of detecting falsity of statements or to examine records no defense to action for false representations as to price paid for property put in exchange deal; *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032, holding representations as to value of property, made with knowledge of their falsity by one having full knowledge of character and condition of property, the other party having but slight knowledge and no means of obtaining full knowledge are fraudulent representations and not mere expression of opinion.

Annotation cited in *Odbert v. Marquet*, 163 Fed. 892, on the general subject of fraudulent misrepresentations as affecting contracts for sale of realty.

Cited in note in 22 L.R.A.(N.S.) 1211, on what representations afford ground for rescinding sale of books or defense to action for price.

— Right to rely on vendor's statements.

Cited in *Roberts v. Holliday*, 10 S. D. 576, 74 N. W. 1034, sustaining right of purchaser of land to rely on representations of owner's agent as to boundaries; *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 12 L.R.A.(N.S.) 427, 104 S. W. 758, as an example of the judicial tendency to liberalize the defense of false representations although there may have been some negligence in relying thereon; *Judd v. Walker*, 114 Mo. App. 128, 89 S. W. 558 (re-reported upon certification to supreme court 215 Mo. 312), holding that doctrine caveat emptor has no application where vendor by false representations as of his own knowledge entraps vendee into bargain; *Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503, holding that purchaser of irrigated land, unfamiliar with the character of such property and the laws regarding it may recover from real estate dealer who sold it by means of false representations particularly where purchaser informed dealer he relied upon the representations; *Hunt v. Barker*, 22 R. I. 18, 84 Am. St. Rep. 812, 46 Atl. 46, holding that one is not precluded from maintaining an action for false representations as to the ownership of land by the fact that he might have ascertained the true state of the title by an examination of the land records; *Tacoma v. Tacoma Light & Water Co.* 17 Wash. 468, 50 Pac. 55, holding that a city is not necessarily prevented from recovering damages for deceit and fraudulent misrepresentations on a sale to it by a private corporation of a light and water plant, because it made a partial examination of the property, where such examination was not a complete and thorough one, and the purchase was made in reliance on the representations made; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496, holding that a grantor of land who falsely represents the number of acres of bottom lands, of crops, and the rentals of pasture land, cannot set up as a defense that the purchaser might have discovered the falsity of the representations by careful inspection, inquiry and survey.

Cited in note in 17 L.R.A.(N.S.) 420, on right of purchaser of personalty to rely on seller's computation of price, or estimate of quantity.

— Burden of proof.

Cited in *Long v. Davis*, 136 Iowa, 734, 114 N. W. 197, approving instruction upon the burden of proving reliance upon the alleged false representations.

— Measure of damages.

Cited in *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 6 A. & E. Ann. Cas. 1057, holding measure of damages for false representation whereby exchange of realty for stock was induced is the difference in value between that which plaintiff received and that which he would have received had representations been true.

Cited in notes in 123 Am. St. Rep. 786, on measure of damages for

fraudulent representations including contract for sale or exchange of land; 8 L.R.A.(N.S.) 806, on measure of damages for fraudulent representations in sale of realty.

4 N. D. 228, ENDERLIN STATE BANK v. JENNINGS, 59 N. W. 1058.

Effect of judgment by default.

Cited in *Sobolisk v. Jacobson*, 6 N. D. 175, 69 N. W. 46, holding a judgment by default in an action on contract, the complaint in which contained allegations as to false pretenses, adjudging that the debt was incurred for property so obtained, no evidence as to the facts in regard thereto in an action by the judgment debtor against the sheriff for seizing property which was exempt except as against a judgment on a debt so incurred.

Right of other than trial judge to take action.

Cited in *Wyandotte Bank v. Murray*, 84 Kan. 524, 114 Pac. 847, holding that judges of one division ought to refrain from reviewing and reversing of orders of judge of another division, unless for some good reason; *Northwestern Port Huron Co. v. Kickrick*, 22 S. D. 89, 115 N. W. 525, holding that motion for new trial of action tried before substitute judge, and not previously presented to such substitute judge, made on ground of erroneous rulings at trial may be entertained by regular judge.

4 N. D. 239, VAIL v. AMENIA, 59 N. W. 1092.

Township liability for defective highway.

Cited in *James v. Wellston Twp.* 18 Okla. 56, 13 L.R.A.(N.S.) 1219, 90 Pac. 100, 11 A. & E. Ann. Cas. 938, holding townships not liable for failure to maintain highways in the absence of statute imposing such liability.

Liability of township to make compensation for land taken for drains.

Distinguished in *Noble Twp. v. Aasen*, 8 N. D. 77, 76 N. W. 990, holding the unlawful manner of appropriating land by township officers acting under color of office for the construction of ditches and drains thereon does not relieve the township from its liability to compensate the owner for the value of the lands so taken.

4 N. D. 251, DOWS v. GLASPEL, 60 N. W. 60.

Gambling in futures.

Cited in *Boyce v. O'Dell Commission Co.* 109 Fed. 758, holding that "bucket shop" dealings in futures are not within 3 Burns's (Ind.) Rev. Stat. 1894, § 6676, providing that a person betting on a "game," and losing any money thereon, and paying the same, may recover it by action.

Cited in note in 11 L.R.A.(N.S.) 575, on right of broker to recover commissions or advances in furthering wagering contract.

- Intent in making contract for future delivery of grain.

Cited in *Beidler & R. Lumber Co. v. Coe Commission Co.* 13 N. D. 639, 102 N. W. 880, holding a contract for future delivery of grain is void only when the parties intend an actual delivery at the specified date and

not a mere settlement upon the basis of the difference in market price; *John Miller Co. v. Klovstad*, 14 N. D. 435, 105 N. W. 164, holding that if vendee intends to receive a delivery of grain contracted for in advance, the fact that vendor had no intention of so delivering does not invalidate the contract; *Ives v. Boyce*, 85 Neb. 324, 25 L.R.A. (N.S.) 157, 123 N. W. 318, holding that blackboards, telegraph wires and tickers used in "bucket shop" are not per se gambling devices although used in the furtherance of gambling contracts; *Waite v. Frank*, 14 S. D. 626, 86 N. W. 645, holding void, contract for sale of futures without any intention of delivery but with understanding that transactions shall be settled by payment of difference between contract price and market price at same time.

Evidence competent for single purpose.

Cited in *State v. Kent*, 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, holding an instruction that defendant charged with murder is not being tried for any other crime than that charged, and that evidence of any other crime committed by him would not be competent except so far as it tended to establish the crime charged or his intent, motive, or guilty knowledge of the commission thereof, equivalent to an instruction that such evidence cannot be considered as affecting his credibility as a witness.

Costs to defendant.

Cited in *Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684, holding that where a defendant recovers a judgment of \$1 upon a counterclaim he is entitled to costs, under Cal. Code Civ. Proc. § 1024, providing that costs are allowed of course to the defendant upon a judgment in his favor in an action for the recovery of money; *Spencer v. Mungus*, 28 Mont. 357, 72 Pac. 663, holding costs are allowed to defendant upon judgment in his favor regardless of whether judgment awards him any definite amount or merely defeats plaintiff's claim.

Failure to prove foreign law.

Cited in note in 67 L.R.A. 52, on how case determined when proper foreign law not proved.

4 N. D. 269, DAELEY BROS. v. MINNEAPOLIS & N. ELEVATOR CO. 60 N. W. 59.

4 N. D. 272, RIEGI v. PHELPS, 60 N. W. 402.

4 N. D. 278, MARTIN v. TYLER, 25 L.R.A. 838, 60 N. W. 392.

Followed without special discussion in *Bye v. Stafford*, 4 N. D. 304, 60 N. W. 401.

Sufficiency of title of statute.

Cited in *State ex rel. Carey v. Cornell*, 50 Neb. 526, 70 N. W. 56, holding a provision for stenographic reporters and the compensation to be allowed them, germane to the subject-matter of Neb. Laws 1879, p. 82, entitled "An Act to Amend Chapter 13 of the Revised Statutes of 1866, Entitled Courts"; *Re Monk*, 16 Utah, 103, 50 Pac. 810, holding that the title of Utah Laws of 1897, chap. 36, § 8, "An Act Providing for the Man-

ner of Locating and Recording Quartz and Placer Mining Claims," authorized provisions therein that the county recorder should perform the duties of mining recorder, and that he should receive and keep the books and records before kept and held by the district recorder, and expressly requiring the latter to deliver any such books and records in his possession to the county recorder.

Cited in notes in 64 Am. St. Rep. 94, on sufficiency of title of statute; 79 Am. St. Rep. 470, as to when title of statute embraces only one subject, and what may be included thereunder.

Power to condemn land for sewers.

Cited in *Aldrich v. Paine*, 106 Iowa, 461, 76 N. W. 812, holding that no general powers to condemn land for the construction of sewers appertain to the duties of municipal officers.

Validity of drainage assessment.

Followed in *Ross v. Prante*, 17 N. D. 266, 115 N. W. 833, upholding constitutionality of provision for having total damage by reason of ditch construction assessed by jury and having balance between benefits and damage struck by drain commissioner.

Cited in *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841, affirming legislative power to provide for issuance of drainage bonds and assess the cost to the property benefited; *Soliah v. Cormack*, 17 N. D. 393, 117 N. W. 125, sustaining constitutionality of provision delegating to drain commissioner's authority to levy special ditch assessments.

Partial invalidity of statute.

Cited in *State ex rel. Comstock v. Stewart*, 52 Neb. 243, 71 N. W. 998, holding that when part of a statute has been declared unconstitutional there is no presumption in favor of the legality of the remaining portion.

Payment for property taken under eminent domain.

Cited in *Sisson v. Buena Vista County*, 128 Iowa, 442, 70 L.R.A. 440, 104 N. W. 454, holding that a provision for bond to secure payment of damages by reason of construction of ditch is sufficient to satisfy constitutional requirement that private property shall not be taken without payment made or secured; *Brown v. Chicago, R. I. & P. R. Co.* 66 Neb. 106, 92 N. W. 128, holding that nothing short of actual payment or its equivalent will satisfy constitutional requirement for compensation for property taken under eminent domain.

Distinguished in *Redmon v. Chacey*, 7 N. D. 231, 73 N. W. 1081, holding county bonds for cost of locating and constructing drains not proper loan on county's credit.

Power of legislature over counties.

Cited in *State v. Lewis*, 18 N. D. 125, 119 N. W. 1037, holding it within power of legislature to require county to maintain its own indigent persons in state institutions for feeble-minded.

4 N. D. 304, *BYE v. STAFFORD*, 60 N. W. 401.

4 N. D. 305, BIRCHALL v. GRIGGS, 50 AM. ST. REP. 634, 60 N. W. 842.

Judgments depending on attachment of property.

Cited in note in 76 Am. St. Rep. 802, on judgments depending for validity on attachment of property.

Partial invalidity of statute.

Cited in McDermont v. Dinnie, 6 N. D. 278, 69 N. W. 294, holding that statute unconstitutional in part cannot be upheld as to remainder unless latter is complete in itself, capable of enforcement and such as the legislature might be presumed to have passed without the rejected portions.

4 N. D. 308, O'BRIEN v. MILLER, 60 N. W. 841.

Necessity and sufficiency of assignment of error.

Followed in Wilson v. Kartes, 11 N. D. 92, 88 N. W. 1023, affirming judgment of lower court without discussion, appellant having failed to assign errors in his brief as provided by rule of court.

Cited in Thompson v. Cunningham, 6 N. D. 426, 71 N. W. 128, holding that errors in the verdict, decision, or rulings of the trial court will be disregarded on appeal where the motion for new trial was based on a statement of the case which did not specify such errors; Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593, holding sufficient assignment of error setting out verbatim explicit objection to evidence the ruling on which is deemed erroneous; Marck v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 86, 105 N. W. 1106, affirming judgment below without discussion, no assignment of error appearing in the brief and no reason appearing for relaxing the rule; Sucker State Drill Co. v. Brock, 18 N. D. 532, 123 N. W. 687, holding that judgment should be affirmed because of failure to assign errors in brief; Johns v. Ruff, 12 N. D. 74, 95 N. W. 440, holding that assignment of error in the brief in proper form is not always exacted and refusing to dismiss appeal on account of such irregularity.

Necessity for statement of case.

Cited in Nichols & S. Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089, holding statement of the case necessary in cases tried by the court without a jury.

4 N. D. 311, BISSONETTE v. BARNES, 60 N. W. 841.

4 N. D. 312, STATE v. DELLAIRES, 60 N. W. 988.

What constitutes liquor nuisance.

Cited in State v. Thoemke, 11 N. D. 386, 92 N. W. 480, holding repeated sales of liquor, part of which was drunk upon defendant's premises sufficiently proves the "keeping of place" where liquor is sold and consumed; State ex rel. Kelly v. Nelson, 13 N. D. 122, 99 N. W. 1077, holding that to be guilty of keeping a liquor nuisance defendant must be owner or occupant of the premises under some claim of right; State v. Kruse, 19 N. D. 203, 124 N. W. 385, holding that it is "keeping" of place where liquors are sold illegally that constitutes offense of liquor nuisance.

Sufficiency of indictment for sale of liquor.

Cited in *v. Winbauer*, 21 N. D. 161, 129 N. W. 97, holding information insufficient where defendant would be misled and perplexed in preparing defense.

Cited in note in 23 L.R.A. (N.S.) 582, as to whether indictment or information for unlawful liquor sale must state purchaser's name.

4 N. D. 319, STATE EX REL. ENDERLIN STATE BANK v. ROSE, 26 L.R.A. 593, 58 N. W. 514.**Assignment for creditors putting property into custody of law.**

Cited in *Bradley v. Bailey*, 95 Iowa, 745, 64 N. W. 758, holding that a general assignment for creditors which is void because it prefers certain creditors does not place the property in custodia legis so as to prevent the levy of an attachment thereon.

When certiorari lies.

Cited in *State ex rel. Clyde v. Lauder*, 11 N. D. 136, 90 N. W. 564, holding order of court directing deduction from state's attorney's salary for purpose of compensating substitute is not appealable and hence certiorari will lie; *Hemmer v. Bonson*, 139 Iowa, 210, 19 L.R.A. (N.S.) 610, 117 N. W. 257, holding remedy by certiorari will lie at the instance of an individual citizen who suffers peculiar injury by reason of a judgment or order in excess of jurisdiction although he was not a party thereto.

Cited in note in 51 L.R.A. 64, on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

Compelling restitution on reversal.

Cited in *First Nat. Bank v. Elliott*, 60 Kan. 172, 55 Pac. 880, holding that where money is paid to prevent enforcement of a judgment pending appeal, pursuant to a stipulation entered into that defendant shall then pay such sum in full satisfaction of the judgment it affirmed, which shall be restored if reversed, the trial court may, upon reversal, enforce restitution in a summary manner, in that action.

4 N. D. 339, ERSKINE v. STEELE COUNTY, 28 L.R.A. 645, 60 N. W. 1050, Later action in Federal court in 39 C. C. A. 175, 98 Fed. 630.**Authority of county boards.**

Cited in *Jefferson County v. Young*, 120 Ky. 456, 86 S. W. 985, holding authority of fiscal court is special, not general, and since assessor does not derive his authority from fiscal court it has no authority to purchase plats to aid him in his duties.

4 N. D. 248, BENNETT v. NORTHERN P. R. CO. 61 N. W. 18.**4 N. D. 351, HANNAH v. CHASE, 50 AM. ST. REP. 656, 61 N. W. 18.****Proof of title to support action to quiet adverse claims.**

Cited in *Brown v. Comonow*, 17 N. D. 84, 114 N. W. 728, holding in Dak. Rep.—16.

action to quiet title plaintiff must first show title in himself before the weakness of defendant's title becomes material.

Subrogation to rights of mortgagee.

Cited in *Farm & Colonization Co. v. Meloy*, 11 S. D. 7, 75 N. W. 207, holding that a third mortgagee who purchases the mortgaged land on foreclosure of his mortgage cannot, in an action to determine adverse claims against the second mortgagee, in which he claims to own the property, also claim to be subrogated to the rights of the first mortgagee on the ground that the mortgage had been discharged of record by mistake.

4 N. D. 357, HOSTETTER v. BROOKS ELEVATOR CO. 61 N. W. 49.

Specification of errors for review.

Cited in *First Nat. Bank v. Merchant's Nat. Bank*, 5 N. D. 161, 64 N. W. 941, holding that assignments of error will not be considered on appeal in the absence of specifications of error in the bill of exceptions; *Schmitts v. Heger*, 5 N. D. 165, 64 N. W. 943, holding assignment of errors and objection of appellant's counsel insufficient in the absence of specifications of errors in the bill of exceptions; *Henry v. Maher*, 6 N. D. 413, 71 N. W. 127, holding that the evidence cannot be considered to determine its sufficiency to support the verdict unless specifications of particulars as to insufficiency were contained in the notice of intention to move for new trial on the minutes or embodied in the statement where the motion was made on a statement of the case; *Thompson v. Cunningham*, 6 N. D. 426, 71 N. W. 128, holding that errors in the verdict, decisions or rulings of the trial court will be disregarded on appeal where the motion for new trial was based on a statement of the case which did not specify such errors; *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667; *Wilson v. Kartes*, 11 N. D. 92, 88 N. W. 1023, refusing to consider appeal from jury trial where appellant failed to assign errors in his brief as required by rule of court; *Barnum v. Gorham Land Co.* 13 N. D. 359, 100 N. W. 1079, refusing to consider evidence or alleged errors in rulings where specifications of error were not embodied in the statement of the case as prescribed by statute; *Marck v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 86, 106 N. W. 1106, affirming judgment of lower court without discussion appellant having failed to embody assignments of error in his brief and no good reason appearing for relaxing the rule; *D. S. B. Johnston Land-Mortg. Co. v. Case*, 13 S. D. 28, 82 N. W. 90, holding that alleged error in denying new trial cannot be considered on appeal except in so far as disclosed by the judgment roll where the settled statement of facts or bill of exceptions used on the motion contained no specifications of the particulars in which the evidence was claimed to be insufficient or of the errors of law occurring at the trial.

Necessity for statement of case.

Cited in *Nichols & S. Co. v. Stangler*, 7 N. D. 102, 72 N. W. 1089, holding statement of the case necessary in cases tried by the court without a jury.

Mortgage of after acquired property.

Cited in *Donovan v. St. Anthony & D. Elevator Co.* 7 N. D. 513, 75 N. W. 809, holding that valid mortgage may be made on unplanted crop which will attach thereto as a lien as soon as it comes into existence by mortgagor's agency.

Cited in note in 109 Am. St. Rep. 520, on mortgage of property to be subsequently acquired.

Who may maintain trover.

Cited in note in 9 N. D. 630, on who may maintain trover.

4 N. D. 365, HAZELTON BOILER CO. v. FARGO GAS & ELECTRIC CO. 61 N. W. 151.**When question must be submitted to jury.**

Cited in *McRea v. Hillsboro Nat. Bank*, 6 N. D. 353, 70 N. W. 813, holding that contradictory statements by parties on essential matters of fact, together with varying testimony as to other points requires a submission to the jury.

4 N. D. 377, TYLER v. SHEA, 50 AM. ST. REP. 660, 61 N. W. 468.**Waiver of right to appeal.**

Cited in *Signor v. Clark*, 13 N. D. 35, 99 N. W. 68, holding that voluntary payment of judgment and acceptance of satisfaction extinguishes the cause of action and precludes appeal.

—By acceptance of benefits.

Cited in *Wishek v. Hammond*, 10 N. D. 72, 84 N. W. 587, holding party not precluded by accepting benefits under part of a separable judgment from appealing from remainder of the judgment; *Hodges v. Smith*, 34 Tex. Civ. App. 635, 79 S. W. 328; *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385, 109 N. W. 391,—holding that acceptance of benefits concededly due under judgment does not preclude appeal for further recovery; *McKain v. Mullen*, 65 W. Va. 558, 29 L.R.A.(N.S.) 1, 64 S. E. 829; *Weston v. Falk*, 66 Neb. 198, 93 N. W. 131,—holding that where a reversal of the judgment would not necessarily leave the benefits accepted thereunder unimpaired such acceptance precludes appeal; *Clairview Park Improv. Co. v. Detroit & Lake St. C. R. Co.* 164 Mich. 74, 33 L.R.A.(N.S.) 250, 129 N. W. 353, holding obtaining of writ of possession and attorneys obtaining of payment of costs allowed, waiver of appeal from judgment in ejectment; *McKain v. Mullen*, 65 W. Va. 558, 29 L.R.A.(N.S.) 1, 64 S. E. 829, holding unreserved acceptance of taxes, interest, and charges ordered by decree setting aside tax deed, waiver of appeal from decree; *Stebe v. Stebe*, 163 Mich. 650, 129 N. W. 356, holding that husband's remarriage after award to wife of divorce and alimony and pending appeal therefrom requires dismissal of appeal from decree; *Moorman v. Moorman*, 163 Mich. 652, 129 N. W. 13, holding recording of certified copy of decree awarding house as permanent alimony, and the repairing and mortgaging thereof, waiver of right to appeal from decree;

Williams v. Williams, 6 N. D. 269, 69 N. W. 47, holding right to appeal from final judgment granting plaintiff a divorce, waived by defendant accepting a sum which the order for judgment directed plaintiff to pay in full for all claims, alimony, costs, etc.; *Boyle v. Boyle*, 19 N. D. 523, 126 N. W. 229, holding appeal by wife from judgment denying divorce to her and granting one to husband, waived by unconditional acceptance by her attorney of sums allowed for costs and counsel fees; *Tuttle v. Tuttle*, 19 N. D. 748, 124 N. W. 429, holding wife's acceptance and retention of sum allowed her for counsel fees and suit money waived right to appeal from judgment granting divorce to husband.

Cited in note in 29 L.R.A.(N.S.) 3, 10, 30, 32, on right to appeal from unfavorable while accepting favorable part of decree, judgment, or order.

Disapproved in *Re Sachleben*, 106 Mo. App. 307, 80 S. W. 737, holding that acceptance of amount found due to ward in judicial accounting with guardian precludes appeal from the accounting although the amount accepted is conceded by the guardian to be due.

Status of judgment pending appeal.

Cited in *Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 188, 3 L.R.A.(N.S.) 259, 69 Pac. 189, holding that appeal does not suspend the finality of judgment and the act of setting it up as bar to another proceeding does not waive right to appeal.

Appeal from part of judgment.

Cited in *Prescott v. Brooks*, 11 N. D. 93, 90 N. W. 129, holding that under statute subsequent to that construed in cited case appeal from part of a judgment cannot bring up the case for retrial; *Tronsrud v. Farm Land & Finance Co.* 18 N. D. 417, 121 N. W. 68, holding that appeal from decree rendered by district court in action tried without jury, under code must be from entire judgment.

Equity jurisdiction to modify judgment affecting remedy only.

Cited in *Hartley v. Bartruff*, 112 Iowa, 592, 84 N. W. 704, holding that where a judgment fixes a party's right to redeem 80 acres of land by the payment of \$49.56 within sixty days from the date thereof, said decree otherwise to be null and void, the court may, in the furtherance of justice modify the decree, at the following term and before the record is signed by extending the time so specified; *Swan v. Harvey*, 123 Iowa, 192, 98 N. W. 641, holding that district court may extend time for redemption from tax sale as originally ordered by it although by appeal the court has lost jurisdiction of the merits.

4 N. D. 391, FIRST NAT. BANK v. LAUGHLIN, 61 N. W. 473.

Provision for attorney's fees affecting negotiability.

Cited in *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, holding non-negotiable a note containing a promise to pay a certain sum and "reasonable attorney's fees in case of suit," under Mont. Civ. Code, § 3992, providing that a negotiable instrument be payable in money only, and without any condition not certain of fulfillment, and §

3997, providing that it must not contain any other contract than for the payment of a certain sum of money.

Cited in note in 125 Am. St. Rep. 208, on agreements and conditions destroying negotiability.

Distinguished in *Cudahy Packing Co. v. State Nat. Bank*, 67 C. C. A. 662, 134 Fed. 538, as having been decided under statute rather than the law merchant.

Material alteration of negotiable instrument.

Cited in *Porter v. Hardy*, 10 N. D. 551, 88 N. W. 458, holding void as against makers even in hands of innocent indorsee for value a negotiable instrument materially altered by payee or his agent; *Sawyer v. Campbell*, 107 Iowa, 397, 78 N. W. 56, holding the sureties on a note not released by writing a provision on its face that the payee will, on written request of all the "makers," grant an extension of time, as their right to enforce payment by the principal at maturity was not affected thereby; *White v. Harris*, 69 S. C. 65, 104 Am. St. Rep. 791, 48 S. E. 41, on effect of striking out provision for attorney's fees in promissory notes.

Cited in notes in 86 Am. St. Rep. 101, 123, on unauthorized alteration of written instruments; 32 L.R.A.(N.S.) 521, on alteration of instrument by obliterating material provision without substituting new matter.

Presumption as to time instrument was altered.

Cited in *Cass County v. American Exch. State Bank*, 9 N. D. 263, 83 N. W. 12, holding that alterations in written instruments will be presumed to have been made before delivery.

Recovery back of money paid.

Cited in *Fegan v. Great Northern R. Co.* 9 N. D. 30, 81 N. W. 39, denying station agent's right to recover from railroad company money paid by him to cover his cashier's defalcation.

Waiver of objection.

Cited in *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558, holding mere general objection not sufficient to raise on appeal in objection which could have been obviated if specifically pointed out; *Minnesota Thresher Mfg. Co. v. Lincoln*, 4 N. D. 410, 61 N. W. 145, holding that question as to whether waiver by defendant of certain claims is shown by the testimony will be only question considered on appeal from direction of verdict on grant of such waiver; *Ravicz v. Nickells*, 9 N. D. 536, 84 N. W. 353, denying right of defendant after trying case to jury and entry of judgment against him to claim that facts set out in answer amounted to equitable counterclaim entitling him to equitable relief; *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826, holding that by failure to raise any other question or request that any other part of the case be submitted to the jury after denial of motion for directed verdict party is estopped to assert such claims.

-By replying.

Cited in *Noble Twp. v. Aason*, 8 N. D. 77, 76 N. W. 990, holding objection that facts stated in counterclaim do not constitute enforceable cause of action waived by replying thereto.

—By failure to demur.

Cited in *Vidger v. Nolin*, 10 N. D. 353, 87 N. W. 593, holding that failure to demur to a counterclaim on an appeal from a judgment of a justice of the peace does not constitute a waiver of objections to such counterclaim, where the court was without jurisdiction of the subject matter of the counterclaim; *Fletcher Bros. v. Nelson*, 6 N. D. 94, 69 N. W. 53, holding the right to object to an answer setting up a counterclaim as a defense in claim and delivery waived by failure to demur; *Oswald v. Moran*, 8 N. D. 111, 77 N. W. 281, holding that question whether cause of action for money paid for liquor in violation of law can be set up as counterclaim in action to foreclose mortgage can be raised by demurrer only.

4 N. D. 410, MINNESOTA THRESHER MFG. CO. v. LINCOLN, 61 N. W. 145.

Agreement to notify vendor of defects in machinery sold with warranty.

Cited in *J. I. Case Threshing Mach. Co. v. Hall*, 32 Tex. Civ. App. 214, 73 S. W. 835, holding that parties may by contract make retention of defective machine and failure to notify vendor conclusive of satisfaction of warranty on sale of threshing machine.

—Sufficiency of notice.

Cited in *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. D. 466, 92 N. W. 826, holding telephone notice to agent who is without authority to waive conditions of contract is not sufficient to satisfy agreement to notify threshing machine company at its home office of any defects in machine purchased from it.

—Waiver of notice.

Cited in *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335, holding that seller of threshing machine with warranty may waive stipulated notice of defects and does waive formal notice by receiving and acting upon actual notice.

4 N. D. 427, WALTER A. WOOD HARVESTER CO. v. HEIDEL, 61 N. W. 155.

4 N. D. 433, STATE v. COLLINS, 61 N. W. 467.

Sufficiency of indictment for embezzlement.

Cited in *State v. Nelson*, 79 Minn. 373, 82 N. W. 674, holding that the property embezzled and its ownership must be set out in an indictment for embezzlement, and proved with the same exact completeness as in cases of larceny.

4 N. D. 437, BINGHAM v. MEARS, 27 L.R.A. 257, 61 N. W. 808.

Primary liability of absolute guarantor.

Cited in *Fegley v. Jennings*, 44 Fla. 203, 103 Am. St. Rep. 142, 32 So.

§73, holding assignee of note for value who guarantees "prompt payment" is unconditionally bound and cannot plead failure of demand, protest and notice on failure to exhaust securities his remedy being to pay note and proceed against principal or securities.

— Sureties on appeal bond.

Cited in *Palmer v. Caywood*, 64 Neb. 372, 89 N. W. 1034, holding where judgment is affirmed on appeal judgment creditor may proceed at once on the appeal undertaking without proceeding against judgment debtor or awaiting administration of estate of deceased judgment debtor; *Day v. McPhee*, 41 Colo. 467, 93 Pac. 670, holding that surety on appeal bond cannot require plaintiff to first exhaust remedies against principal or to exhaust collateral securities but upon paying the judgment may himself resort to such securities.

4 N. D. 452, *PARSONS v. VENZKE*, 50 AM. ST. REP. 669, 61 N. W. 1036, Affirmed in 164 U. S. 89, 41 L. ed. 360.

Conclusiveness of decision of land department.

Cited in *Healey v. Forman*, 14 N. D. 449, 105 N. W. 233, holding that the jurisdiction of the court to adjudicate land titles from the Federal government arises only after title passes to an individual; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398, holding the decisions of the Secretary of the Interior as to the weight and competency of evidence before him in passing upon the cancelation of a public land entry binding upon the courts; *Brokken v. Baumann*, 10 N. D. 453, 88 N. W. 84, holding decision of land department on question as to settler's relation to land for which he has made homestead entry at the time of issuance of patent to him not subject to review in collateral proceeding; *Forman v. Healey*, 19 N. D. 116, 121 N. W. 1122, holding that disregard of rules which does result in denial of right or in loss of opportunity to be heard, will not affect decision.

Cited in note in 52 Am. St. Rep. 219, on conclusiveness of decisions of Land Department.

Ex parte cancelation of certificate of entry on land.

Cited in *Guaranty Sav. Bank v. Bladow*, 6 N. D. 108, 69 N. W. 41, holding ex parte cancelation of certificate of entry by land department not void as against holder of certificate or his mortgagee who were without notice of the proceedings.

Cited in note in 75 Am. St. Rep. 881, 882, on right of entryman to notice and hearing before cancelation of entry.

Presumption as to cancelation of entry.

Cited in *Caldwell v. Bush*, 6 Wyo. 342, 45 Pac. 488, 46 Pac. 1092, holding that an entryman's presence at a hearing in the matter of the cancelation of his entry raises a presumption that he appeared generally and thereby submitted to the jurisdiction of the local land office and all subsequent proceedings.

Power of land commissioner to cancel entry.

Cited in *Pfund v. Valley Loan & T. Co.* 52 Neb. 473, 72 N. W. 480,

holding that the Commissioner of the General Land Office has power, after a final receipt is issued to a homestead entryman, and before the issuance of a patent, to cancel the entry if he finds the same to be fraudulent.

Right to set aside decision of predecessor as to cancelation of entry.

Cited in *Gage v. Gunther*, 136 Cal. 338, 89 Am. St. Rep. 141, 68 Pac. 710, holding that the authority of the Secretary of the Interior to review or set aside his decision or that of his predecessor as to the cancelation of an entry cannot be taken away by any rule of procedure which he may formulate.

4 N. D. 473, HOFFMAN v. BANK OF MINOT, 61 N. W. 1031.

Later phase of same case in 5 N. D. 350, 65 N. W. 688.

Followed without discussion in *Hoffman v. Mortgage, Bank & Invest. Co.* 4 N. D. 477, 61 N. W. 1032.

Necessary parties to discharge of receivership.

Cited in *Deane v. Kent Circuit Judge*, 155 Mich. 644, 119 N. W. 1093, refusing to permit discontinuance of receivership proceedings by record parties without leave of court, other creditors having acquired an interest.

4 N. D. 477, HOFFMAN v. MORTGAGE BANK & INVEST. CO. 61 N. W. 1032.

4 N. D. 478, JACKSON v. ELLENDALÉ, 61 N. W. 1030.

Municipal water supply.

Cited in notes in 61 L.R.A. 109, on establishment and regulation of municipal water supply; 32 L.R.A.(N.S.) 229, on right to require water consumer to repair service pipe; 24 L.R.A.(N.S.) 486, on right to compel consumer to pay for connection with water mains.

4 N. D. 481, STATE EX REL. BUTLER v. CALLAHAN, 61 N. W. 1025.

When mandamus lies.

Cited in notes in 98 Am. St. Rep. 885, on mandamus as proper remedy against public officers; 31 L.R.A. 343, 363, on mandamus to compel surrender of office; 1 L.R.A.(N.S.) 588, on mandamus to compel payment of salary to public officer whose title is disputed.

Questions considered in mandamus proceeding.

Cited in *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234, holding all questions relating to prima facie title to office properly tried in mandamus proceedings; *State ex rel. Sunderall v. McKenzie*, 10 N. D. 132, 86 N. W. 231, holding that, in mandamus proceedings demanding a county canvassing board to canvass and count certain votes, neither the canvassing board nor the courts have power to ascertain who was, in fact elected to the office; but their duty is confined to canvassing the official return and declaring the result of such canvass; *Chandler v. Starling*, 19 N. D. 144, 121 N. W. 198, holding that ultimate right and title to office cannot be litigated.

Interest to enable enforcement of right to office.

Distinguished in *Jenness v. Clark*, 21 N. D. 150, 129 N. W. 357, holding that officer holding over until successor is elected has such special interest as enables him to maintain action under code section 7351 against intruder.

4 N. D. 494, NORTHERN P. R. CO. v. MCGINNIS, 61 N. W. 1032.

Followed without discussion in *Northern P. R. Co. v. Benson*, 4 N. D. 506, 61 N. W. 1035; *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241.

What property exempt from taxation.

Cited in note in 132 Am. St. Rep. 344, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

— Railroad property.

Cited in *Wells County v. McHenry*, 7 N. D. 246, 73 N. W. 241, holding place-lands of Northern Pacific Railroad Company surveyed in field before assessment and levy of tax though plat of survey is subsequently filed, not free from taxation as uncertified lands; *Myers v. Northern P. R. Co.* 28 C. C. A. 412, 48 U. S. App. 620, 83 Fed. 358, holding lands lying within the place limits of the Northern Pacific Railroad Company grant, which are included in the lists claimed by it as inuring under the grant, taxable unless the company affirmatively shows that they are mineral lands, although such lists have not been adjusted, and the question of the mineral or nonmineral character of the lands has not been determined.

Disapproved in *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242, holding all property of Northern Pac. Rd. Co., including lands granted to aid in its construction outside of right of way and not used by it as carrier exempt from taxation.

Necessity for tender of tax justly due.

Cited in *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, holding tender of tax justly due, prerequisite to equitable relief from illegal tax.

4 N. D. 506, NORTHERN P. R. CO. v. BENSON, 61 N. W. 1035.

4 N. D. 507, MINKLER v. UNITED STATES SHEEP CO. 33 L.R.A. 546, 62 N. W. 594.

When receiver may be appointed.

Cited in *Hirsch v. Israel*, 106 Iowa, 498, 76 N. W. 811, holding that a receiver may be appointed in a suit by judgment creditors of a mortgagor to subject personal property in his possession to the payment of their judgments, when the mortgagor is insolvent and has complete control of the goods and of the proceeds arising therefrom especially when defendants are protected by plaintiff's bond from loss or damage growing out of the order of appointment.

Conditions precedent to equitable remedy of creditor.

Cited in note in 23 L.R.A. (N.S.) 4, 65, on conditions precedent to equitable remedies of creditors.

4 N. D. 514, RE EATON, 62 N. W. 597, Later appeal in 7 N. D. 272, 74 N. W. 870.

Grounds for disbarment.

Cited in note in 114 Am. St. Rep. 840, on disbarment for criminal act prior to conviction therefor.

Sufficiency of proof for disbarment.

Cited in Re Elliott, 18 S. D. 264, 100 N. W. 431, holding that in disbarment proceedings the proof should establish the charges by a clear and undoubted preponderance of the evidence; Re Whittemore, 14 N. D. 481, 105 N. W. 232, holding in disbarment proceedings that whatever doubt the evidence leaves in the mind of the court should be resolved in favor of the accused.

4 N. D. 532, SWENSON v. GREENLAND, 62 N. W. 603.

Necessity for pleading basis of tax liens.

Cited in Miami v. Miami Realty Loan & G. Co. 57 Fla. 366, 49 So. 511, holding bill to enforce tax lien was defective for failure to allege where the taxes were assessed and levy made.

Distinguished in Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1021, holding where the complaint was in action to quiet title and set forth certain tax liens as basis for plaintiff's suit it was unnecessary to specify the assessment and levy of such taxes.

4 N. D. 536, BISHOP v. CHICAGO, M. & ST. P. R. CO. 62 N. W. 605.

Sufficiency of evidence to support verdict.

Cited in Flath v. Casselman, 10 N. D. 419, 87 N. W. 988, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial.

Duty of railroad company at crossing.

Cited in Coulter v. Great Northern R. Co. 5 N. D. 568, 67 N. W. 1041, holding that it was for the jury to say whether, under the facts in the case, the railroad company owed the same degree of care to travelers at the crossing involved that it did to travelers at crossings on legally established highways; Johnson v. Great Northern R. Co. 7 N. D. 284, 71 N. W. 250, holding that railroad company placing usual planking at crossing and erecting sign warning travelers of crossing owes public safety duty thereat as at other crossings though highway has not been laid out in strict accordance with law.

Res ipsa loquitur.

Cited in Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 324, holding there is a statutory presumption of negligence arising from the killing of stock by railway trains.

Question for jury as to contributory negligence.

Cited in Sinkling v. Illinois C. R. Co. 10 S. D. 560, 74 N. W. 1029, holding question whether one turning horse loose near track without anything to prevent it from getting thereon at time fast train is about due,

free from such contributory negligence as will prevent recovery, for jury.

Contributory negligence as a bar.

Cited in *Action v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225, holding contributory negligence no defense to action for injuries sustained by collision if motorman by use of ordinary care could have avoided accident.

4 N. D. 543, MOORE v. BOOKER, 62 N. W. 607.

Grounds for suppressing deposition.

Cited in *Ueland v. Dealy*, 11 N. D. 529, 89 N. W. 325, on the rule that purely technical objections to a deposition should be overruled in the absence of a claim of prejudice.

Rebuttal of presumption of regularity of depositions.

Cited in *F. A. Patrick & Co. v. Nurnberg*, 21 N. D. 377, 131 N. W. 254, holding that party seeking to suppress deposition, has burden of rebutting presumption of regularity of taking them.

Assumption of debt.

Cited in *McArthur v. Dryden*, 6 N. D. 438, 71 N. W. 125, holding an individual promise by an agent of a grain elevator company to pay the debt of a third person out of the proceeds of grain brought by the latter to the elevator void when no consideration passed to him personally for the promise, and no grain was delivered by him to such third person otherwise than as agent.

Distinguished in *Bray v. Booker*, 8 N. D. 347, 79 N. W. 293, holding a promise to pay a vendor's debt to a third person as part of the purchase price does not, without performance, extinguish the purchaser's debt nor the vendor's right to a lien for the purchase money.

Assumption of mortgage by grantee.

Cited in *Eggleston v. Morrison*, 84 Ill. App. 625, holding that a mortgagee is entitled to the benefit and advantage of a contract wherein grantees of the mortgagor agreed to assume the encumbrances upon the mortgaged property conveyed to them by contemporaneous warranty deed containing no assumption clause or reference to the mortgage, if, as happened, said deed given by way of security should become absolute; *Ordway v. Downey*, 18 Wash. 412, 63 Am. St. Rep. 892, 51 Pac. 1047; 52 Pac. 228, holding a verbal agreement to assume a mortgage enforceable, it being an agreement additional to, and not at variance with, the terms of the deed.

Covenant against encumbrances.

Cited in *Laderoute v. Chale*, 9 N. D. 331, 83 N. W. 218, holding a covenant against all encumbrances except a mortgage for \$250 not broken by foreclosure of a second mortgage given to secure notes for interest on the \$250 mortgage, although neither grantor nor grantee knew of the second mortgage when the covenant was entered into.

Amendment of record on appeal.

Cited in *Montgomery v. Harker*, 9 N. D. 527, 84 N. W. 369, denying

power of supreme court to amend the record on appeal so as to include evidence claimed to have been omitted from the record.

Cited in note in 31 L.R.A.(N.S.) 211, on power of trial court to correct record after appeal or writ of error.

Distinguished in *Scott v. Jones*, 9 N. D. 551, 84 N. W. 479, holding that the supreme court will not remand a record for the purpose of having the court change or correct its findings where the record and findings conform to the law.

Settlement of statement of case after appeal.

Cited in *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479, holding that district judge retains full and complete jurisdiction, after appeal to settle statement of case to be used on appeal.

4 N. D. 559, GARR v. CLEMENTS, 62 N. W. 640.

Priority of liens.

Cited in *First Nat. Bank v. Scott*, 7 N. D. 312, 75 N. W. 254, holding that lien of mortgage superior to agister's lien attaching after filing of mortgage.

4 N. D. 565, TIERNEY v. PHOENIX INS. CO. 36 L.R.A. 760, 62 N. W. 642.

Judgment in former action against third person as evidence.

Cited in *Mathews v. Hanson*, 19 N. D. 692, 124 N. W. 1116, holding that in action to reconvey property, judgment in former action against third person which invested plaintiff with all rights and title of such third person to property, is admissible.

Judicial sale of insured property as change of title.

Cited in note in 24 L.R.A.(N.S.) 808, on judicial sale of insured property as change in title, etc.

Recovery back of purchase money paid at void tax sale.

Cited in *Paine v. Dickey County*, 8 N. D. 581, 80 N. W. 770, holding that a contract right to the recovery of the purchase price paid to a county for land sold at a void tax sale created by N. D. Rev. Law 1890, § 84.

4 N. D. 577, STATE v. KENT, 27 L.R.A. 686, 62 N. W. 631, Later appeal in 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052.

Right to change of venue.

Cited in *State v. Winchester*, 18 N. D. 534, 122 N. W. 1111 (rereported in 19 N. D. 756) holding that fact that defendant as sheriff subpoenaed jury does not entitle state to change of venue.

Affidavit of bias of presiding judge.

Cited in *Buchanan v. State*, 2 Okla. Crim. Rep. 126, 101 Pac. 295 holding that affidavit of bias is sufficient to disqualify judge without specifying particulars; *Lincoln v. Territory*, 8 Okla. 546, 58 Pac. 730 holding that under Okla. Stat. § 5138, as amended by Okla. Laws 1895 p. 198, providing that "if it be shown to the court by the affidavit of the accused that he cannot have a fair and impartial trial, by reason of the

bias and prejudice of the presiding judge, . . . a change of judge shall be ordered," said order must be made upon the filing of defendant's affidavit, the statute being mandatory.

Distinguished in *Cox v. United States*, 5 Okla. 701, 50 Pac. 175, holding it not error for a presiding judge to overrule a motion for a change of judge, supported by defendant's affidavit which merely states a conclusion as to prejudice and bias.

Disqualification of witness for prosecution as juror.

Cited in *State v. Jordan*, 19 Idaho, 192, 112 Pac. 1049, holding that challenge for implied bias may be taken for being, or being subpoenaed, as witness for prosecution.

"May" construed as "must."

Cited in *Walker v. Maronda*, 15 N. D. 63, 106 N. W. 296, holding that in statutory provision for change of venue upon affidavit of bias of justice of peace the word "may" is to be construed "must."

Cited in note in 5 L.R.A.(N.S.) 342, on "may" in constitutional or statutory provision as mandatory.

Right of state's attorney to procure assistance.

Cited in *Thalheim v. State*, 38 Fla. 169, 20 Pac. 938, holding that in the absence of express statutory prohibition the state attorney may, in a prosecution for embezzlement, obtain, with the consent of the court, assistance of other counsel, although such assistants be members of the bar who were retained by the corporation whose money the defendant is charged with embezzling,—especially where no provision is made for the payment of such assistants by the public.

Right of unlicensed attorney to transact business for another.

Cited in notes in 24 L.R.A.(N.S.) 754, 755, on right of disbarred or suspended attorney or unlicensed person to transact legal business for another; 24 L.R.A.(N.S.) 565, 566, on right to complain because prosecution is conducted or assisted by unofficial member of bar.

Indictment of accessory as principal.

Cited in *Roseneranz v. United States*, 83 C. C. A. 634, 155 Fed. 38, holding that under statute accessory may be indicted and convicted as principal; *State v. Geddes*, 22 Mont. 68, 55 Pac. 919, holding an information charging one as a principal sustained by evidence showing that he advised and encouraged the crime charged therein, under Mont. Pen. Code, § 1852, putting principal and accessory in felony upon the same legal ground, and providing that both "must" be prosecuted, tried, and punished as principals.

Cross-examination of accomplice.

Cited in *Stevens v. People*, 215 Ill. 593, 74 N. E. 786, holding it proper to cross-examine accomplice testifying for state as to his expectation of immunity or reduced punishment by reason of such testimony.

Corroboration of accomplice.

Later appeal in 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, holding book of instructions by accused to accomplice admissible to strengthen and

support the other testimony of the accomplice although not admissible to corroborate him.

Cited in note in 98 Am. St. Rep. 168, 171, on convicting on testimony of accomplice.

Evidence of favor accorded witnesses for prosecution.

Cited in *Territory v. Chavez*, 8 N. M. 528, 45 Pac. 1107, holding evidence of liberty and favor accorded to witnesses for the territory on the trial of an accomplice for murder, notwithstanding their previous conviction of the crimes charged, admissible.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 5 N. D.

5 N. D. 1, DOHERTY v. RANSOM COUNTY, 63 N. W. 148.

Delegation of legislative power.

Cited in *Bookings County v. Murphy*, 23 S. D. 311, 121 N. W. 793, holding act permitting county commissioners of certain counties to fix salary of county auditor not invalid as delegation of legislative power when construed in connection with other provisions of act.

5 N. D. 8, SARGENT v. KINDRED, 63 N. W. 151, Later appeal in 5 N. D. 472, 67 N. W. 826.

Waiver of removal of cause to Federal court on erection of state.

Cited in *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 100, 95 Pac. 606, holding where enabling act admitting state provides that all actions in which the United States is not a party shall on admission of state be transferred to United States court on application at or before second term of court where pending after state's admission, a party having transferable cause pending in state court who with notice of hearing of cause at first ensuing term of state court fails to appear and court renders final decision therein, the right of removal is waived.

Affidavit of merits on motion to vacate judgment.

Cited in *Kirschner v. Kirschner*, 7 N. D. 291, 75 N. W. 252, holding affidavit of merits showing full and fair statement of all facts to attorney and justice of good defense on merits necessary to warrant setting aside judgment by default for mistake, inadvertence, or excusable neglect; *Emmons County v. Thompson*, 9 N. D. 598, 84 N. W. 385, holding affidavit on merits or proposed verified answer necessary on application to vacate for mere irregular judgment any action against land for delinquent taxes; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 391, holding a

sufficient affidavit of merits is indispensable in all cases and proposed verified answer should be submitted setting up defense valid on its face, or where not submitted an affidavit setting out valid defense should be submitted; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, holding affidavit of merits and proposed verified answer necessary on application to vacate judgment.

Counter affidavits on motion to vacate judgment.

Cited in *Minnesota Thresher Mfg. Co. v. Holz*, 10 N. D. 16, 84 N. W. 581, holding counter affidavits denying allegations of proposed answer not admissible on motion to vacate judgment though affidavits controverting excuse of negligence given in support of motion may be considered.

5 N. D. 22, SHELLY v. MIKKELSON, 63 N. W. 210.

Necessity of tender of deed in action on any of several purchase money notes after maturity of all.

Distinguished in *Tronson v. Colby University*, 9 N. D. 559, 84 N. W. 474, denying right of grantor who permits all of several purchase money notes to run until maturity of the last to recover anything without tendering a deed when such tender was required on payment of last note; *First National Bank v. Spear*, 12 S. D. 108, 80 N. W. 166, denying right of holder of non-negotiable notes maturing at different times given in consideration of corporate stock and a lease of land to be delivered on full payment, to maintain an action on any of such notes after maturity of all of them without showing willingness and ability to perform his part of the contract by delivering stock and lease.

Specific performance of contract.

Cited in *Pederson v. Dibble*, 12 N. D. 572, 98 N. W. 411, holding where vendor in contract to convey land was obligated to convey on delivery to him of a specified quantity of wheat, or its equivalent in money, and vendee was obligated to make such delivery or payment, the latter could maintain action for specific performance when at time action was brought and performance by him tendered the time for the delivery of the deed had arrived.

— Relief granted in action for.

Cited in *Block v. Donovan*, 13 N. D. 1, 99 N. W. 72, sustaining right to compel defendant in action for specific performance of contract, to turn over to plaintiff notes, mortgages and papers for which deed was given by plaintiff where specific performance cannot be made.

Breach of contract to convey.

Questioned in *Prichard v. Mulhall*, 127 Iowa, 545, 103 N. W. 774, 4 A. & E. Ann. Cas. 789, holding an action at law on breach by vendee of executory contract to convey land, for recovery of purchase price can only be maintained on tender of proper deed and its production in court.

5 N. D. 46, LINN v. JACKSON, 63 N. W. 208.

Pleading in trover.

Cited in note in 9 N. D. 632, on pleading in actions for trover and conversion.

5 N. D. 50, GEORGE v. TRIPLETT, 63 N. W. 891.

Discrediting own witness.

Disapproved in Putnam v. United States, 162 U. S. 704, 40 L. ed. 1125, 16 Sup. Ct. Rep. 923, holding that counsel, taken by surprise at the testimony of a witness, cannot, in examining him, refer to his testimony given before a grand jury, for the purpose of refreshing his recollection, where such testimony was not given contemporaneously with the occurrence testified to.

5 N. D. 53, McCORMICK HARVESTING MACH. CO. v. TAYLOR, 57 AM. ST. REP. 538, 63 N. W. 890.

5 N. D. 55, PATCH v. NORTHERN P. R. CO. 63 N. W. 207.

Review of order for new trial.

Cited in Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, holding orders for new trial based on insufficiency of evidence are never reversed by reviewing court except for strong and cogent reasons; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612,—holding the granting of a new trial for insufficiency of evidence is a matter within the discretion of the trial court and will not be disturbed except where discretion is abused; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026, holding order of trial court in vacating verdict and judgment and granting new trial for insufficiency of evidence is within court's discretion and will not be disturbed on appeal except for an abuse of discretion.

5 N. D. 56, HEEBNER v. SHEPARD, 63 N. W. 892.

Necessity for reply.

Cited in Christian & C. Co. v. Coleman, 125 Ala. 158, 27 So. 786, holding that the interposition of a plea of set-off is not the institution of a new action, but is a mere mode of defense, the filing of which is notice to the plaintiff, and on which judgment by default may be taken if he fail to seasonably take issue upon or reply thereto.

5 N. D. 58, TAYLOR v. TAYLOR, 63 N. W. 893.

Certificate of judge to record on appeal.

Cited in Nollman v. Evenson, 5 N. D. 344, 65 N. W. 686, holding certificate by trial judge that the record contains "all the proceedings had and testimony given," sufficient to obtain trial de novo on appeal when made before any practice had been settled.

Revocation of condonation.

Cited in Mosher v. Mosher, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. Dak. Rep.—17.

St. Rep. 654, 113 N. W. 99, holding where parties separate because of ill treatment of one by the other and they start married life anew, there is a revocation of the condonation upon the resumption of such ill treatment and original cause for divorce revived.

5 N. D. 66, MARTIN v. HAWTHORNE, 63 N. W. 895.

Thresher's lien.

Cited in *Moher v. Rasmusson*, 12 N. D. 71, 95 N. W. 152, holding statute relating to thresher's lien must be complied with to create valid lien and statement is inoperative which does not set out amount and quantity of grain threshed as required by statute; *Gorthy v. Jarvis*, 15 N. D. 509, 108 N. W. 39, holding when grain threshed lies in two counties, lien should be executed in duplicate and filed in both, and where filed in only one it cannot be enforced as to grain in other.

Entry of final judgment by appellate court.

Cited in *Martin v. Hawthorne*, 5 N. D. 66, 63 N. W. 895, holding that entry of final judgment will not be made in the supreme court in a case tried de novo therein; *Christianson v. Farmers' Warehouse Asso.* 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300, holding that N. D. Laws 1893, chap. 82, does not violate the provisions of the Constitution conferring only appellate jurisdiction on the supreme court.

Evidence in trover.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

5 N. D. 69, STATE EX REL. VAN HORN v. BRIGGS, 63 N. W. 206.

Claims against state.

Cited in note in 42 L.R.A. 37, on what claims constitute valid demands against a state.

5 N. D. 72, BRUNDAGE v. MELLON, 63 N. W. 209.

Liability for torts of partner.

Cited in notes in 67 Am. St. Rep. 48, on liability of one partner for tortious acts of another; 51 L.R.A. 485, on liability of partnership for torts.

Necessity for offering further proof where proper evidence is excluded.

Cited in *Meadows v. Osterkamp*, 13 S. D. 571, 93 N. W. 625, holding defendant in action to remove cloud by setting aside a tax deed in which he sets up claim for improvements, not bound to offer further proof of good faith on his part where evidence offered by him as to such improvements is excluded in the case taken from the jury on the ground that the tax deed is void; *Murphy v. Brown*, 12 Ariz. 268, 100 Pac. 801, holding that where court erroneously excludes evidence which lies at base of case, offer of proof need not state all facts which would authorize judgment in his favor.

Exclusion of evidence as ground for reversal.

Cited in *Miller v. Northern P. R. Co.* 18 N. D. 19, 118 N. W. 344, 19 A. & E. Ann. Cas. 215, holding error in excluding evidence not ground for reversal where with it, case would not have been made out.

5 N. D. 76, KVELLO v. TAYLOR, 63 N. W. 889.**Fraud on creditors by transfer of homestead.**

Cited in *Commercial State Bank v. Kendall*, 20 S. D. 314, 129 Am. St. Rep. 936, 106 N. W. 53, holding transfer of homestead by husband to wife honestly made, does not create a resulting trust in favor of creditors; *Dalrymple v. Security Improv. Co.* 11 N. D. 65, 88 N. W. 1033, holding an incumbrance placed on homestead for money loaned is not a fraud.

5 N. D. 80, ANDERSON v. FIRST NAT. BANK, 64 N. W. 114, Re-affirmed on later appeal in 6 N. D. 497, 72 N. W. 916.**Amendment of pleading.**

Cited in *Martin v. Luger Furniture Co.* 8 N. D. 220, 77 N. W. 1003, holding allowance of amendments to pleadings subject to review on appeal; *Hardman v. Kelley*, 19 S. D. 608, 104 N. W. 272, holding the court erred in refusing an amendment to a pleading by inserting an additional defense which party has to the action a reasonable time before the time of the trial of the action; *Finlayson v. Peterson*, 11 N. D. 45, 89 N. W. 855, holding court properly allowed an amendment to complaint where it first prayed for recovery of land and damages for use and after an appeal it was amended to ask merely for an accounting; *Walfinger v. Thomas*, 22 S. D. 57, 133 Am. St. Rep. 900, 115 N. W. 100, holding that complaint demanding rescission of contract on ground of fraudulent representations may be amended to demand same relief on ground of mutual mistake, to conform to evidence.

Distinguished in *Todd v. Bettingen*, 102 Minn. 260, 18 L.R.A. (N.S.) 263, 113 N. W. 906, holding where a complaint sets out facts without separate statements of causes of action and seeks equitable and legal relief and after various amendments an order of the trial court directing verdict for defendant is affirmed on appeal in which it was determined that pleadings and course of trial determined action was at law to recover for breach of written contract void within statute of frauds, the trial court erred in allowing an amendment so as to set forth cause of action in assumpsit or conversion.

Variance between pleading and proof.

Cited in *Halloran v. Holmes*, 13 N. D. 411, 101 N. W. 310, holding in action to quiet plaintiff's title and to prevent a conveyance by an apparent owner who as alleged in the complaint, holds it as security, proof that apparent owner's title is a mere passive trust is not a variance amounting to failure of proof.

Dealings by agent with himself.

Later appeal in *Anderson v. First Nat. Bank*, 6 N. D. 497, 72 N. W. 916, holding that an agent for the sale of property has no right to sell

to himself without the principal's consent, even though he pays full value.

Cited in *Bennett v. Glaspell*, 15 N. D. 239, 107 N. W. 45, on validity of contract made by real estate broker with himself; *Clendenning v. Hawley*, 10 N. D. 90, 86 N. W. 114, holding that agent with authority to lease land cannot make valid lease to himself.

What constitutes a conversion.

Cited in *Grigsby v. Day*, 9 S. D. 585, 70 N. W. 881, holding owner of half interest in notes and mortgages payable to himself guilty of conversion in disposing of same without consent of co-owner.

Cited in note in 9 N. D. 632, on what amounts to conversion.

Notice of intention and of motion for new trial.

Cited in *Fletcher Bros. v. Nelson*, 6 N. D. 94, 69 N. W. 53, holding that notice of motion for new trial containing notice that motion will be made on minutes of court and on specified ground operates as notice of intention as well as notice of motion.

5 N. D. 92, BANGS v. FADDEN, 64 N. W. 78.

5 N. D. 100, PURCELL v. ST. PAUL F. & M. INS. CO. 64 N. W. 943.

Time for notice of loss.

Cited in *Hartford F. Ins. Co. v. Redding*, 47 Fla. 228, 67 L.R.A. 518, 110 Am. St. Rep. 118, 37 So. 62, holding written proofs of loss delivered to insurer in December on a fire occurring in August constituted notice of loss.

5 N. D. 114, RE HENDRICKS, 64 N. W. 110.

5 N. D. 125, NICHELLS v. NICHELLS, 33 L.R.A. 515, 57 AM. ST. REP. 540, 64 N. W. 73.

Withdrawal of attorney.

Cited in *Martinson v. Marzolf*, 14 N. D. 301, 103 N. W. 937, holding withdrawal of an attorney after answer is not a withdrawal of an answer.

Discretion in setting aside judgment.

Cited in *Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836, holding trial court may set aside judgment entered by mistake of counsel within its discretion; *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75; *Racine-Sattle Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228,—to point that court's discretion in vacating judgment will not be disturbed except on showing of abuse; *Keeney v. Fargo*, 14 N. D. 419, 105 N. W. 92, holding while under statute the matter of relieving party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect if application is made within one year after notice thereof, is a matter within sound discretion of court not reviewable except for abuse, a party may lose his right thereto by not acting seasonably after notice.

Cited in note in 60 Am. St. Rep. 642, on vacation of judgments on motion when not specially authorized by statute.

5 N. D. 140, ST. JOHN v. LOFLAND, 64 N. W. 930.

Evidence of transactions with deceased persons.

Cited in *Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677, holding in action to foreclose deed given as security for a debt wherein grantee and heirs of grantor are adverse parties, testimony of the grantee that he had paid interest on a prior mortgage and taxes on mortgaged premises to protect lien of his deed not within statute disqualifying party from action from testifying to transaction had with deceased; *Cockley Mill. Co. v. Bunn*, 75 Ohio St. 270, 116 Am. St. Rep. 741, 79 N. E. 478, 9 A. & E. Ann. Cas. 179, holding where a corporation sues a personal representative for debt due from decedent, a general manager is not disqualified to testify as to facts occurring before decedent's death, within statute precluding party to action from testifying to facts occurring before death of a decedent.

Distinguished in *Witte v. Koeppen*, 11 S. D. 598, 74 Am. St. Rep. 826, 79 N. W. 831, holding assignor of claim against intestate's estate beneficially interested in result, not incompetent to testify as to transactions between himself and intestate.

5 N. D. 147, STATE v. MARKUSON, 64 N. W. 934, Later application for writ of habeas corpus in 5 N. D. 180, 64 N. W. 939.

Procedure in contempt proceedings.

Cited in *State v. Markuson*, 7 N. D. 155, 73 N. W. 82, sustaining statutory summary procedure for punishment of contempt in defendant's obeying order issued pendente lite in action to abate liquor nuisance; *Noble Township v. Aasen*, 10 N. D. 264, 86 N. W. 742, holding that failure to file, in criminal contempt proceedings, interrogatories setting forth the facts and circumstances of the offense charged, is jurisdictional, and is not cured by the silence of the defendant.

Power of legislature to abridge court's power to punish for contempt.

Cited in note in 36 L.R.A. 255, on legislative power to abridge the power of courts to punish for contempt.

5 N. D. 161, FIRST NAT. BANK v. MERCHANTS' NAT. BANK, 64 N. W. 941.

When case triable de novo on appeal.

Cited in *Peckham v. Van Bergen*, 8 N. D. 595, 80 N. W. 759, holding the provision of N. D. Rev. Codes, § 5630, for the admission of all evidence where trial is by the "court without a jury," inapplicable in an equity case where the court calls a jury to obtain advisory findings of fact; *Hagen v. Gilbertson*, 10 N. D. 546, 88 N. W. 455, holding stipulation by counsel after trial to jury that jury should be waived and court make findings of fact not authority for trial de novo on appeal where statement fails to include evidence which was offered and excluded in trial to jury.

Certificate of trial judge to record on appeal.

Cited in *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550, 64 N. W.

1023, holding insufficient for trial de novo, certificate by trial judge that the record contains all the evidence offered and received at the trial.

Distinguished in *Erickson v. Kelly*, 9 N. D. 12, 81 N. W. 77, holding sufficient, certificate of trial judge attached to statement of a case tried without a jury that the statement "contains all of the evidence introduced;" *Nollman v. Evenson*, 5 N. D. 344, 65 N. W. 686, holding certificate by trial judge that the record contains "all the proceedings had and testimony given," sufficient to obtain trial de novo on appeal when made before any practice had been settled.

Specification of error to review evidence.

Cited in *Schmitz v. Heger*, 5 N. D. 165, 64 N. W. 943, holding assignment of errors and objection of appellant's counsel insufficient in the absence of specifications of errors in the bill of exceptions; *Nichols & S. Co. v. Stangler*, 7 N. D. 102, 72 N. W. 1089, holding that evidence in record cannot be re-examined on appeal where statement of the case does not specify the particulars in which the evidence is alleged to be insufficient; *Thompson v. Cunningham*, 6 N. D. 426, 71 N. W. 128, holding that errors in the verdict, decisions or rulings of the trial court will be disregarded on appeal where the motion for new trial was based on a statement of the case which did not specify such errors; *Barnum v. Gorham Land Co.* 13 N. D. 359, 100 N. W. 1079, holding in action at law for recovery of money which is not tried de novo on appeal the evidence or rulings of the court at trial can only be reviewed on appeal by a statement of the case containing specification of error; *Schmitz v. Heger*, 5 N. D. 165, 64 N. W. 943, holding alleged errors of law corrected on the trial not reviewable on appeal from order denying motion for new trial made on bill of exceptions containing no specification of error.

5 N. D. 165, SCHMITZ v. HEGER, 64 N. W. 943.

Specifications of error.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667, holding that judgment will be affirmed for failure to assign errors in brief; *Thompson v. Cunningham*, 6 N. D. 426, 71 N. W. 128, holding that errors in the verdict decisions or rulings of the trial court will be disregarded on appeal where the motion for new trial was based on a statement of the case which did not specify such errors; *Nichols & S. Co. v. Stangler*, 7 N. D. 102, 72 N. W. 1089, holding that evidence in record cannot be re-examined on appeal where statement of the case does not specify the particulars in which the evidence is alleged to be insufficient; *Barnum v. Gorham Land Co.* 13 N. D. 359, 100 N. W. 1079, holding in action for the recovery of money alleged error in admission of evidence and rulings of court cannot be reviewed on appeal where the statement of the case contains no specification of error.

5 N. D. 167, DORAN v. DAZEY, 57 AM. ST. REP. 550, 64 N. W. 1023.

Constructive notice from break in chain of title.

Cited in *Lyon v. Gombert*, 63 Neb. 630, 88 N. W. 774, holding absence

of patent from a chain of title is fact to excite inquiry from one purchasing land; *Mississippi River Logging Co. v. Blue Grass Land Co.* 131 Wis. 16, 110 N. W. 796, holding where grantor after conveying by warranty deed to one person conveys by quit claim deed to another, the latter fact was a circumstance putting a purchaser on inquiry as to later grantee's title.

5 N. D. 173, CHACEY v. FARGO, 64 N. W. 932.

Municipal liability for injury by defects in street.

Cited in note in 20 L.R.A.(N.S.) 717, 733, 738, on liability of municipality for defects or obstructions in streets.

Proximate cause of injury.

Cited in *Hensler v. Stix*, 113 Mo. App. 162, 88 S. W. 108, holding where operator of passenger elevator negligently caught woman's skirt in gate and at same time started elevator which put woman in a position of danger, such act was the proximate cause of her injury, though the injury itself was caused by a reversal of the elevator not in itself careless.

Cited in note in 9 L.R.A.(N.S.) 553, on obstructions in highway as proximate cause of injury notwithstanding intervening cause.

5 N. D. 180, RE MARKUSON, 64 N. W. 939.

Commitment on suspended sentence.

Cited in *Ex parte Clendenning*, 22 Okla. 108, 19 L.R.A.(N.S.) 1041, 97 Pac. 650, holding where court imposes sentence for violating liquor law and orders discharge of accused from custody pending his good behavior, it cannot after lapse of time provided in sentence and after the term issue a commitment on such sentence; *Miller v. Evans*, 115 Iowa, 101, 56 L.R.A. 101, 91 Am. St. Rep. 143, 88 N. W. 198, holding that failure to execute a mittimus under a judgment sentencing a person to imprisonment for a certain number of days in case of failure to pay a fine, until after the prescribed number of days has elapsed, will not entitle the defendant to relief from the sentence, in the absence of any effort on his part to have it promptly executed; *Smith v. District Ct.* 132 Iowa, 603, 109 N. W. 1085, 11 A. & E. Ann. Cas. 296, on a term of imprisonment as beginning to run from the date of the judgment.

Suspension of imposition of sentence.

Cited in *Neal v. State*, 104 Ga. 509, 42 L.R.A. 190, 69 Am. St. Rep. 175, 30 S. E. 858, holding that after passing sentence a court cannot suspend the execution of the same; *State v. Abbott*, 87 S. C. 466, 33 L.R.A.(N.S.) 112, 70 S. E. 6, holding that court has no power to suspend sentence of imprisonment during good behavior of convict; *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 63 L.R.A. 82, 95 Am. St. Rep. 230, 67 N. E. 23, holding where an accused immediately after being found guilty moves for new trial and court does not grant new trial and suspends imposing sentence for seven months, it loses jurisdiction and has no authority to impose sentence; *State v. Langum*, 112 Minn. 121, 127 N. W. 465, holding that trial court has power, independent of statute to grant stay of criminal proceedings, after conviction, for purpose of enabling perfection of ap-

peal; *State v. Hockett*, 129 Mo. App. 639, 108 S. W. 599, holding where an accused pleads guilty at a November term of court, a suspension of sentence until following June term deprives court of jurisdiction to impose sentence.

Cited in note in 33 L.R.A.(N.S.) 120, 121, on power of court to suspend or stay execution of sentence.

5 N. D. 187, SIFTON v. SIFTON, 65 N. W. 670.

5 N. D. 191, FLAGG v. SCHOOL DIST. NO. 70, 65 N. W. 674.

5 N. D. 196, BRAITHWAITE v. JORDAN, 31 L.R.A. 238, 65 N. W. 701.

Consideration for undertaking on appeal.

Cited in *Morin v. Wells*, 30 Mont. 76, 75 Pac. 688, holding the benefit of rendering the appeal ineffectual and staying proceedings is sufficient consideration for signature by surety.

5 N. D. 261, McPHERRIN v. JONES, 65 N. W. 685.

Charge on credibility of witness.

Cited in *Doyle v. Burns*, 123 Iowa, 488, 99 N. W. 195, holding erroneous an instruction that jury could disregard entire testimony of witness except where corroborated by other credible evidence which neglected to state that statements must have been intentionally or knowingly false; *State v. Johnson*, 14 N. D. 288, 103 N. W. 565, holding the testimony of a witness should not be wholly disregarded because he has innocently made a mistake as to a material fact, but must be wilfully and intentionally false before a jury may disregard it unless corroborated: *Pittsburgh, C. C. & St. L. R. Co. v. Haislup*, 39 Ind. App. 394, 79 N. E. 1035, holding erroneous an instruction that if witness had sworn falsely as to one material fact in the case, even though he might have done so inadvertently or by mistake, jury could disregard entire testimony unless corroborated by other satisfactory evidence; *Hurlbut v. Leper*, 12 S. D. 321, 81 N. W. 631, holding proper, instruction that jury may disregard whole of testimony of any witness who, though confined to above, "wilfully testified falsely" to any material fact in the case; *Simpson v. Miller*, 57 Or. 61, 29 L.R.A.(N.S.) 680, 110 Pac. 485, holding that false testimony due to mistake as to facts does not justify rejection of entire testimony of witness; *State v. Winney*, 21 N. D. 72, 128 N. W. 680, holding that instruction as to corroboration of witnesses which states that if any witness has "wilfully testified falsely" is sufficient.

Distinguished in *State v. Campbell*, 7 N. D. 58, 72 N. W. 935, holding instruction authorizing jury to wholly disregard testimony of witness testifying falsely to any material fact, not ground for reversal where no exception was taken on that ground.

5 N. D. 263, SECURITY BANK v. KINGSLAND, 65 N. W. 697.

Validity of acts by agent for his own benefit.

Cited in *Northwestern F. & M. Ins. Co. v. Lough*, 13 N. D. 601, 102 N. W. 160, holding deed executed by cashier of state banks to himself as an individual is presumptively void and of no effect, in absence of affirmative evidence of authority.

Right to take corporate paper for officer's debt.

Cited in note in 31 L.R.A. (N.S.) 172, on right of taker of commercial paper of corporation for officer's individual debt.

Extent of recovery by pledgee.

Cited in note in 44 L.R.A. 248, on extent of recovery by pledgee on negotiable paper which pledgee could not collect.

Necessity for indorsement to transfer of note.

Cited in *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193, holding indorsement essential to a transfer of commercial paper in due course and that without it a purchaser in good faith takes the same subject to all defenses existing between the original parties.

What will put purchaser of commercial paper on inquiry.

Cited in note in 29 L.R.A. (N.S.) 361, on what circumstances sufficient to put purchaser of negotiable paper on inquiry.

5 N. D. 273, STEWART v. PARSONS, 65 N. W. 672, Later phase of same case in 14 N. D. 213, 103 N. W. 626.

5 N. D. 277, WELSH v. BARNES, 65 N. W. 675.

5 N. D. 281, OUVERSON v. GRAFTON, 65 N. W. 676.

Proximate cause of injury.

Cited in *McDonell v. Minneapolis, St. P. & S. Ste. M. R. Co.* 17 N. D. 606, 118 N. W. 819, holding where dam of sucking colt is killed by negligence of railroad, the extra care and attention required in rearing such colt could be recovered as a proximate result of the negligent act, whether damages could have been anticipated or not; *Peterson v. Conlan*, 18 N. D. 205, 119 N. W. 367, to point that owner of trespassing animals is liable only for proximate damages.

— Accident in use of street.

Cited in *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057, holding it for the jury whether the negligence of a city in allowing a wire to be stretched across a street was the proximate cause of an injury to a pedestrian caused by a fall upon him of a performer sliding down the wire caused by a weakness or defect in the harness suspending her.

Contributory negligence in use of street.

Cited in *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A. (N.S.) 1111, 127 N. W. 91, holding it not negligence, as matter of law to drive upon dangerous or defective highway, with knowledge of condition, unless dangerous

condition such that person of ordinary prudence would not; *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359, holding a pedestrian was not guilty of contributory negligence as matter of law in stepping into hole in sidewalk with knowledge of defective condition of sidewalk, when at time she was walking fast, on cold and stormy night, and did not remember the particular defect causing the injury; *Wells v. Lisbon*, 21 N. D. 34, 128 N. W. 308, holding that care required of traveler on street undergoing repairs must be proportionate to increased danger from darkness or other atmospheric conditions.

Cited in note in 21 L.R.A.(N.S.) 618, 639, 640, 672, 674, on contributory negligence as affecting municipal liability for defects and obstructions in streets.

Burden of proving contributory negligence.

Cited in note in 33 L.R.A.(N.S.) 1164, 1187, on burden of proof as to contributory negligence.

Municipal liability for defects in street.

Cited in note in 20 L.R.A.(N.S.) 525, 653, 654, 655, 733, 742, on liability of municipality for defects or obstructions in streets.

Imputed negligence.

Cited in note in 110 Am. St. Rep. 293, on imputed negligence.

— Of driver to passenger.

Cited in *Loso v. Lancaster County*, 77 Neb. 466, 8 L.R.A.(N.S.) 618, 109 N. W. 752, holding a person riding with driver in private vehicle can recover from county for injury from defective bridge, although driver be negligent if person so riding is himself free from negligence and exercise no control over driver; *Duval v. Atlantic Coast Line R. Co.* 134 N. C. 331, 65 L.R.A. 722, 101 Am. St. Rep. 830, 46 S. E. 750, holding where injury to guest riding in private vehicle at invitation of driver occurs through concurring negligence of a third person and the driver, the negligence of the latter is not imputed to such guest; *Shultz v. Old Colony Street R. Co.* 193 Mass. 309, 8 L.R.A.(N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 A. & E. Ann. Cas. 402, holding where negligence of a third person concurs with that of the driver of a private vehicle, with whom a guest exercising no control over the driver is riding, being in exercise of due care and having no reason to suspect carelessness on part of driver, causing injury to such guest, the negligence of the driver is not imputed to the guest.

Cited in note in 8 L.R.A.(N.S.) 600, 645, on imputed negligence of driver to passenger.

5 N. D. 297, GAGE v. FISHER, 31 L.R.A. 557, 65 N. W. 809.

Contracts by members of corporation for control.

Cited in *Morgan v. Hartley Oil & Gas Co.* 30 Pa. Co. Ct. 22, 35 Pittsb. L. J. N. S. 53, holding agreement by majority stockholders transferring their stock to trustees for a designated term for purpose of vesting in them control of corporation is in nature of a power and is revocable.

Cited in note in 56 Am. St. Rep. 40, 51, on agreements to control future voting of corporate stock.

— Validity of.

Cited in *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795, holding void as against public policy a contract by president and teller in a bank, who are stockholders, with another person, whereby latter was to secure control of corporation and elect board of directors who would retain such president and teller in their position, the expense of gaining control to be borne equally by parties; *Morel v. Hoge*, 130 Ga. 625, 16 L.R.A.(N.S.) 1136, 61 S. E. 487, 14 A. & E. Ann. Cas. 935, holding void as against public policy an agreement by factions of a corporation whereby in consideration of a subscription by one faction it was to have the permanent right of electing a majority of the board of directors and exercising a control over company and its affairs; *Bensinger v. Kantzler*, 112 Ill. App. 293, holding void as against public policy a provision in a contract by which holders of a controlling interest in a corporation agree they will elect certain stockholders officers thereof for certain period at stated salary; *Carter v. Producers' Oil Co.* 182 Pa. 551, 39 L.R.A. 100, 38 Atl. 571, holding rule of partnership association excluding the right of a member to purchase additional shares and exercise the rights of a member in respect of them until he shall be re-elected to membership in respect of those shares, valid under the act of June 25, 1885, providing that interests in such associations shall be personal estate and transferred under such rules and regulations as the associations prescribe.

Cited in note in 16 L.R.A.(N.S.) 1138, on validity of agreements to control voting power of stock.

Distinguished in *Smith v. San Francisco & N. P. R. Co.* 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582, holding that to separate the voting power from the ownership of stock in a corporation is not illegal as against public policy when effected by an irrevocable proxy given upon sufficient consideration and for a lawful purpose.

Validity of contract where consideration is partly illegal.

Cited in note in 117 Am. St. Rep. 497, on contracts, consideration for which has partly failed, or is partly illegal.

Specific performance of sale of stock.

Cited in *Eichbaum v. Sample*, 30 Pa. Co. Ct. 497, holding where corporate stock is pledged as collateral security and pledgee has made no demand for payment of the debt, the pledgor may on tender of amount of debt compel by bill in equity a delivery of the stock.

5 N. D. 315, *ACME HARVESTER CO. v. AXTELL*, 65 N. W. 680.

5 N. D. 319, *WILLIAM DEERING & CO. v. RUSSELL*, 65 N. W. 691.

5 N. D. 327, MOEN v. LILLESTAL, 65 N. W. 694.

Vendee's rights and liabilities under executory contract of sale.

Cited in *Schauble v. Schulz*, 69 C. C. A. 581, 137 Fed. 389, holding a vendee under an executory contract of sale is from the time of his entry vested with sufficient title as against persons other than vendor to start claim of adverse possession.

— Crops or improvements on land.

Cited in *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623, holding where without fault of either party a barn is destroyed by fire on property in possession of a vendee under a contract for deed, he must bear the loss as he is the equitable owner; *Lynch v. Sprague Roller Mills*, 51 Wash. 535, 99 Pac. 578, holding crops raised by occupier of land under a contract to sell belong to him and not to seller.

5 N. D. 335, SYKES v. HANNAWALT, 65 N. W. 682.

Chattel mortgage of future earnings of thresher.

Cited in *Dyer v. Schneider*, 106 Minn. 275, 20 L.R.A.(N.S.) 505, 130 Am. St. Rep. 615, 118 N. W. 1023, holding void as to creditors without actual notice a chattel mortgage on the future earnings of a threshing machine, men and teams, for a designated term in designated territory; *Reynolds v. Strong*, 10 N. D. 81, 88 Am. St. Rep. 680, 85 N. W. 987, holding future earnings of a threshing machine subject to mortgage.

Cited in note in 20 L.R.A.(N.S.) 506, on chattel mortgage of future earnings of threshing outfit.

Necessity and sufficiency of record of chattel mortgage.

Cited in *Aultman & T. Mach. Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. 373, 87 N. W. 435, holding the lien of a chattel mortgagee under a mortgage upon chattels in Iowa, executed and recorded only in North Dakota, superior to that of an Iowa creditor who subsequently attached the same in that state on a debt which originated prior to the execution of the mortgage.

Cited in note in 137 Am. St. Rep. 492, on effect of failure to execute and record chattel mortgage as prescribed by statute.

Right of mortgagor of accounts to sue.

Cited in *Swan v. Thurman*, 112 Mich. 416, 70 N. W. 1023, holding that a mortgagor of accounts may maintain an action thereon.

Evidence in trover.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

5 N. D. 344, NOLLMAN v. EVENSON, 65 N. W. 686.

Trial de novo on appeal.

Cited in *Christianson v. Farmers' Warehouse Asso.* 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300, holding that duty of supreme court to try cause anew

on judgment roll and render final judgment according to justice of the case does not require it to perform any functions not properly pertaining to appellate jurisdiction.

5 N. D. 350, STATE EX REL. MEARS v. BARNES, 65 N. W. 688.

Right to remove case to Federal court.

Cited in *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 56 Am. St. Rep. 652, 75 N. W. 244, holding right of removal to Federal court of case pending at time of admission as state lost unless application for removal is made in time.

Intervention.

Cited in note in 123 Am. St. Rep. 286, on intervention.

5 N. D. 359, STATE EX REL. MOORE v. ARCHIBALD, 66 N. W. 234.

Original Supreme court jurisdiction of extraordinary remedies.

Cited in *State ex rel. Whiteside v. First Judicial Dist. Ct.* 24 Mont. 539, 63 Pac. 395, holding that Mont. Const. giving the supreme court appellate jurisdiction only, which shall be coextensive with the state and a general supervisory control over all inferior courts, contains a grant of supervisory control distinct and separate from the appellate jurisdiction to meet exigencies to which the latter is not commensurate; *Homesteaders v. McCombs*, 24 Okla. 201, — L.R.A.(N.S.) —, 103 Pac. 691, 20 A. & E. Ann. Cas. 181, holding that supreme court has not original jurisdiction of action instituted by foreign insurance company to compel insurance commissioner to permit insurance companies to do business within state.

Cited in notes in 58 L.R.A. 855, 863, 864, on original jurisdiction of court of last resort in mandamus case; 13 L.R.A.(N.S.) 771, on exclusiveness of jurisdiction of highest court to issue remedial writs for prerogative purposes.

— **Certiorari.**

Cited in *Duluth Elevator Co. v. White*, 11 N. D. 534, 90 N. W. 12, holding supreme court could not issue writ of certiorari to annul a tax and defeat its collection, alleged illegal because of action by state board of equalization; *State ex rel. Whiteside v. First Judicial Dist. Ct.* 24 Mont. 539, 63 Pac. 395, holding that the grant to the supreme court of appellate jurisdiction in Mont. Const. art. 8, § 2, from its very nature implies also all the instrumentalities necessary to make it effective, one of which is the writ of certiorari.

— **Injunction.**

Cited in *Whipple v. Stevenson*, 25 Colo. 447, 55 Pac. 188, holding that under Colo. Const. art. 6, § 3, empowering the supreme court to issue injunction and other specified writs and also "other original and remedial writs," the original jurisdiction of the court is limited to those cases in which those writs might issue; *State ex rel. Clarke v. Moran*, 24 Mont. 433, 63 Pac. 390, holding that under Mont. Const. art. 8, § 3, providing that the

supreme court "shall have power in its discretion to issue and to hear and determine writs of . . . injunction and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction," the supreme court has original jurisdiction of a writ of injunction to be used to restrain excess in cases affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people; *State ex rel. Brett v. Kenner*, 21 Okla. 817, 97 Pac. 258, holding supreme court has not original jurisdiction to issue injunction to restrain county commissioners from issuing certain warrants and making levy against taxable property of county to redeem them; *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282, holding that supreme court in exercise of its original jurisdiction will enjoin alleged new county and those assuming to act as its officers from exercising jurisdiction over territory embraced in such new county until validity of organization of county, involved in pending proceeding, is finally adjudicated.

— *Mandamus*.

Cited in *People ex rel. Kocourek v. Chicago*, 193 Ill. 507, 58 L.R.A. 833, 62 N. E. 179, holding that Ill. Const. art. 6, § 2, giving the supreme court original jurisdiction in mandamus cases, extends only to cases involving the rights, interests, and franchises of the state and the rights and interests of the whole people, to enforce the performance of high official duties affecting the public at large, and in emergency (which the court itself is to determine), to assume jurisdiction of cases affecting local public interests or private rights when necessary to prevent a failure of justice; *State ex rel. McDonald v. Holmes*, 16 N. D. 457, 114 N. W. 367, holding supreme court will not issue mandamus at suit of county treasurer to compel state auditor to issue and deliver to state treasurer a state warrant in settlement with county for paying reward allowed by statute for securing arrest and conviction of violators of law prohibiting sale of intoxicants; *State ex rel. Steele v. Fabrick*, 17 N. D. 532, 117 N. W. 860, holding that while proceedings for the division of a county do not involve questions of state sovereignty to call forth jurisdiction of supreme court in issuance of mandamus, it will so issue such writ to compel county officers to submit question to voters, where application to the district court would be futile to get question before voters at next general election; *State ex rel. Shaw v. Thompson*, 21 N. D. 426, 131 N. W. 231, holding that under peculiar facts of case supreme court has jurisdiction to issue original writ to compel city auditor to prepare and cause to be furnished ballots and supplies necessary to conduct election on question of adoption of commission form of government.

Cited in note in 58 L.R.A. 865, on original jurisdiction of court of last resort in mandamus case.

— *Prohibition*.

Cited in *People ex rel. Graves v. District Ct.* 37 Colo. 443, 13 L.R.A. (N.S.) 768, 86 Pac. 87, holding supreme court would issue writ of prohibition against a district court which had unlawfully ordered the production of election books on the arrest of an election judge, the storing of ballot

boxes in place not designated by law, and appearance of many voters for examination.

- Quo warranto.

Cited in *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705, holding the supreme court will assume jurisdiction of an application for writ of quo warranto at suit of a private relator who has litigation pending directed to judge of judicial district appointed by governor, although attorney general refuses to consent to such application; *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385, holding supreme court can entertain application for leave to file information in nature of quo warranto as by what authority county holds and exercises powers and functions over adjacent unorganized county.

When mandamus lies.

Cited in *Cruse v. State ex rel. Harpham*, 52 Neb. 831, 73 N. W. 212, holding that mandamus is the appropriate remedy to compel one without the prima facie right to an office to deliver the books, papers, and moneys to one having the prima facie right thereto; *State ex rel. Coney v. Huland*, 75 Neb. 767, 107 N. W. 113, holding mandamus will lie to compel an officer whose term of office has ended to deliver all books, papers, records, money and other property belonging to said office to the person elected to succeed him and who has qualified for office; *Chandler v. Starling*, 19 N. D. 144, 121 N. W. 198, holding that ultimate right and title to office cannot be litigated in mandamus proceedings.

Cited in note in 31 L.R.A. 343, 347, 350, on mandamus to compel surrender of office.

Practice on application for prerogative writ of mandamus.

Cited in *State ex rel. McDonald v. Holmes*, 16 N. D. 457, 114 N. W. 367, holding leave to file information should ordinarily be made by attorney general in name of the state.

Conflicting claims to office.

Cited in *Couch v. State*, 169 Ind. 269, 124 Am. St. Rep. 221, 82 N. E. 457, holding an incumbent of public office who at expiration of term has been succeeded by another who has qualified thereunder, desiring to contest the election, eligibility or qualification of successor, should first surrender office and proceed in manner prescribed by law for determining contested claims to office.

Duration of office.

Cited in *Childs v. State*, 4 Okla. Crim. Rep. 474, 33 L.R.A.(N.S.) 563, 113 Pac. 545, holding that appointee of office, created to be filled by appointment, holds office only during pleasure of appointing power where term is not designated by act creating office.

Necessity for following parliamentary procedure.

Cited in *Mann v. LeMars*, 19 Iowa, 251, 80 N. W. 327, holding that in the proceedings of a mayor and six councilmen, all sitting about a single table within sight and hearing of one another, a particular measure which has been agreed to by the number required by law in a manner not for-

bidden by statutory provisions is not invalidated because parliamentary procedure may not have been followed.

5 N. D. 384, LEWIS v. GALLUP, 67 N. W. 137.

Certiorari.

Cited in *St. Paul, M. & M. R. Co. v. Blackmore*, 17 N. D. 67, 114 N. W. 730, holding an order in condemnation proceedings made after judgment was entered and paid to the clerk whereby the clerk was ordered to retain therefrom amount due county for taxes, was appealable, and could not be reviewed by certiorari.

5 N. D. 393, FIRST NAT. BANK v. LAMONT, 67 N. W. 145.

Consideration for mortgage.

Cited in *Red River Valley Nat. Bank v. Barnes*, 8 N. D. 432, 79 N. W. 880, holding that a collateral note and chattel mortgage securing the same need no further consideration than the principal debt.

Distinguished in *Towle v. Greenberg*, 6 N. D. 37, 68 N. W. 82, holding that one to whom a note secured by mortgage is given, the only consideration for which consists of notes due from the mortgagor to a bank, which are not surrendered, cannot recover thereon in an action to which the bank is not a party.

5 N. D. 400, FIELD v. GREAT WESTERN ELEVATOR CO. 67 N. W. 147, Later appeal in 6 N. D. 424, 66 Am. St. Rep. 611, 71 N. W. 135.

What orders are appealable.

Distinguished in *Oliver v. Wilson*, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757, holding order granting peremptory writ of mandamus appealable as a final order in a special proceeding affecting a substantial right.

— Orders of dismissal.

Followed in *Lough v. White*, 13 N. D. 387, 100 N. W. 1084, holding an order of the district court dismissing an appeal from a judgment in justice court, not appealable.

Cited in *Dibble v. Hanson*, 17 N. D. 21, 114 N. W. 371, 16 A. & E. Ann. Cas. 210, holding order for the dismissal of action not appealable; *Cameroon v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, holding order dismissing action for failure of proof not appealable; *Hanberg v. National Bank*, 8 N. D. 328, 79 N. W. 336, holding judgment upon an order to show cause why an action should not be dismissed not appealable; *Larson v. Walker*, 17 N. D. 247, 115 N. W. 838, holding order denying motion to set aside order striking cause from calendar and dismissing same not appealable.

What is an entry of judgment.

Cited in *McTavish v. Great Northern R. Co.* 8 N. D. 333, 79 N. W. 443, holding entry by clerk in judgment book, of court's order that a party "have a clear judgment" for a specified amount, not entry of judgment.

Loss of right by delay or action taken.

Later appeal in 6 N. D. 424, 66 Am. St. Rep. 611, 71 N. W. 135, holding that the right to appeal to the supreme court from a judgment of a county court was irrevocably lost by appealing to the district court.

Cited in *Rolette County v. Pierce County*, 8 N. D. 613, 80 N. W. 804, holding a delay of ten years in asserting a right to be such laches as precludes a party to an action in which such right is involved and in which an order for judgment was granted, which was a judgment in all respects except that it was not entered in the judgment book, from moving to set aside the order and obtaining leave to amend the complaint.

5 N. D. 402, FOLSOM v. KILBOURNE, 67 N. W. 291.

5 N. D. 406, STATE EX REL. SCOVIL v. MOORHOUSE, 67 N. W. 140.

Construction of repealing acts.

Cited in *Arnett v. State*, 168 Ind. 180, 8 L.R.A.(N.S.) 1192, 80 N. E. 153, holding a repealing clause, like any other provision of a statute, is to be subjected to rules of construction and the intent will prevail over the literal import of the words; *Pratt v. Swan*, 16 Utah, 483, 52 Pac. 1092, holding that a repealing statute merely enacted to effect a revision and codification of the laws will be regarded as a subordinate feature of the general plan, and a former law will be considered as continued and amended in order that the legislative intent may prevail; *State v. Western U. Teleg. Co.* 111 Minn. 21, 124 N. W. 380, holding that statute will not be construed to repeal another act where apparent that it was intended not to so operate.

5 N. D. 414, DUNHAM v. PETERSON, 36 L.R.A. 232, 57 AM. ST. REP. 556, 67 N. W. 293.

Guaranty of payment.

Cited in *German American Sav. Bank v. Hanna*, 124 Iowa, 374, 100 N. W. 57, holding payee of note containing waiver of presentment for payment, protest, notice of protest and notice of nonpayment, who indorses guaranty of payment is an indorser with liability beyond that of a simple guarantor, also citing note in 36 L.R.A. 232, on this subject.

Who are indorsees of negotiable instruments.

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding where note payable to foreign corporation is void in payee's hands because of its failure to comply with statutes relative to admission of foreign corporation to do business in state, and is transferred to an innocent purchaser thereof before maturity, for value, the latter is an indorsee and entitled to enforce note; *Mullen v. Jones*, 102 Minn. 72, 112 N. W. 1048, holding a writing on back of a promissory note by payee guarantying payment of note at maturity and waiving notice of nonpayment and demand is an indorsee in commercial sense and person to whom indorsed is an indorsee under the law merchant.

Dak. Rep.—18.

Who are bona fide transferees of bills and notes.

Cited in *Vickery v. Burton*, 6 N. D. 245, 68 N. W. 193, holding that the purchaser in good faith without indorsement takes paper subject to all defense existing between the original parties; *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567, holding indorsee not prevented from being innocent holder in due course by fact that note was transferred under guaranty of payment.

Cited in note in 17 L.R.A.(N.S.) 1110, on transferee, without indorsement, of bill or note payable or indorsed "to order" as bona fide purchaser. Applying same rule in state and Federal courts.

Cited in *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837 (dissenting opinion), on right to have two rules as to liability of foreign insurance companies on their contracts.

5 N. D. 422, MYRICK v. McCABE, 67 N. W. 143.

"Special proceedings."

Cited in *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905, holding procedure to obtain an injunctive order restraining a mortgage foreclosure by advertisement is not a special proceeding, and appeal will not lie from order denying motion to vacate; *Maben v. Rosser*, 24 Okla. 588, 103 Pac. 674, holding that proceeding to remove judges is not criminal proceeding but special proceeding.

What orders are appealable.

Cited in *State v. Crum*, 7 N. D. 299, 74 N. W. 992, holding order refusing to grant reconsideration of proceeding against attorney for contempt of court, not appealable; *Carruth v. Taylor*, 8 N. D. 166, 77 N. W. 617, holding final order in habeas corpus proceeding, not appealable.

Right to costs.

Cited in *Re Eaton*, 7 N. D. 269, 74 N. W. 870, holding no costs or disbursements recoverable by either party in a disbarment proceeding although it is a special proceeding in the sense that it is neither a civil nor criminal action.

5 N. D. 426, SMITH v. NICHOLSON, 67 N. W. 296.

Time of issuance of writ of attachment.

Cited in *Taughner v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 747, holding that writ issued by justice of peace before summons is issued in action confers no authority to make attachment.

5 N. D. 432, NORTHWESTERN CORDAGE CO. v. RICE, 57 AM. ST. REP. 563, 67 N. W. 298.

Implied warranties.

Cited in *Hooven & A. Co. v. Writz*, 15 N. D. 477, 107 N. W. 1078, holding on sale of binder twine manufactured by seller and sold in carload lots, not accessible for examination and containing defects resulting from process of manufacture and not disclosed to purchaser, there is an im-

plied warranty of proper materials and of soundness and merchantability within statute.

Cited in notes in 102 Am. St. Rep. 615, on implied warranty of quality; 23 Eng. Rul. Cas. 462, on implied warranty on sale of goods by description.

Acceptance of goods as waiver of rights.

Cited in *International Soc. v. Hildreth*, 11 N. D. 262, 91 N. W. 70, holding where purchaser accepted book which did not fully comply with description set out in subscription contract, he affirmed contract and his only remedy was to recover damages for the breach; *McCormick Harvesting Mach. Co. v. Fields*, 90 Minn. 161, 95 N. W. 886, holding where corn shredder was sold with printed instrument containing warranty of machine and provision that continuous use by purchaser would be deemed an acceptance, such acceptance may be considered in determining whether purchaser relied on warranty and whether he has waived right to take advantage of a breach; *Mine Supply Co. v. Columbia Min. Co.* 48 Or. 391, 86 Pac. 789, holding where there is an effort to use and operate an article purchased which does not correspond to description which effects a breach of the contract, such user does not waive right to damage for breach; *Miamisburg Twine & C. Co. v. Wohlbuter*, 71 Minn. 484, 74 N. W. 175, holding that where Manila twine was not only sold by description but by sample as well, with an express warranty that it should correspond with both the description and the sample, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description, and the vendee may retain the goods and rely upon his warranty as to description.

Cited in note in 24 L.R.A.(N.S.) 239, on failure to inspect or test as waiver of express warranty.

**5 N. D. 438, CHRISTIANSON v. FARMERS' WAREHOUSE ASSO.
32 L.R.A. 730, 67 N. W. 300.**

Trial de novo.

Cited in *Kipp v. Angell*, 10 N. D. 199, 86 N. W. 706, holding omission from statement on appeal of any evidence offered in the trial court, fatal to a trial de novo; *Prescott v. Brooks*, 11 N. D. 93, 90 N. W. 129, holding an appeal from a portion of a judgment and request for retrial for only portion of case does not confer jurisdiction on supreme court to enter on retrial.

Disapproved in *Re Burnette*, 73 Kan. 609, 85 Pac. 575, as not being in harmony with principles lying at foundation of state's judicial system, holding supreme court could not try a case de novo, its jurisdiction not being original.

Introducing new evidence on appeal.

Cited in *Edmonson v. White*, 8 N. D. 72, 76 N. W. 986, denying right of supreme court to admit new evidence on appeal.

Bona fide transferee of commercial paper.

Cited in *First National Bank v. Flath*, 10 N. D. 281, 86 N. W. 867,

holding that usages and customs of the commercial transactions determine the "ordinary course of business" in transfer of negotiable instruments.

Recital in note affecting negotiability.

Cited in note in 32 L.R.A.(N.S.) 859, on recital in note as to security affecting negotiability.

5 N. D. 451, ANDERSON v. FIRST NAT. BANK, 67 N. W. 821.

Reaffirmed on later appeal in 6 N. D. 497, 72 N. W. 916.

Right to rely on ultra vires.

Cited in *Toutelot v. Whithed*, 9 N. D. 467, 84 N. W. 81, denying right of either party to set up invalidity on ground of ultra vires of executed contract by national bank to purchase stock of another corporation.

What is a conversion.

Cited in note in 9 N. D. 632, on what amounts to conversion.

5 N. D. 460, SEYBOLD v. GRAND FORKS NAT. BANK, 67 N. W. 682.

Gifts causa mortis.

Cited in note in 99 Am. St. Rep. 893, 915, on gifts causa mortis.

Certificates of deposit.

Cited in note in 75 Am. St. Rep. 55, on certificate of deposit.

Who is real party in interest.

Cited in note in 64 L.R.A. 591, as to who is real party in interest within statutes defining parties by whom action must be brought.

What is a conversion.

Cited in note in 9 N. D. 632, on what amounts to conversion.

5 N. D. 472, SARGENT v. KINDRED, 67 N. W. 826.

Notice to attorney.

Cited in *Brand v. Baker*, 42 Or. 426, 71 Pac. 320, holding knowledge by an attorney of sale under execution and confirmation thereof is notice to client.

Nunc pro tunc vacation of judgment.

Cited in *Garr, S. & Co. v. Collin*, 15 N. D. 622, 110 N. W. 81, holding where an application to open a default judgment is made within time provided by statute, and matter submitted to court, its order granting application is not void because made after time limited by statute, it being made nunc pro tunc as of time of submission of matter.

Cited in note in 52 Am. St. Rep. 798, on power of court to vacate judgment after time specified in statute.

5 N. D. 476, ROSENBAUM BROS. v. HAYES, 67 N. W. 951, Reaffirmed on later appeals in 8 N. D. 461, 79 N. W. 987; 10 N. D. 311, 86 N. W. 973.

Intent in delivery of possession.

Cited in *Merchants' Exch. Bank v. McGraw*, 22 C. C. A. 622, 48 U. S.

App. 55, 76 Fed. 930, holding that the delivery of a bill of lading as security for an advance of money with intent to transfer the property in the goods is a symbolical delivery of them, and vests in the party making the advance a special property sufficient to enable him to maintain replevin, trover, or any action against one who attaches them upon a writ against the general owner; *Witte Mfg. Co. v. Reilly*, 11 N. D. 203, 91 N. W. 42, holding the purpose of a delivery by the seller as shown, facts may be shown as bearing on the intent with which it is made.

5 N. D. 483, GREENBERG v. UNION NAT. BANK, 67 N. W. 597.

Pleading in action for penalty.

Cited in *Sheets v. Prosser*, 16 N. D. 180, 112 N. W. 72, holding where party sues to recover on a penalty, the complaint must expressly aver that a recovery of the statutory penalty is sought, and must indicate statute giving penalty; *Peckham v. Van Bergen*, 10 N. D. 43, 84 N. W. 566, holding that forfeiture for failure to execute release of satisfied mortgage on request can only be recovered on proof of request, and where there is a specific count on the forfeiture.

Distinguished in *Erickson v. Citizens' Nat. Bank*, 9 N. D. 81, 81 N. W. 46, holding that a failure to refer to the specific statute relied on in an action to recover usurious interest paid to a national bank will not be considered on appeal, where the question was raised in the trial court by an objection to the introduction of evidence instead of by demurrer.

5 N. D. 487, STATE v. ROOT, 57 AM. ST. REP. 568, 67 N. W. 590.

What constitutes a contempt.

Cited in *State ex rel. Baker Lodge No. 47 G. F. & A. M. v. Sieber*, 49 Or. 1, 88 Pac. 313, holding failure to obey court's injunctive order as to the free flowage of water in a stream constituted criminal intent.

Cited in notes in 2 L.R.A.(N.S.) 604, on assault on or abuse of judge after retiring from courtroom as contempt; 17 L.R.A.(N.S.) 575, on criticism of decision or opinion after case determined as contempt or ground for disbarment.

Punishment for contempt.

Cited in *Re Dunn*, 85 Neb. 606, 124 N. W. 120, on authority of supreme court to indefinitely suspend a practitioner at its bar for contempt, after hearing and opportunity to be heard.

Affidavits charging contempt.

Cited in *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, holding affidavit on information and belief is insufficient upon which to base constructive criminal contempt proceedings for violation of an injunctive order of court; *State v. Harris*, 14 N. D. 501, 105 N. W. 621, holding affidavits on which a warrant is issued in contempt for violation of an injunctive order must state facts showing the offense complained of as a contempt.

—Necessity for.

Cited in *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Anni. Cas. 1035, holding while no affidavit of accusation is necessary for contempt committed in presence of court, where such contempt is not so committed, an affidavit of accusation is indispensable.

Procedure in contempt proceeding.

Cited in *Noble Twp. v. Aasen*, 10 N. D. 264, 86 N. W. 742, holding failure to file interrogatories setting forth facts and circumstances of offense charged in criminal contempt proceeding not cured by defendant's silence in absence of express waiver.

Record in criminal contempt.

Cited in *State v. Crum*, 7 N. D. 299, 74 N. W. 992, holding order containing conviction and sentence which must embrace statement of facts constituting offense and recite that same occurred in immediate view and presence of court and set out punishment, only record proper in case of criminal contempt in open court.

5 N. D. 507, STATE v. BRONKOL, 67 N. W. 680.**Sale of mortgaged property.**

Cited in *State v. Miller*, 74 Kan. 667, 87 Pac. 723, holding under a statute making it a crime to sell mortgaged personal property without the consent of the mortgagee, a conviction cannot be had without proof of wrongful intent.

What constitutes jeopardy.

Cited in note in 27 L.R.A.(N.S.) 137, on impaneling jury and proceeding with trial without arraignment as jeopardy.

5 N. D. 516, STATE v. KENT (STATE v. PANCOAST), 35 L.R.A. 518, 67 N. W. 1052.**When trial is commenced.**

Distinguished in *Lipscomb v. State*, 76 Miss. 223, 25 So. 158, holding that a trial has been commenced within Miss. Code, § 933, providing for the completion of a trial in progress at the time of the expiration of the term of court, when all dilatory proceedings have been disposed of and when all ordinary efforts, the object of which is to prevent a trial, have been ineffectually exhausted, and the cause is called for trial and nothing remains to be done except to proceed therein.

Waiver of error in change of venue.

Cited in *Kennison v. State*, 83 Neb. 391, 119 N. W. 768, holding where at request of an accused the venue is changed and he appears at trial without protest goes to trial and raises objection for first time on appeal, although county is not adjoining that where crime was committed, he will be held to have waived constitutional privilege of being tried where crime was committed; *Re Jones*, 90 Mo. App. 318, holding that a defendant waives error in awarding to a party not entitled to it a change of venue by his appearance in the action in the court to which venue had been erroneously awarded; *Scott Hardware Co. v. Riddle*, 84 Mo. App. 275, holding that a

party who has agreed that the venue should be changed to another court of competent jurisdiction and has submitted himself to that court when the venue was changed, and has appeared in that court and submitted the issues to trial without objection, is estopped to question the jurisdiction of the court over his person.

Construction of criminal statutes.

Cited in *State v. Barry*, 14 N. D. 316, 103 N. W. 637, holding statutory provision that court may render judgment in criminal cases if punishment imposed by jury is under the limit prescribed by law for the offense of which accused is found guilty, or if punishment is greater than highest limit prescribed for offense, is mandatory and court must enter judgment.

Examination of witnesses whose names are not on information.

Cited in *State v. Albertson*, 20 N. D. 512, 128 N. W. 1122, holding that court may allow examination of witnesses not indorsed on information.

Corroboration of accomplice.

Cited in note in 98 Am. St. Rep. 171, on convicting on testimony of accomplice.

Proof of flight or concealment.

Cited in *Woolbridge v. State*, 49 Fla. 137, 38 So. 3, holding in prosecution for forgery it was not reversible error to admit proof of concealment and flight, where accused on cross-examination testified he left the county for purpose of concealment, knowing his books were being investigated.

Cross-examination of witness.

Cited in *Schnase v. Goetz*, 18 N. D. 594, 120 N. W. 553, holding that witness may be cross-examined as to conviction of crime, for purpose of discrediting him or lessening weight of his testimony; *Wallace v. State*, 41 Fla. 547, 26 So. 713, holding that it is a general rule that cross-examination of a witness as to indictments or charges before conviction against him, or of criminal offenses, is a matter of discretion in the trial court not subject to review on writ of error or appeal, unless the discretion is abused; *State v. Malmberg*, 14 N. D. 523, 105 N. W. 614, holding on prosecution of an accused for crime of maintaining a nuisance it was proper for an examiner to interrogate a witness as to particular acts and circumstances tending to show ill will or other motive for falsifying although witness has denied the existence of such motives; *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847, holding where plaintiff on direct examination testified that he hired another to borrow money from defendant and relend it to plaintiff, it was proper on cross-examination to require plaintiff to testify that person so hired was insolvent and had no credit; *State v. Nyhus*, 19 N. D. 326, 27 L.R.A. (N.S.) 487, 124 N. W. 71, holding cross-examination of one accused of rape as to former arrests for other offenses, improper, without opportunity to answer as to guilt of such offenses.

- Of accused.

Following in *State v. Nyhus*, 19 N. D. 326, 27 L.R.A. (N.S.) 487, 124 N. W. 71, holding in prosecution for rape it was not proper cross-examination to permit accused to be asked as to arrests for other crimes, without

opportunity to answer as to innocence or guilt of offense for which was arrested.

Cited in *Wallace v. State*, 41 Fla. 547, 26 So. 713, holding that a defendant on cross-examination may be required to disclose fully every matter which he voluntarily opened upon direct examination, notwithstanding his answers would tend to criminate, degrade, or disgrace him; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477, holding that accused voluntarily taking witness stand might properly be asked on cross-examination whether a former arrest he had not resisted the officer making arrest; *People v. Dupounce*, 133 Mich. 1, 103 Am. St. Rep. 435, 94 N. W. 388, 2 A. & E. Ann. Cas. 246, holding a defendant in a criminal case who takes the stand in his own behalf waives his constitutional right to refuse to answer any question material to the case, although the answers tend to prove him guilty of some other crime than that for which he is on trial; *State v. Shockley*, 29 Utah, 25, 110 Am. St. Rep. 639, 80 Pac. 865, holding where a witness is also an accused in a criminal prosecution, his counsel cannot speak for him and make proper objection and protect accused in right and immunity from answering questions on cross examination respecting commission of other crimes in no way connected with one on trial.

Distinguished in *State v. Bond*, 12 Idaho, 424, 86 Pac. 43, holding witness who is separately charged with crime is called as a witness for the prosecution on a preliminary examination of another accused, he may refuse to testify on direct or cross examination on anything that may incriminate him.

Proof of other crime.

Cited in *State v. Martin*, 47 Or. 282, 83 Pac. 849, 8 A. & E. Ann. Cas. 769, holding in prosecution for homicide proof of illegal intercourse with deceased's daughter admissible to prove motive, where it is shown that deceased had threatened prosecution of accused for seduction with consequent imprisonment, and accused was presumably engaged to another girl and unwilling to marry deceased's daughter; *Thompson v. United States*, 75 C. C. A. 172, 144 Fed. 14, 7 A. & E. Ann. Cas. 62, holding where accused is on trial for issuing counterfeit bank notes, it is competent for the government to show that accused said he was an abortionist and was liable to be detected and arrested, and wanted the spurious paper in question to use as bail in an emergency; *State v. Miller*, 20 N. D. 509, 128 N. W. 1034, holding proof that defendant had, within two months prior to time set in information, sold intoxicating liquors, admissible on prosecution for importing intoxicating liquors, for purpose only of showing intent of such importation; *Horn v. State*, 12 Wyo. 80, 73 Pac. 705, holding statements by accused of other crimes committed by him admissible as affecting his credibility where he has repeatedly stated on direct and cross examination that he had never committed any crime.

Cited in note in 105 Am. St. Rep. 987, on admissibility of evidence of other crimes.

Distinguished in *State v. Hazlet*, 16 N. D. 426, 113 N. W. 374, holding on facts in prosecution for homicide it was error to admit evidence that

accused was guilty of sodomy, it not affording a motive for the crime for which he was tried.

Privilege of witness.

Cited in *State v. Ekanger*, 8 N. D. 550, 80 N. W. 482, denying right of party on trial for crime to refuse to answer question as self incriminating on objection by attorney only; *Miskimmins v. Shaver*, 8 Wyo. 392, 49 L.R.A. 831, 58 Pac. 411 (dissenting opinion), in which the majority hold that one charged with compounding a felony by refusing to testify against accused cannot, although the information against him has been dismissed, be compelled to give evidence to prove the commission of the felony.

Cited in note in 75 Am. St. Rep. 333-337, 340, 341, on privilege of witness as to incriminating testimony.

Refusal to give instruction covered by general charge.

Cited in *State v. Campbell*, 7 N. D. 58, 72 N. W. 935, holding it proper to refuse requests to charge when sufficiently covered by general charge.

Separation of jury in capital case.

Cited in note in 24 L.R.A.(N.S.) 780, 782, on permitting separation of jury in capital case.

Consideration of evidence for purpose offered.

Cited in *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907, holding where an affidavit is offered solely to show malice and is incompetent for such purpose, it cannot be received although it might have been admissible if offered for the purpose of impeachment.

Sufficiency of unverified information.

Cited in *Re Talley*, 4 Okla. Crim. Rep. 398, 31 L.R.A.(N.S.) 805, 112 Pac. 36, holding unverified information sufficient for all purposes except to authorize issuance of warrant of arrest.

Waiver of verification of information.

Cited in note in 31 L.R.A.(N.S.) 807, on waiver of verification of information.

§ N. D. 568, *COULTER v. GREAT NORTHERN R. CO.* 67 N. W. 1046.

Sufficiency of complaint in negligence case.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675, holding that because a particular act of negligence prohibited by statute is included in the sum total of negligent acts charged in a complaint, it does not follow that the theory of the complaint is thereby confined and limited to the statutory offense charged.

At what crossings railroad company owes duty.

Cited in *Johnson v. Great Northern R. Co.* 7 N. D. 284, 75 N. W. 250, holding that railroad company placing usual planking at crossing and erecting sign warning travelers of crossing, owes public same duty thereat as at other crossings though highway has not been laid out in strict accordance with law.

Contributory negligence at railroad crossings.

Cited in *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531, holding it a question for the jury whether the driver of an automobile was guilty of contributory negligence in driving across crossing ahead of train being backed where view was obstructed and driver looked and listened but did not see or hear train.

Question for jury as to contributory negligence.

Cited in *Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 367, 121 N. W. 830, holding question of negligence was for jury, there having been substantial conflict as to evidence thereof; *Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co.* 20 N. D. 642, 12 N. W. 993, holding that under evidence question of contributory negligence was properly submitted to jury.

Amendment of record on appeal.

Cited in *Hedlum v. Holy Terror Min. Co.* 14 S. D. 369, 85 N. W. 861, holding that bill of exceptions cannot be amended by supreme court; *Baumer v. French*, 8 N. D. 319, 79 N. W. 340, holding that no amendment to a statement of the accused can be permitted for purpose of incorporating a specification of error not included in the statement at the time of a motion for new trial from the judgment appealed from.

Distinguished in *Montgomery v. Harker*, 9 N. D. 527, 84 N. W. 369, denying power of supreme court to amend the record on appeal so as to include evidence claimed to have been omitted from the record; *Scott v. Jones*, 9 N. D. 551, 84 N. W. 479, holding that the supreme court will not remand a record for the purpose of having the court change or correct its findings where the record and findings correspond.

Settlement of statement of case after appeal.

Cited in *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479, holding that district judge retains full and complete jurisdiction, after appeal to settle statement of case to be used on appeal.

5 N. D. 587, FINLAYSON v. PETERSON, 33 L.R.A. 532, 57 AM. ST. REP. 584, 67 N. W. 953, Later appeal in 11 N. D. 45, 89 N. W. 855.

Notice of judicial sale.

Cited in *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227, holding that the first publication of a notice of a tax sale must be at least twenty-one days prior to the first day of sale, under the mandatory provision of N. D. Rev. Codes 1895, § 1255, requiring publication once a week for three consecutive weeks preceding the sale.

—Mortgage foreclosure sale.

Cited in *Quinn v. McDole*, 28 R. I. 327, 67 Atl. 327, holding statutory requirement of "four weeks' notice of sale" meant that at least twenty-eight days must elapse between first day of publication and sale, and notice for three weeks and two days of fourth week insufficient; *Orvik v. Casselman*, 15 N. D. 34, 105 N. W. 1105, as to law relating to foreclosure in force at time mortgage was given, but holding a subsequent law re-

ducing time of publication of notice of foreclosure controlled time of notice even though mortgage was given before law was passed; *Thomas v. Iasenhuth*, 18 S. D. 303, 100 N. W. 436, as being a refusal by the North Dakota Supreme Court to pass on necessity of publication of notice of mortgage foreclosure sale on same day of each calendar week.

Distinguished in *McDonald v. Nordyke Marmon Co.* 9 N. D. 290, 83 N. W. 6, upholding notice of mortgage foreclosure published once in each week for six successive weeks prior to sale, though only forty days elapsed between first publication and day of sale; *Grandin v. Emmons*, 10 N. D. 223, 54 L.R.A. 610, 88 Am. St. Rep. 680, 86 N. W. 723, holding publication of notice of foreclosure under power of sale once each week for six successive weeks sufficient, though only thirty-seven days elapse between first publication and day of sale.

Retroactive effect of curative act.

Cited in *Draper v. Clayton*, 87 Neb. 443, 29 L.R.A.(N.S.) 153, 127 N. W. 369, holding that curative act cannot validate proceedings under invalid act; *Kenny v. McKenzie*, 23 S. D. 111, — L.R.A.(N.S.) —, 120 N. W. 781, holding that curative act did not validate foreclosure proceedings where assignment of mortgage was void and was not properly acknowledged.

5 N. D. 594, *STATE EX REL. LITTLE v. LANGLIE*, 32 L.R.A. 723, 67 N. W. 958.

Notice of election.

Cited in *Norman v. Thompson*, 30 Tex. Civ. App. 537, 72 S. W. 64, holding failure to give notice did not avoid the election if the voters attended without it.

Majority of votes.

Cited in *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360; *State ex rel. Davis v. Fabrick*, 18 N. D. 402, 121 N. W. 65,—holding that “majority vote” to carry submitted proposition is majority of all votes cast on question and not majority of votes cast at election; *Board of Education v. Winchester*, 120 Ky. 591, 87 S. W. 768, holding majority is to be reckoned on the whole number of votes cast on the question not on whole number of votes at the election; *Rice v. Palmer*, 78 Ark. 432, 96 S. W. 396 (dissenting opinion), on same point.

Cited in note in 22 L.R.A.(N.S.) 483, on basis for computation of majority essential to adoption of proposition submitted at general election.

Distinguished in *State ex rel. McClurg v. Powell*, 77 Miss. 543, 48 L.R.A. 662, 27 So. 927, holding Miss. Const. § 273, requiring that a proposed amendment shall receive “a majority of the qualified electors voting,” refers to a majority of all the electors voting at that election for anything; *Davis v. Brown*, 46 W. Va. 716, 34 S. E. 839, holding that under a law for relocation of a county seat requiring for relocation “three fifths of all the votes cast at said election upon the question” to be in favor of relocation, only three fifths of the votes cast on that particular question are required; *Re Denny* (1901) 156 Ind. 104, 51 L.R.A. 722, 59 N. W. 359, holding that Ind. Const. art. 16, § 1, requiring that a constitutional amendment to be adopted must be ratified by a majority of the electors of the state, refers to a majority of those participating in the general election.

Contest of validity of election.

Cited in *Molyneaux v. Molyneaux*, 130 Iowa, 100, 106 N. W. 370, holding where, after an election for the consolidation of school districts is held, a meeting of the electors of the consolidated district is held on due notice at which a person appears, votes for new directors, and raises no objection to the proceedings, they are thereafter estopped to question validity of such election.

Presumption of correctness of official action.

Cited in *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393, 127 N. W. 499, holding that it will be presumed that board of education did every thing required by statute before it made order for annexation of territory to school district.

Parties in mandamus.

Cited in *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706, holding that mandamus to compel county board of canvassers to reconvene and prepare new abstract of vote cast upon proposition to divide certain county, may be maintained on relation of elector and taxpayer of such county.

5 N. D. 608, PATTERSON v. WOLLMANN, 33 L.R.A. 536, 67 N. W. 1040.

Operation of ferry.

Cited in *Greensboro Ferry Co. v. New Geneva*, 34 Pa. Co. Ct. 33, holding ferry established and operated by authority of the state, even though exclusive, is not a monopoly.

— As appurtenant to land.

Cited in *Greensboro Ferry Co. v. New Geneva*, 34 Pa. Co. Ct. 33, holding owners of land on a stream under grants from the state do not take as an appurtenance the privilege of keeping a public ferry, although they do take right of private ferry.

Injunction against infringement of franchise.

Cited in *Greensboro Ferry Co. v. New Geneva Ferry Co.* 34 Pa. Co. Ct. 33, holding equity will enjoin the infringement of a person's grant of privilege of operating ferry; *Bartlesville Electric Light & P. Co. v. Bartlesville Interurban R. Co.* 26 Okla. 453, 29 L.R.A.(N.S.) 77, 109 Pac. 228, holding that corporation which has been granted right to use street may restrain competing corporation which has no such franchise; *Cumberland Gaslight County v. West Virginia & M. Gas. Co.* 182 Fed. 667, on right of gas company to prevent competition by any one who has no franchise.

Cited in note in 29 L.R.A.(N.S.) 78, on injunction against wrongful invasion of nonexclusive public franchise.

5 N. D. 623, LOVEJOY v. MERCHANTS' STATE BANK, 67 N. W. 956.

Damages on conversion by mortgagee.

Cited in *Siebolt v. Konatz Saddlery Co.* 15 N. D. 87, 106 N. W. 564, hold-

ing if mortgagee has possession under invalid foreclosure of a valid chattel mortgage the owner could recover the difference between the value of the property and amount due on mortgagee's lien; *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90, holding when amount of note and interest do not exceed the value of the property converted on a chattel mortgage by the mortgagee the mortgagor can recover nothing; *Force v. Peterson Mach. Co.* 17 N. D. 220, 116 N. W. 84, holding mortgagee of personalty on suit by mortgagor for wrongful sale without foreclosure can set up the amount of his lien, the rule being the same since the passage of the statute as before; *Taughner v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 747, to point that there is no injury where value of property converted is less than debt secured by mortgage.

Cited in note in 9 N. D. 636, on damages for conversion.

Who may maintain trover.

Cited in *Clendening v. Hawk*, 8 N. D. 419, 70 N. W. 878, sustaining right of second mortgagee of chattels to sustain action for conversion against first mortgagee and to recover as damages amount of lien so far as it can be satisfied out of the value of the property above amount of first mortgage.

Form of judgment in replevin.

Cited in *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547, holding that a judgment in replevin in favor of the owner of land, against one cultivating the same under a contract reserving the title in the crops in the owner until division, should be for the return of the entire crop if in the latter's possession, but that the alternative for value should be limited to the sum justly due the owner under the contract for his equitable share of the crop and advances due if any.

What is a conversion.

Cited in note in 9 N. D. 632, on "what amounts to conversion."

5 N. D. 629, STATE EX REL. SELLIGER v. O'CONNOR, 67 N. W. 824.

Occupation tax on interstate commerce.

Cited in notes in 46 L. ed. U. S. 785, on peddlers and drummers as related to interstate commerce; 19 L.R.A.(N.S.) 303, 306, on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause.

Distinguished in *Re Lipschitz*, 14 N. D. 622, 95 N. W. 157, holding, construing a later statute, that license tax on peddlers was valid, there being no burden placed on interstate commerce.

Partial invalidity of statute.

Cited in *McDermont v. Dinnie*, 6 N. D. 278, 69 N. W. 294, holding that statute unconstitutional in part cannot be upheld as to remainder unless latter is complete in itself, capable of enforcement and such as the legislature might be presumed to have passed without the rejected portions.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 6 N. D.

6 N. D. 1, **ELTON v. O'CONNOR**, 33 L.R.A. 524, 74 N. W. 3, 68 N. W. 84.

6 N. D. 27, **PEABODY v. LLOYDS BANKERS**, 68 N. W. 92.

6 N. D. 37, **TOWLE v. GREENBERG**, 68 N. W. 82.

6 N. D. 41, **STATE v. MINNEAPOLIS & N. ELEVATOR CO.** 68 N. W. 81.

6 N. D. 44, **TULLIS v. RANKIN**, 33 L.R.A. 449, 66 AM. ST. REP. 586, 68 N. W. 187.

Expert testimony as to cause and effect.

Cited in **Chicago v. Didier**, 227 Ill. 571, 81 N. E. 698, holding in an action for damages for physical injuries the testimony of medical experts that plaintiff's condition had been caused by the injuries was admissible.

6 N. D. 48, **GAAR v. GREEN**, 68 N. W. 318.

Contract for additional consideration to complete contract.

Cited in note in 11 L.R.A.(N.S.) 793, on promise of additional compensation for completing contract other than for payment of money.

6 N. D. 56, **SHUTTUCK v. SMITH**, 69 N. W. 5.

Conclusiveness of decisions of public boards.

Cited in **Erickson v. Cass County**, 11 N. D. 494, 92 N. W. 841, holding where the jurisdiction of a board of drain commissioners was established its determination as to what land will be benefited by the construction of the drain is conclusive in the absence of any claim of fraud.

Requisites of valid tax levy.

Cited in **Engstad v. Dinnie**, 8 N. D. 1, 76 N. W. 292, holding a municipal

tax levy void unless preceded by and based on an appropriation bill drawn in pursuance of N. D. Rev. Codes, § 2262.

Distinguished in *Wells County v. McHenry*, 7 N. D. 246, 74 N. W. 241, holding validity of county tax levy not exceeding maximum percentage allowed by statute not affected by inclusion of item for miscellaneous expenses if the specific items did not include all purposes authorized by statute.

— **Omissions affecting validity of levy.**

Cited in *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132, holding the failure of a city in making a levy to comply with a statutory provision that the levy be based on estimate furnished by the city auditor or a committee of the council, was not shown by the mere fact that counsel testified that the records contained no estimates where the fact that the auditor might have made such estimate was not negatived; *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, holding a tax levy was not necessarily void because of the absence of an itemized statement of the expenses for the ensuing year.

Presumption of validity of a tax levy.

Cited in *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, upholding the presumption of the validity of a tax levy.

Curative powers of legislature.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, on the existence of power in the legislature to cure by subsequent proceedings defects in tax proceedings; *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883, holding that it is within the power of the legislature to cure proceedings for the improvement of a street defective because the petition therefor did not have the requisite number of signers, since the legislature might have dispensed with such petition in the first instance.

Effect of involuntary sale in excess of the amount due.

Cited in *Darling v. Purcell*, 13 N. D. 288, 100 N. W. 726, holding a sale under a judgment for a greater amount than due is not therefore invalid.

6 N. D. 81, STATE EX REL. WINEMAN v. DAHL, 34 L.R.A. 97, 63 N. W. 418.

Validity of joint resolution as expression of legislative will.

Cited in *Olds v. State Land Office Comrs.* 134 Mich. 442, 86 N. W. 956, holding a joint resolution by the legislature authorizing a certain person to select a definite number of acres of swamp land in return for services rendered to the state under a contract was not invalid.

Jurisdiction to ascertain validity of constitutional amendment.

Cited in *McConaughy v. Secretary of State*, 106 Minn. 392, 119 N. W. 408, holding the courts of the state had jurisdiction to determine the validity of the proposal, submission and ratification of constitutional amendments.

Original jurisdiction of court of last resort.

Cited in *Norris v. Cross*, 25 Okla. 287, 105 Pac. 1000, awarding peremptory mandamus to compel secretary of state to hear protests and examine sufficiency of referendum petition.

Cited in note in 58 L.R.A. 855, on original jurisdiction of court of last resort in mandamus case.

¶ **N. D. 88, ELLESTAD v. NORTHWESTERN ELEVATOR CO. 69 N. W. 44.**

Presumption of ownership of crops.

Cited in Webster v. Sherman, 33 Mont. 448, 84 Pac. 878, holding an instruction that the ownership of the land carried with it the presumption that such owner is likewise the owner of the crops grown upon the land was correct; Wadsworth v. Owens, 17 N. D. 173, 115 N. W. 667, holding the presumption that the owner of the land is the owner of the crops may be overcome by the terms of the farming contract which arrange the disposition of and ownership of the crops.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

¶ **N. D. 94, FLETCHER BROS. v. NELSON, 69 N. W. 53.**

Waiver of motion to file statement of case.

Cited in Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338, holding motion to file statement of case with clerk waived by counsel's appearance and arguing motion for new trial based on such statement.

Passing of title on sale of personalty.

Cited in Clark v. Shannon & M. Co. 117 Iowa, 645, 91 N. W. 923, holding it was a question of fact for the jury whether the act of an agent in going to purchase a stock of goods, the execution and delivery of a bill of sale and the putting in charge of a person as agent for the purchaser constituted a sale and delivery.

Right of court to amend verdict in replevin.

Cited in Frank v. Symons, 35 Mont. 56, 88 Pac. 561, holding where the amount asked in an action for claim and delivery is not contraverted a finding by the jury for a lesser amount may be stricken out by the court as surplusage.

Cited in note in 25 L.R.A.(N.S.) 315, on power of court to amend verdict by adding interest.

Waiver of irregularity in verdict.

Cited in Plano Mfg. Co. v. Person, 12 S. D. 448, 81 N. W. 807, holding that an irregularity in the verdict and judgment in stating that defendant is entitled to possession of the property "described in the plaintiff's complaint," after reduction of the amount claimed by stipulation of the parties, will not be considered when first objected to on appeal.

Sufficiency of consideration for agreements entered into subsequent to the original contract.

Cited in Pence v. Adams, 116 Iowa, 462, 89 N. W. 1065, holding where after the defendants had agreed to sell land to the plaintiffs for a certain consideration a further agreement that if a railroad was not built to a neighboring town within a certain time defendants would repay all moneys was without consideration and nonenforceable.

Dak. Rep.—19.

6 N. D. 108, GUARANTY SAV. BANK v. BLADOW, 69 N. W. 41.
Modified in 176 U. S. 448, 44 L. ed. 540, 20 Sup. Ct. Rep. 425.

Jurisdiction of courts over public land titles.

Cited in *Healey v. Forman*, 14 N. D. 449, 105 N. W. 233, holding a demurrer to a counter-claim based on erroneous rulings of the land department was properly sustained in an action to recover the possession of real estate where the pleadings showed the title to the land was still in the United States.

Effect of failure to give notice of cancelation of list of public lands.

Cited in *Small v. Lutz*, 41 Or. 570, 69 Pac. 825, holding the act of the interior in cancelling a list of lands as swamp and overflowed lands is not rendered void by a failure to notify a grantee of the state of such proceedings.

Cited in note in 75 Am. St. Rep. 881, on right of entryman to notice and hearing before cancelation of entry.

6 N. D. 117, HARTZELL v. VIGEN, 35 L.R.A. 451, 66 AM. ST. REP. 589, 69 N. W. 203.

Acquirement of jurisdiction over non-resident.

Cited in *Ireland v. Adair*, 12 N. D. 29, 94 N. W. 766, holding a judgment entered in an action on an account was void for want of jurisdiction where the judgment roll failed to show the attachment of property, and it appeared that the defendant was a non-resident and was not served with summons and did not voluntarily appear in the case.

6 N. D. 152, BIGELOW v. DRAPER, 69 N. W. 570.

Amendment of pleading.

Cited in *Burlington Voluntary Relief Dept. v. Moore*, 52 Neb. 719, 73 N. W. 15, holding that a petition in an action on a life insurance policy by an administratrix, which does not show who is the beneficiary, may be amended by alleging that plaintiff is the beneficiary in her own right.

Nature of rights of riparian owners in navigable streams.

Cited in *Clark v. Allman*, 71 Kan. 206, 70 L.R.A. 971, 80 Pac. 571, on the vested nature of the rights of riparian owners in navigable streams.

Cited in note in 6 L.R.A.(N.S.) 258, on effect of constitutional provision asserting title to navigable water upon vested riparian rights.

Public ownership of waters.

Cited in note in 50 L.R.A. 745, on state and federal ownership of waters.

Element of necessity as essential to right to condemn land.

Cited in *Greasy Creek Mineral Co. v. Ely Jellico Coal Co.* 132 Ky. 692, 116 S. W. 1189, holding land might be condemned by a railroad company where necessary to the elimination of grades and curves.

Distinguished in *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 20 L.R.A.(N.S.) 1, 113 N. W. 598, 15 A. & E. Ann. Cas. 10, where it was held that a municipal corporation seeking to condemn a way for a street

across a railroad right of way need not show the public necessity for such street.

What may be condemned.

Cited in *Northern Light & P. Co. v. Stacher*, 13 Cal. App. 404, 109 Pac. 896, holding that riparian rights may be condemned for electric power; *State ex rel. Bloomington Land & Live Stock Co. v. District Ct.* 34 Mont. 535, 115 Am. St. Rep. 540, 88 Pac. 44, holding under statute a railroad company may where its right of way crosses a stream condemn land adjacent thereto for the purpose of changing the course of the stream.

Cited in notes in 1 L.R.A.(N.S.) 611, on condemnation of shares of minority stockholders; 17 L.R.A.(N.S.) 1005, 1006, on power to condemn riparian rights apart from land to which appurtenant; 21 L.R.A.(N.S.) 451, on exercise of eminent domain by one corporation for public purpose to be subserved by another.

Judicial power over eminent domain.

Cited in note in 22 L.R.A.(N.S.) 51, 57, 65, 67, 71, 72, 74, on judicial power over eminent domain.

View by jury.

Cited in note in 42 L.R.A. 390, 392, on view by jury.

6 N. D. 175, SOBOLISK v. JACOBSON, 69 N. W. 46.

Averment of extraneous issues in action on contract.

Cited in *Jewett Bros. v. Huffman*, 14 N. D. 110, 103 N. W. 408, holding in an action on a contract to recover the purchase price of goods sold and delivered false pretenses as a basis for the remedy of attachment do not constitute part of the cause of action.

6 N. D. 180, NATIONAL BANK v. JOHNSON, 69 N. W. 49.

Duty of bank holding negotiable instrument for collection.

Cited in *First National Bank v. Prior*, 10 N. D. 146, 86 N. W. 362, holding that general authority to collect does not carry either express or implied authority to compromise a claim; *Winchester Mill. Co. v. Bank of Winchester*, 120 Tenn. 225, 18 L.R.A.(N.S.) 441, 111 S. W. 248, holding a bank in whose hands a check is placed for collection is negligent in sending the check directly to the drawee bank; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 32 L.R.A.(N.S.) 987, 69 S. E. 1012, holding it negligence for collecting bank to send checks direct to drawee bank.

Cited in notes in 77 Am. St. Rep. 614, 629, on duties of banks acting as collecting agents; 86 Am. St. Rep. 782, 788, on title of bank to money deposited with or collected by it; 18 L.R.A.(N.S.) 442, on sending check directly to drawee bank.

Liens of banker.

Cited in note in 111 Am. St. Rep. 428, on bankers' liens not founded on contract.

6 N. D. 191, ASHE v. BEASLEY, 69 N. W. 188.**Sufficiency of notice to take depositions.**

Cited in *Donaldson v. Winningham*, 54 Wash. 19, 102 Pac. 879, upholding the necessity of the statutory notice of taking depositions containing the name of the witness to be examined.

Sufficiency of abstract on appeal.

Cited in *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314; *State v. Scholfield*, 13 N. D. 664, 102 N. W. 878; *McMillan v. Conat*, 11 N. D. 256,—upholding the necessity of the abstract of an appellant embodying such portions of the record as will establish the facts necessary to sustain his contention.

Sufficiency of presentment of negotiable instrument for payment.

Cited in *Nelson v. Grondahl*, 13 N. D. 303, 100 N. W. 1093, holding where a note designated a certain store as the place of payment presentment at such place on the date of maturity was sufficient to charge the indorser.

6 N. D. 201, CORNWELL v. FRATERNAL ACCI. ASSO. 40 L.R.A. 437, 66 AM. ST. REP. 601, 69 N. W. 191.**Attempt to commit crime.**

Cited in note in 6 L.R.A.(N.S.) 804, on procuring or providing instrumentalities with intent to commit crime, as an attempt.

6 N. D. 205, FLUGEL v. HENSCHER, 69 N. W. 195.**Right of trial court to set aside verdict.**

Cited in *Kaslow v. Chamberlain*, 17 N. D. 449, 117 N. W. 529, holding the trial court had no power a year after verdict and entry of judgment to order a new trial on its own motion; *Mizener v. Bradbury*, 128 Cal. 340, 60 Pac. 928, discussing but not deciding, whether after verdict and order granting stay of proceedings until further order of court and after the expiration of the time within which notice of a motion for a new trial can be made, a trial judge can set aside the verdict and grant a new trial, in the absence of the parties and on its own motion, upon the ground that said verdict is not justified by the law or evidence, under Cal. Code Civ. Proc. § 662.

6 N. D. 212, HANSON v. CUMMINGS STATE BANK, 69 N. W. 202.**6 N. D. 215, KJHNERT v. CONRAD, 69 N. W. 185.****Nature of wife's homestead interest.**

Cited in *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245, considering the nature of a wife's interest in a homestead, and holding evidence showed an abandonment.

Wife as necessary party to suit affecting homestead.

Cited in *Fowler v. Bracy*, 124 Mich. 250, 82 N. W. 892, holding that in

a suit in equity to foreclose the lien of a land contract, the wife of the contract purchaser is not a necessary party, although a portion of the land which is the subject of the contract is a homestead.

Mortgage of homestead to secure husbands' debt.

Cited in *Roberts v. Roberts*, 10 N. D. 531, 88 N. W. 289, holding that wife by joining with husband in mortgage of homestead property to secure his debt waives her possessory right to the property until barred by limitations.

Abandonment of homestead.

Cited in note in 102 Am. St. Rep. 411, on abandonment of homestead.

6 N. D. 222, SWEDISH AMERICAN NAT. BANK v. DICKINSON, CO. 49 L.R.A. 285, 69 N. W. 455.

Supplemental amendment of pleadings.

Cited in *Cassidy v. Saline County Bank*, 7 Ind. Terr. 543, 104 S. W. 829, holding in an action on an open account the complaint could not be amended by the setting up of a judgment obtained in another state on the same cause of action; *Allen v. Davenport*, 115 Iowa, 20, 87 N. W. 743, holding that a supplemental answer "by way of counterclaim for the proper cost and expense of said paving as against the plaintiffs and their property" cannot be set up under Iowa Code, § 3641, after the issuance of a procedendo directing the entry of judgment for the plaintiff restraining the levy of a special assessment, in an action involving the validity of a contract for the improvement and the assessment therefor, since the amendment attempts to introduce an entirely new cause of action.

Causes of action and remedies distinguished.

Cited in *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160 (dissenting opinion), distinguishing between causes of action and remedies.

6 N. D. 245, VICKERY v. BURTON, 69 N. W. 193.

Assignment or indorsement of notes.

Cited in *Massachusetts Loan & T. Co. v. Twichell*, 7 N. D. 440, 75 N. W. 786, holding assignee without indorsement of negotiable note takes it subject to equities between the original parties; *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding the word "assign" as used in a statute providing that the contracts of corporations, associations or joint stock companies doing business in the state without having complied with statutes shall be void as to such corporations and "assigns" did not include the indorsees of negotiable paper.

Cited in note in 17 L.R.A. (N.S.) 1110, on transferee, without indorsement, of bill or note payable or indorsed "to order" as bona fide purchaser.

Burden of proof of bona fide ownership of notes.

Followed in *Tamlyn v. Peterson*, 15 N. D. 488, 107 N. W. 1081, hold-

ing the burden is on the indorsee of negotiable paper to prove that he is a purchaser for value, before maturity without notice, and in good faith where fraud in the inception of the instrument is alleged and proved.

Cited in *Knowlton v. Schultz*, 6 N. D. 417, 71 N. W. 550, holding burden of proving purchase for value before maturity without notice in good faith imposed on indorsee by proof of fraud in inception of note; *Walter v. Rock*, 18 N. D. 45, 115 N. W. 511, holding burden upon indorsee to show good faith where fraud in inception of note is shown; *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567, holding that proof of unauthorized and fraudulent delivery of note by payee's agent casts burden on plaintiff of proving purchase for value in due course; *First National Bank v. Flath*, 10 N. D. 281, 86 N. W. 867, holding burden of proving purchase for value before maturity in good faith without notice imposed on indorsee by proof that note was obtained by fraud; *Mooney v. Williams*, 9 N. D. 329, 83 N. W. 237, holding burden of proving purchase in good faith without notice shifted to indorsee by evidence that note was obtained by original payee by fraud and was without consideration; *Ravicz v. Nickells*, 9 N. D. 534, 84 N. W. 353, holding burden of proving good faith not thrown upon indorsee of note by mere allegation in answer of fraud in inspection.

Effect of signing instrument with initials.

Cited in *Woodward v. McColum*, 16 N. D. 42, 111 N. W. 623, holding the validity of a deed was not affected by the fact that the grantor signed by his initials where the body of the deed gave his full Christian name.

When direction of verdict proper.

Cited in *Zink v. Lahart*, 16 N. D. 56, 110 N. W. 931, reversing the judgment of the district court for its improper act in directing a verdict where it appeared from the record that there was a square conflict in the evidence; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 A. E. Ann. Cas. 960, holding a trial court erred in directing a verdict where it appeared from the records that there was evidence which might have weight with the jury on the question of the due exercise of care by the defendant's servants; *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000 (dissenting opinion), on the propriety of a direction of a verdict by the trial court; *McRea v. Hillsboro Nat. Bank*, 6 N. D. 347, 70 N. W. 813, holding that contradictory statements by parties on essential matters of fact, together with varying testimony as to other points, requires a submission to the jury; *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, holding negligence, whether contributory or primary, a question of fact unless established or conceded facts from which inference must be drawn, admit of but one conclusion.

Construction of evidence on motion to direct verdict.

Cited in *Warnken v. Langdon Mercantile Co.* 8 N. D. 243, 77 N. W. 1000, holding that evidence will be construed most favorably to plaintiff on motion to direct verdict for defendant.

6 N. D. 254, **BENJAMIN v. NORTHWESTERN ELEVATOR CO.**
69 N. W. 296.

Evidence in trover.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

6 N. D. 255, **STANDARD OIL CO. v. ARNESTAD**, 34 L.R.A. 861,
66 AM. ST. REP. 604, 69 N. W. 197.

Liability of sureties on bond.

Cited in *Friendly v. National Surety Co.* 46 Wash. 71, 10 L.R.A.(N.S.) 1160, 89 Pac. 177, holding a surety company securing a contract by a firm to construct an apartment house was released from liability by the withdrawal of one of the partners from the firm and the assignment of the contract to another of the partners without the consent of the surety company; *London & L. F. Ins. Co. v. Holt*, 10 S. D. 171, 72 N. W. 403, holding sureties on fidelity bond of firm of insurance agents not liable for failure of containing member of firm to pay over money collected after dissolution.

Cited in note in 42 L. ed. U. S. 990, on indemnity bonds.

6 N. D. 263, **VAN DYKE v. DOHERTY**, 69 N. W. 200.

Sufficiency of denial on information and belief.

Cited in *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872, holding that, denial of knowledge or information sufficient to form belief as to existence of judgment should be stricken out as sham where its record which is pointed out in complaint shows that attorneys for defendants were also engaged in the litigation which resulted in the judgment.

Cited in notes in 133 Am. St. Rep. 120, as to when denials on information and belief are permissible; 30 L.R.A.(N.S.) 780, on denials upon information and belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge.

Pleading in trover.

Cited in note in 9 N. D. 635, on evidence in action for trover and conversion.

6 N. D. 269, **WILLIAMS v. WILLIAMS**, 69 N. W. 47.

Effect of accepting benefits on right to appeal.

Cited in *Williams v. Richards*, 152 Ind. 528, 53 N. E. 765, holding that a party waives its right to appeal from a final decree declaring a partnership dissolved and directing sale and final distribution of the assets, by participating in the said distribution; *Moorman v. Moorman*, 163 Mich. 652, 129 N. W. 13, holding appeal from divorce decree waived by recording realty awarded as alimony and giving mortgage thereon; *Boyle v. Boyle*, 19 N. D. 522, 126 N. W. 229, holding appeal from divorce decree waived by attorney's unconditional acceptance of sums allowed for costs and counsel fees; *Tuttle v. Tuttle*, 19 N. D. 748, 124 N. W. 429, holding

appeal from divorce decree waived by acceptance and retention of amount awarded as counsel fees and suit money.

Cited in note in 29 L.R.A.(N.S.) 3, 15, on right to appeal from unfavorable while accepting favorable part of decree, judgment, or order.

6 N. D. 274, UNDERWOOD v. ATLANTIC ELEVATOR CO. 69 N. W. 185.

Evidence in trover.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

Who may maintain trover.

Cited in note in 9 N. D. 630, on who may maintain trover.

6 N. D. 276, GULL RIVER LUMBER CO. v. OSBORNE McMILLAN ELEVATOR CO. 69 N. W. 691.

Discretionary power of trial court to grant new trial.

Cited in *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026; *Bristol v. & S. Co. v. Skapple*, 17 N. D. 271, 115 N. W. 841; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765,—affirming that the granting of a new trial because of the insufficiency of the evidence rested in the sound discretion of the trial court; *State v. Howser*, 12 N. D. 495, 98 N. W. 352, holding same on prosecution for a criminal conspiracy; *Casey v. First Bank*, 20 N. D. 211, 126 N. W. 1011, holding that denial of motion for new trial for insufficiency of evidence will not be reversed except in case of abuse of discretion; *Baumer v. French*, 8 N. D. 319, 79 N. W. 340, holding that order for new trial granted on motion based on statement of the case which fails to set out the particulars in which the evidence is alleged to be insufficient must be reversed.

Who may maintain trover.

Cited in note in 9 N. D. 630, on who may maintain trover.

Evidence in trover.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

6 N. D. 278, McDERMONT v. DINNIE, 69 N. W. 294.

Enforcement of valid portions of unconstitutional statute.

Cited in *Angell v. Cass County*, 11 N. D. 265, 91 N. W. 72, holding the valid parts of an unconstitutional statute were not enforceable where interdependent on the unconstitutional portions thereof.

Constitutional questions determinable on mandamus.

Cited in *State ex rel. University v. Candland*, 36 Utah, 406, 24 L.R.A.(N.S.) 1266, 140 Am. St. Rep. 834, 104 Pac. 285, holding in mandamus proceedings an officer who is directly responsible for his ministerial acts may attack the constitutionality of the statute directing him to act; *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927, 2 A. & E. Ann. Cas. 74, on the right of a ministerial officer to question on mandamus the constitutionality of the statute directing him to act.

Cited in notes in 47 L.R.A. 516; 24 L.R.A.(N.S.) 1261,—on unconstitutionality of statute as defense against mandamus to compel enforcement.

6 N. D. 285, STATE EX REL. BROOKS BROS. v. O'CONNER, 69 N. W. 692.

Right of redemption from execution sale.

Cited in *Lynch v. Burt*, 67 C. C. A. 305, 132 Fed. 417, affirming the necessity of strict compliance with the statute giving the right to redeem from an execution sale.

Right to redeem from foreclosure.

Cited in *Stocker v. Puckett*, 17 S. D. 267, 96 N. W. 91, distinguishing between the right of mortgagor and redemptioner to redeem and holding that the right of the mortgagor to redeem was not extended by the act of a redemptioner in redeeming within the year.

6 N. D. 293, WARREN v. STINSON, 70 N. W. 279.

Right to be relieved against execution sale.

Cited in *Brand v. Baker*, 42 Or. 426, 71 Pac. 320, holding the court would not more than a year after rendering an order confirming an execution sale relieve one therefrom because he did not know of it he having knowledge of the judgment and that it was unpaid.

Conclusiveness of order confirming sale.

Cited in *Crouch v. Dakota, W. & M. R. Co.* 18 S. D. 540, 101 N. W. 722, on the effect of the order of confirmation on the rights of the owner of the property sold.

6 N. D. 310, KREUGER v. SCHULTZ, 70 N. W. 269.

Conveyance of land held adversely.

Cited in *Galbraith v. Payne*, 12 N. D. 164, 96 N. W. 258, on the legislative tendency to disfavor rule against champertous conveyances but denying the abridgement of the common law doctrine with reference thereto.

Adverse possession of public property.

Cited in note in 76 Am. St. Rep. 483, on adverse possession of public property.

6 N. D. 317, DAISY ROLLER MILLS v. WARD, 70 N. W. 271.
Later phases of same case in 6 N. D. 359, 71 N. W. 543; 6 N. D. 609, 72 N. W. 1013; 8 N. D. 87, 76 N. W. 1046; 9 N. D. 254, 83 N. W. 15.

Effect of death after judgment on right to execution.

Cited in note in 61 L.R.A. 356, on effect of death of party after judgment upon remedy by execution.

Rights of grantee under fraudulent conveyance.

Cited in *Burt v. C. Gotzian & Co.* 43 C. C. A. 59, 102 Fed. 937, denying right of one taking conveyance or assignment to aid scheme in fraud of

creditors to hold any interest thereunder as against creditors to secure amount paid therefor; *Lynch v. Burt*, 67 C. C. A. 305, 132 Fed. 417, holding a grantee under a fraudulent conveyance is on the setting aside of the conveyance entitled to reimbursement for expenditures made to protect his title where it appears that he was not conscious of the fraud; *Morley Bros. v. Stringer*, 133 Mich. 690, 95 N. W. 978, holding in a suit to set aside a conveyance as fraudulent to creditors the grantee who was a party to the fraud was not entitled to be reimbursed for the payment of a mortgage on the land.

When conveyances are fraudulent.

Cited in *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320, as to when conveyances are fraudulent as to creditors.

6 N. D. 330, PLANO MFG. CO. v. DALEY, 70 N. W. 277.

Evidence admissible under general denial.

Cited in *Vallancey v. Hunt*, 20 N. D. 579, 34 L.R.A. (N.S.) 473, 129 N. W. 455, holding that breach of warranty of goods sold cannot be proved under general denial in claim and delivery.

Right to show mistake in the drawing of a mortgage.

Cited in *Gorder v. Hillboe*, 17 N. D. 281, 115 N. W. 843, holding in an action for the conversion of grain it was competent for the defendant to show that the grain was mortgaged to him and that the mortgage was drawn by mistake to cover the crop for another year.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

6 N. D. 337, CONRAD v. SMITH, 70 N. W. 815.

Law governing rights or remedies.

Cited in *First M. E. Church v. Fadden*, 8 N. D. 162, 77 N. W. 615, holding a statute changing a rule of evidence applicable to pending cases, as well as those subsequently commenced; *Schaffner v. Young*, 10 N. D. 245, 86 N. W. 733, holding that rights of parties in a transaction are to be determined by law in force at the time.

Presumption of fraud from retention of possession.

Cited in note in 24 L.R.A. (N.S.) 1154, as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome.

6 N. D. 345, NEARING v. COOP, 70 N. W. 1044.

Nature of rights of vendee entering into possession under an executory contract of sale.

Cited in *Schauble v. Schulz*, 69 C. C. A. 581, 137 Fed. 389, holding the possession of a vendee entering into possession under an executory contract of sale and afterwards receiving a conveyance was as to all but the vendor adverse from the time of such entry; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856, holding a vendee entering into possession under an executory contract for the purchase of land becomes the owner of the beneficial interest; *Salzer Lumber Co. v. Claffin*, 16 N. D. 601, 113 N. W. 1036; *Wood-*

ward v. McCollum, 16 N. D. 42, 111 N. W. 623,—upholding the doctrine that upon the execution of a contract for the purchase of real estate the vendee becomes the owner of the beneficial interest.

6 N. D. 351, **MARTIN v. LUGER FURNITURE CO.** 70 N. W. 1134, Later appeal in 8 N. D. 220, 77 N. W. 1003.

6 N. D. 353, **McREA v. HILLSBORO NAT. BANK,** 70 N. W. 813.

When question is for jury.

Cited in *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860, holding that whether the statements of one party to a contract were sufficient to allow a modification of the original contract, when materially different to the statements of such other party, is for the jury to determine; *Zink v. Lahart*, 16 N. D. 56, 110 N. W. 931, holding in an action for the purchase price of a quantity of flax it was error for the trial court to direct a verdict for the plaintiff where it appeared from the record that there was a square conflict in the evidence as to whether the person purchasing the flax was defendant's agent; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960, holding in an action for injuries due to the negligence of carrier's servants it was error to direct a verdict for the defendant where the evidence on the question of the exercise of due care by defendant's servants was conflicting; *Sherer v. Schlager*, 18 N. D. 421, 24 L.R.A. (N.S.) 520, 122 N. W. 1000 (dissenting opinion), on the right of the trial court in his discretion to direct a verdict.

6 N. D. 359, **PATTERSON v. WARD,** 71 N. W. 543, Decision on the merits in 6 N. D. 609, 72 N. W. 1013, Later phase of same case in 8 N. D. 87, 76 N. W. 1046; 9 N. D. 254, 83 N. W. 15.

Appealable receivership orders.

Cited in *State ex rel. Heinze v. Second Judicial Dist. Ct.* 28 Mont. 227, 72 Pac. 613, holding an order in the form of a final judgment entered on the motion of a receiver that plaintiff pay allowances made by court to receiver under a former order was an appealable order.

6 N. D. 361, **McKENZIE v. BISMARCK WATER CO.** 71 N. W. 608.

Sufficiency of service of notice of appeal.

Distinguished in *Koegh v. Snow*, 9 N. D. 458, 83 N. W. 864, holding that statute limiting time to appeal from an order is set in motion by service of a copy of such order; *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding a service of notice of appeal upon a firm of attorneys one of whom was an attorney of record was sufficient, the admission of service being signed by them in the firm name as attorneys for the respondent.

Right to review on appeal of errors of law occurring on the trial of the cause.

Cited in *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353, hold-

ing the error of the trial court in directing a verdict being an error of law was not available on appeal where the exceptions thereto were not saved.

New trial in district courts for newly discovered evidence.

Cited in *State ex rel. Berndt v. Templeton*, 21 N. D. 470, 130 N. W. 1009, holding that Sec. 7229, Rev. Codes 1905, does not take from district courts power to entertain motions for new trial upon ground of newly discovered.

Priority of claims against receiver.

Cited in notes in 71 Am. St. Rep. 377, on relation of receivers to pre-existing liens and remedies for their enforcements; 2 L.R.A. (N.S.) 1056, on priority of claims against property in hands of receiver over recorded liens.

Judicial sale of property without right of redemption.

Cited in *Pacific Northwest Packing Co. v. Allen*, 54 C. C. A. 648, 116 Fed. 312, holding a sale under a mortgage of a lease of a portion of a harbor area a fish canning plant and the necessary personal property used in carrying on the business might be without redemption.

6 N. D. 382, WALCOTT TWP. v. SKAUGE, 71 N. W. 544.

Burden of highway easement on title to land.

Cited in *Cosgriff v. Tri-State Teleph. & Teleg. Co.* 15 N. D. 210, 5 L.R.A. (N.S.) 1142, 107 N. W. 525, holding land owners took their title to the land subject to the easement of a highway established by the government and accepted by the public long before they acquired title to the land; *Northern P. R. Co. v. Lake*, 10 N. D. 541, 88 N. W. 461, holding that the maintenance of private buildings upon a highway by a stranger is an invasion of the public easement, as well as a trespass against the owner of the land.

Establishment of highway.

Cited in *Great Northern R. Co. v. Viborg*, 17 S. D. 374, 97 N. W. 6, holding a highway may be established by prescription as against the government over land to which the right is given by statute to construct highways; *Hughes v. Veal*, 84 Kan. 534, 114 Pac. 1081, holding that survey by county officials of highway over public lands and travel by public constitute acceptance of congressional grant.

6 N. D. 391, ANGELL v. EGGER, 71 N. W. 547.

Rights of parties in crops under farming contracts.

Followed in *McFadden v. Thorpe Elevator Co.* 18 N. D. 93, 118 N. W. 242, holding that provision in farm contract reserving title to crops does not constitute chattel mortgage.

Cited in *Van Gordan v. Goldamer*, 16 N. D. 323, 113 N. W. 609, upholding the validity of a contract to retain all the title to a crop to be raised under a farming contract; *Aronson v. Oppeward*, 16 N. D. 595, 114 N. W. 377, holding where under a contract to farm land it was agreed that the title to the crops should remain in the landlord until the repayment of advances made to the tenant the rights of the landlord in the grain was

not absolute but subject to the rights of the tenant on the completion of the terms of the contract; *Wadsworth v. Owens*, 17 N. D. 173, 115 N. W. 467, on the determination of the rights of landlord and tenants in crops under farming contract; *Hawk v. Konouzki*, 10 N. D. 37, 84 N. W. 563, holding title to crops raised under lease providing that ownership shall remain in lessor until full performance of all conditions, contingent on performance by lessee of all such conditions; *Whithed v. St. Anthony & D. Elevator Co.* 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238, holding replevin maintainable by purchaser of realty on foreclosure to recover possession of owner's share in crop raised during redemption period under contract for such share in lieu of rent; *Bidgood v. Monarch Elevator Co.* 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561, holding that the lien of a mortgage executed by a tenant on his interest in a crop never attached where the title of the crop was to remain in the landlord until division, and it was delivered to an elevator without division, and storage checks issued to the parties for their respective shares; *Wadsworth v. Owens*, 21 N. D. 255, 130 N. W. 932, holding that rights in crops, of tenant who holds over at lessor's request, and without new agreement is governed by written contract made for preceding year; *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304, holding that lessee cannot maintain trover and conversion until division of crops where written contract between lessor and lessee for raising of crops on shares provided that title should remain in lessor until division thereof.

Reformation of contract for mistake.

Cited in *Merchant v. Pielke*, 9 N. D. 182, 82 N. W. 878, holding that a contract will be reformed on the ground of mutual mistake where the evidence is clear, convincing, and substantially free from conflict.

6 N. D. 400, *NICHOLS & S. CO. v. PALSON*, 71 N. W. 136, Later appeals in 8 N. D. 606, 80 N. W. 765; 10 N. D. 440, 87 N. W. 977.

Right of agent to modify terms of contract.

Cited in *Colean Mfg. Co. v. Blanchett*, 16 N. D. 341, 113 N. W. 614, considering but not deciding the right of an agent to modify the terms of a written contract.

Making of new contract.

Distinguished in *Colean Mfg. Co. v. Feckler*, 20 N. D. 188, 126 N. W. 1019, holding that conditional taking of machinery after refusal to accept under written order therefor was not under new contract.

6 N. D. 404, *NICHOLS & S. CO. v. FIRST NAT. BANK*, 71 N. W. 135.

Replevin for notes.

Cited in note in 3 L.R.A.(N.S.) 139, on replevin or detinue for promissory note.

What constitutes a delivery of goods sold.

Cited in *Colean Mfg. Co. v. Feckler*, 20 N. D. 188, 126 N. W. 1019, hold-

ing it a delivery where machinery is accepted by vendee upon condition that missing parts will be immediately furnished.

6 N. D. 407, NEW ENGLAND MORTG. SECUR. CO. v. GREAT WESTERN ELEVATOR CO. 71 N. W. 130.

Waiver of lien of chattel mortgage.

Cited in *Peterson v. St. Anthony & D. Elevator Co.* 9 N. D. 55, 81 Am. St. Rep. 528, 81 N. W. 59, holding lien of chattel mortgage waived where the mortgagor acting under mortgagee's authority actually sells the property; *Drexel v. Murphy*, 59 Neb. 210, 80 N. W. 813, holding that a chattel mortgagee waives his lien by authorizing the mortgagor to sell the property and apply on the mortgage proceeds which he accepts and retains.

Distinguished in *Seymour v. Cargill Elevator Co.* 6 N. D. 444, 71 N. W. 132, holding lien of mortgage on mortgagor's share of crop not lost by his sale of his share after division thereof without mortgagee's knowledge of an intention to sell.

Waiver of release of lien by act of agent.

Cited in *Winter & A. Co. v. Atlantic Elevator Co.* 88 Minn. 196, 92 N. W. 955, holding a lien on a crop of flax for the value of the seed was released so as to prevent a recovery from the purchaser of the crop where the agent of the holder of the seed grain notes told the cropper to sell the crop and then return to such agent a cash ticket for the purchase price.

Passing of title on sale for cash.

Distinguished in *Masoner v. Bell*, 20 Okla. 618, 18 L.R.A. (N.S.) 166, 90 Pac. 239, where held that on a sale of property on cash the title to the property did not pass until the payment of the cash.

Effect of motion for verdict by both parties.

Cited in *First M. E. Church v. Fadden*, 8 N. D. 162, 77 N. W. 615; *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 13 N. W. 266,—holding that party will be deemed to have submitted all controverted questions of fact to determination of court where each party moved for directed verdict and did not afterwards ask for submission of any question of fact to jury; *First Nat. Bank v. Hayes*, 64 Ohio St. 100, 59 N. E. 893, holding that where, at the close of the evidence, each party to a suit requests direction of a verdict in his favor, the party against whom the verdict is rendered cannot be heard to say there was error because there was some evidence tending to support the issue in his favor.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

6 N. D. 413, HENRY v. MAHER, 71 N. W. 127.

Specification of errors to be reviewed.

Cited in *Thompson v. Cunningham*, 6 N. D. 426, 71 N. W. 128, holding that errors in the verdict, decisions or rulings of the trial court will be disregarded on appeal where the motion for new trial was based on a statement of the case which did not specify such errors; *March v. Minne-*

apolis, St. P. & S. Ste. M. R. Co. 15 N. D. 86, 105 N. W. 1106, refusing to consider an appeal because of the failure of the brief to contain an assignment of the errors without the record disclosing any cause for the relaxation of the rule.

Requisites to review of evidence.

Cited in *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 319, 116 N. W. 333, refusing where no motion for a new trial was made to review on appeal the sufficiency of the evidence to sustain the verdict; *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667, holding that errors cannot be considered on review unless they have been saved by proper exceptions.

Review of ruling on motion to direct verdict.

Cited in *Ness v. Jones*, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706, holding no question of fact involved in review of ruling of trial court on motion to direct a verdict.

6 N. D. 417, KNOWLTON v. SCHULTZ, 71 N. W. 550.

Burden of proof in action on negotiable instrument.

Cited in *First National Bank v. Flath*, 10 N. D. 281, 86 N. W. 867, holding burden of proving purchase for value before maturity in good faith without notice imposed on indorsee by proof that note was obtained by fraud; *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567, holding that proof of unauthorized and fraudulent delivery of note by payee's agent casts burden on plaintiff of proving purchase for value in due course; *Tamlyn v. Peterson*, 15 N. D. 488, 107 N. W. 1081, holding the burden is on the indorsee of a negotiable instrument to prove that he is a purchaser for value, before maturity without notice, and for value where fraud in the inception of the instrument is proved; *Kirby v. Gerguin*, 15 S. D. 444, 90 N. W. 856, holding burden of proving purchase for value before maturity in good faith without notice imposed on indorsee by proof that note was obtained by fraud; *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511, holding burden upon indorsee to show good faith, where fraud in inception of note is shown.

6 N. D. 424, FIELD v. GREAT WESTERN ELEVATOR CO. 66 AM. ST. REP. 611, 71 N. W. 135.

6 N. D. 426, THOMPSON v. CUNNINGHAM, 71 N. W. 128.

6 N. D. 432, HOWE v. SMITH, 71 N. W. 552.

Sufficiency of description of premises to be charged with mechanic's lien.

Cited in *Doyle v. Wagner*, 100 Minn. 388, 111 N. W. 275, holding a description of premises sought to be charged with a mechanic's lien is sufficient which gives the correct number of the lot and building and properly describes the addition, although it gives an erroneous number of the block; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203, holding description of property in notice of lien by reference to ad-

6 N. D.] NOTES ON NORTH DAKOTA REPORTS.

dition block and lot numbers not fatally defective because word "first" improperly inserted in designating addition.

6 N. D. 438, McARTHUR v. DRYDEN, 71 N. W. 125.

Right of third person to sue.

Cited in note in 71 Am. St. Rep. 198, 206, on right of third person to sue on contract made for his benefit.

Evidence in trover.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

6 N. D. 444, SEYMOUR v. CARGILL ELEVATOR CO. 71 N. W. 132.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

Evidence in trover.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

6 N. D. 450, BRYNJOLFSON v. NORTHWESTERN ELEVATOR CO. 66 AM. ST. REP. 612, 71 N. W. 555.

Presumption of execution and delivery of deed.

Distinguished in McManus v. Commow, 10 N. D. 340, 87 N. W. 8, holding execution and delivery of lost deed inferable from grantee's affirmative testimony that he himself drew up the deed and that it was executed and acknowledged before a notary public who testifies to acknowledgment of some unremembered instrument by grantor and testimony from would-be purchaser from grantor to his declaration that he had already parted with title to grantee.

Evidence in trover.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

6 N. D. 454, GORDON v. VERMONT LOAN & T. CO. 71 N. W. 556.

6 N. D. 461, KOLKA v. JONES, 66 AM. ST. REP. 615, 71 N. W. 558.

When action for malicious civil prosecution maintainable.

Cited in McCormick Harvesting Mach. Co. v. Willan, 63 Neb. 391, 101 L.R.A. 338, 88 N. W. 497; Wade v. National Bank of Commerce, 114 Neb. 377; Luby v. Bennett, 111 Wis. 613, 56 L.R.A. 261, 87 N. W. 804,—holding right of action for malicious prosecution without seizure of property, arrest of person, or other special circumstances; McCormick Harvesting Mach. Co. v. Willan, 63 Neb. 391, 56 L.R.A. 338, 93 Am. St. Rep. 449, 88 N. W. 497, holding damages were recoverable for the malicious prosecution of a civil action without probable cause although there was no restraint of person or seizure of property; Abbott v. Thorne, 34 W.

692, 65 L.R.A. 826, 101 Am. St. Rep. 1021, 76 Pac. 392, considering when an action will lie for a malicious prosecution.

Cited in note in 93 Am. St. Rep. 458, 459, 461, 462, 466, 468, on liability for malicious prosecution of civil action.

— Want of probable cause.

Cited in *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800, holding the mere entry of nonsuit at the instance of plaintiff is not sufficient to support a want of probable cause so as to support an action for its prosecution.

Inference of malice.

Cited in *Merchant v. Pielke*, 10 N. D. 48, 84 N. W. 574, holding malice inferable from want of probable cause in action for malicious prosecution.

Recovery of attorney's fees as damages.

Cited in *Metcalf v. Bockoven*, 62 Neb. 877, 87 N. W. 1055, on the right to recover attorney's fees and costs as part of the damages for malicious prosecution.

Propriety of motion to strike out evidence.

Cited in *Walker v. Lee*, 51 Fla. 360, 40 So. 881, holding a motion to strike out a deed admitted in evidence over the objection of plaintiff was not a remedy within the right of the plaintiff although it subsequently appeared that its admission was improper; *Nokken v. Avery Mfg. Co.* 11 N. D. 399, 92 N. W. 487, holding the trial court did not err in refusing to strike out evidence which while competent was insufficient to support plaintiff's contention.

Time for objections.

Cited in *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847, refusing to notice objections on appeal where the grounds of objection were apparent when the evidence was received and the objections were not seasonably made.

Sufficiency of objections.

Cited in *State v. Dahlquist*, 17 N. D. 40, 115 N. W. 81, holding a trial court did not err in receiving the whole of evidence in part objectionable where no attempt was made on objection thereto to point out the objectionable portions; *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085, 17 A. & E. Ann. Cas. 213, upholding the doctrine that no error could be predicated on the overruling of an objection which did not point out the real ground of the objection but merely objected generally; *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335, refusing to review on appeal an objection to a question on the ground that it was irrelevant, incompetent and immaterial and called for a conclusion where the particular grounds of the objection were not pointed out; *Olson v. Burlington, C. R. & N. R. Co.* 12 S. D. 326, 81 N. W. 634, holding insufficient for consideration on appeal, objection that rough model of casting of car coupler was "incompetent and immaterial;" *Plano Mfg. Co. v. Person*. 12 S. D. 446, 81 N. W. 897, holding objection that evidence is incompetent irrelevant and immaterial too general for consideration on appeal; *Towne v. Mathwig*, 19 N. D. 4, 121 N. W. 63, holding objection that
Dak. Rep.—20.

evidence is incompetent, irrelevant and immaterial, too indefinite cases where ground of objection might be remedied.

6 N. D. 482, McCANNA v. ANDERSON, 71 N. W. 769.

Right of homestead.

Cited in *Re Clavo*, 6 Cal. App. 774, 93 Pac. 295, on the intent of homestead act being to secure to the head of every family a home.

Cited in note in 4 L.R.A.(N.S.) 388, on what constitutes a "family" under homestead and exemption laws.

6 N. D. 488, STATE EX REL. REYNOLDS SPECIAL SCHOOL DIST. v. SCHOOL DIST. NO. 21, 71 N. W. 772.

6 N. D. 495, COLBY v. McDERMONT, 71 N. W. 772.

Waiver of objections to refusal to direct verdict.

Cited in *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225; *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319, 83 N. W. 221; *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026; *Brace v. Van Eps*, 12 S. D. 191, 8 N. W. 197,—holding motion for judgment or direction of verdict for defendant at close of plaintiff's case waived by failure to renew after all evidence is in; *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 554, N. W. 872; *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253,—holding denial of a motion for a directed verdict was not available as error in the introduction of further testimony and a failure to renew the motion.

6 N. D. 497, ANDERSON v. FIRST NAT. BANK, 72 N. W. 931.

Affirmed in 172 U. S. 573, 43 L. ed. 558, 19 Sup. Ct. 1284.

Presumption as to value of chose in action.

Cited in *Canfield v. Orange*, 13 N. D. 622, 102 N. W. 313, holding promissory note and mortgage would be presumptively worth their face; *Robertson v. Moses*, 15 N. D. 351, 108 N. W. 788, holding the prima facie value of promissory note at any time is the principal and interest then accrued.

Purchase by agent.

Cited in note in 80 Am. St. Rep. 560, on purchase by agent of principal's property.

6 N. D. 511, BIRKHOLZ v. DINNIE, 72 N. W. 931.

Violation of constitutional debt limit.

Cited in *Reynolds v. Lyon County*, 121 Iowa, 733, 96 N. W. 1096, holding refunding bonds, the proceeds of which are to be applied in payment of bonds outstanding are invalid where they increase the debt of the county beyond the constitutional limit; *National L. Ins. Co. v. Mead*, 13 N. D. 37, 79 Am. St. Rep. 876, 48 L.R.A. 785, 82 N. W. 78, holding refunding bonds not regarded as creating additional indebtedness.

6 N. D. 518, **FRYER v. CETNOR**, 72 N. W. 909.

Right of compromise.

Cited in *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544, considering when a compromise can be made.

6 N. D. 523, **SEVERN v. GIESE**, 72 N. W. 922.

Sufficiency of affidavit for attachment.

Cited in *F. Mayer Boot & Shoe Co. v. Ferguson*, 17 N. D. 103, 14 L.R.A. (N.S.) 1126, 114 N. W. 1091, holding an attachment based upon the affidavit of plaintiff's attorney is sufficient where it states the facts in the words of the statute although it does not state that the affiant possess personal knowledge of such facts.

Cited in note in 76 Am. St. Rep. 802, on judgments depending for validity on attachment of property.

6 N. D. 526, **BRAY v. BOOKER**, 72 N. W. 933, Later phase of same case in 8 N. D. 347, 79 N. W. 293.

Extinguishment of right to vendor's lien.

Held obiter in *Bray v. Booker*, 8 N. D. 347, 79 N. W. 293, holding that promise to pay vendor's definite money obligation to third person as part of purchase price does not extinguish vendee's debt nor vendor's right to lien.

Right of intervention.

Cited in *Faricy v. St. Paul Invest. & Sav. Soc.* 110 Minn. 311, 125 N. W. 676, holding in an action for a number of bonds a receiver for a loan association may intervene on the grounds that the bonds belonged to such association, the plaintiff having obtained their possession by fraud and that defendant is insolvent; *Dickson v. Dows*, 11 N. D. 407, 92 N. W. 798, considering the nature of interest that must be had in the subject-matter of an action to give a right of intervention.

6 N. D. 533, **McCORMICK HARVESTING MACH. CO. v. LARSON**, 72 N. W. 921.

6 N. D. 536, **STANFORD v. MCGILL**, 38 L.R.A. 760, 72 N. W. 938.

Effect of repudiation of contract.

Cited in *Kuhlman v. Wieben*, 129 Iowa, 188, 2 L.R.A. (N.S.) 666, 105 N. W. 445, holding a purchaser could maintain an action for a breach of contract without making a tender of the purchase price on or before the designated date where the vendor before such date repudiated the contract; *Kelly v. Security Mut. L. Ins. Co.* 186 N. Y. 16, 78 N. E. 584, 9 A. & E. Ann. Cas. 661, holding the act of an insurer in declaring a contract void and forfeited and denying liability thereunder did not give the insured a present right of action for its breach.

Cited in note in 94 Am. St. Rep. 123, on countermand of executory contract of sale.

Disapproved in *Wells v. Hartford Manilla Co.* 76 Conn. 27, 55 Atl. 59 affirming the doctrine that one may treat the positive renunciation of contract as a breach thereof, and holding on the evidence that there was such an equivocal breach; *O'Neill v. Supreme Council*, A. L. H. 70 N. L. 410, 57 Atl. 463, 1 A. & E. Ann. Cas. 422; *Alger-Fowler Co. v. Trac* 98 Minn. 432, 107 N. W. 1124,—upholding the doctrine that the unqualified repudiation of a contract before its performance is due gives a right of action for its breach; *Roehm v. Horst*, 178 U. S. 16, 44 L. ed. 960, 20 Sup. Ct. Rep. 780, holding that an unqualified and positive refusal to perform a contract, though the performance thereof is not yet due, may, if the renunciation goes to the whole contract, be treated as a complete breach which will entitle the injured party to bring his action.

Measure of damages for breach of executory contract of sale.

Cited in *Minneapolis Threshing Machine Co. v. McDonald*, 10 N. D. 40, 87 N. W. 993, holding that the price received by the vendor at a sale of property, subsequent to the repudiation of the contract of sale by the vendee, is immaterial in an action upon the contract, as the measure of damages is the difference between the market value and the contract price at the date of delivery; *Reeves & Co. v. Bruening*, 13 N. D. 157, 100 N. W. 241, holding the measure of damages for the refusal of a buyer to accept and pay for personal property was not the value of the property.

Cited in note in 52 L.R.A. 248, 251, on loss of profits of sale or purchase as damages.

Effect of motion for a directed verdict on the rights of the parties.

Cited in *Luther v. Hunter*, 7 N. D. 544, 75 N. W. 916, holding that a verdict directed for defendant after denial of plaintiff's motion to direct verdict will not be disturbed if reasonably supported by the evidence; *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 77, holding where both parties at the close of the evidence ask for a directed verdict, and the court grants the request of one of them, the other party is estopped from reviewing every issue of fact on which there is any conflict in the evidence; *Larson v. Calder*, 16 N. D. 248, 113 N. W. 101; *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 952, 113 N. W. 826; *Segear v. Westcott*, 83 Neb. 515, 120 N. W. 170,—holding that the right of complaint exists on appeal where on the trial both parties asked for a directed verdict and the court dismissed the jury and decided the case upon the law and the evidence; *First M. E. Church v. Fadden*, 8 N. D. 162, 77 N. W. 615; *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 286,—holding that party will be deemed to have submitted all controverted questions of fact to determination of the court where each party moved for a directed verdict and did not afterwards ask for submission of any question of fact to jury.

6 N. D. 575, ROOT v. ROSE, 72 N. W. 1022.

Presumption of probable cause for prosecution.

Cited in note in 15 L.R.A.(N.S.) 1146, on effect on presumption of probable

bable cause for prosecution, of procurement of conviction by fraud, perjury, etc.

Conviction as evidence of probable cause for a prosecution.

Disapproved in *Carpenter v. Sibley*, 153 Cal. 215, 15 L.R.A. (N.S.) 1143, 126 Am. St. Rep. 77, 94 Pac. 879, 15 A. & E. Ann. Cas. 484, holding the conviction of the defendant was not conclusive evidence of probable cause for a prosecution where a showing that the conviction was procured by false testimony and the intimidation of the jury.

Personal liability of judicial officers.

Cited in note in 137 Am. St. Rep. 47, on personal liability of judicial officers.

6 N. D. 586, STATE EX REL. TOMPTON v. DENOYER, 72 N. W. 1014.

Effect of allotment of land to Indians on the control of the Federal government over them.

Cited in *Miller v. Schallern*, 8 N. D. 395, 79 N. W. 865, holding the constitutional right to vote subject to legislative regulation which does not practically destroy the franchise; *State v. Columbia George*, 39 Or. 127, 65 Pac. 604, holding that an allottee of the Umatilla reservation, charged with a murder committed thereon, can only be tried in the Federal courts; *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002, holding that election districts may be established within an Indian reservation, under Minn. Gen. Stat. 1894, § 10, authorizing the establishment of such districts in partially organized counties; *United States v. Kiya*, 126 Fed. 879, holding an Indian receiving an allotment of land in severalty under an act of Congress was by reason of such act no longer a ward of the government as to be subject to a prosecution for rape under the Federal statutes; *Re Now-ge-zhuck*, 69 Kan. 410, 76 Pac. 877, holding an Indian receiving an allotment of land in severalty under a Federal statute which provided that he should have the benefit and be subject to the civil and criminal laws of the state might be prosecuted under the state laws for a breach of the peace; *Re Heff*, 197 U. S. 488, 49 L. ed. 855, 25 Sup. Ct. Rep. 506, holding a prosecution would not lie in the Federal courts for the prosecution of one selling liquor to an Indian who had received an allotment of land and had been granted the benefits of and been made subject to the laws of the state.

6 N. D. 601, IOWA & D. LAND CO. v. BARNES COUNTY, 72 N. W. 1019.

Followed without discussion in *Iowa & D. Land Co. v. Barnes County*, 7 N. D. 31, 72 N. W. 1135.

Recovery of tax bid avoided by mistake.

Cited in *Martin v. Kearney County*, 62 Neb. 538, 87 N. W. 351, holding the irregular action of a city council in making a levy which results in the invalidity of the levy is not such a mistake or wrongful act within

6 N. D.] NOTES ON NORTH DAKOTA REPORTS.

the meaning of a statute for which the county can be held liable to a purchaser at a delinquent tax sale; *Van Nest v. Sargent County*, 7 N. D. 73 N. W. 1083, holding adjudication that tax sale is void, condition precedent to liability of county to purchaser for purchase price and subsequent taxes, penalties and costs paid by him.

Cited in note in 31 L.R.A.(N.S.) 1142, 1143, on right of purchaser in invalid tax sale, in absence of statute, to be reimbursed for purchase price, or subsequent taxes.

Sufficiency of description in notice of tax sale.

Distinguished in *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97, holding insufficient description of property in notice of tax sale as "s w 4 of 4" of specified section, township, and range.

6 N. D. 609, PATTERSON v. WARD, 72 N. W. 1013, Later approved in 8 N. D. 87, 76 N. W. 1046; Later phase of same case 10 N. D. 254.

Purchase by receiver.

Cited in *Jackson v. First State Bank*, 21 S. D. 484, 113 N. W. 876, holding that sale of insolvent bank's assets to bank in which receiver has interest will not be vacated, where sale was permitted by former bank stockholders.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 7 N. D.

7 N. D. 1, **DUNSTAN v. JAMESTOWN**, 72 N. W. 899.

"Duplicate" writings.

Cited in *Grand Lodge A. O. U. W. v. McFadden*, 213 Mo. 269, 111 S. W. 1172 (affirming and adopting opinion in 114 Mo. App. 191, 89 S. W. 68), on what constitutes a "duplicate" of a written instrument.

7 N. D. 6, **BANK OF GILBY v. FARNSWORTH**, 38 L.R.A. 843, 72 N. W. 901.

Necessity for presenting lost check.

Distinguished in *California Nat. Bank v. Weldon*, 14 Cal. App. 765, 113 Pac. 334, holding presentment and notice of dishonor of lost check unnecessary.

7 N. D. 18, **STATE v. WINE**, 72 N. W. 905.

7 N. D. 31, **IOWA & D. LAND CO. v. BARNES COUNTY**, 72 N. W. 1135.

7 N. D. 32, **WELTER v. JACOBSON**, 66 AM. ST. REP. 632, 73 N. W. 65.

Sheriff's duty in replevin action.

Cited in *Muskin v. Moulton*, 104 Me. 557, 72 Atl. 617, on the rule that officer may seize on replevin only goods in possession of person named in precept but holding it immaterial, so far as the officer is concerned, that such goods are mortgaged to another.

Replevin against officer seizing property on replevin.

Cited in *Kierbow v. Young*, 20 S. D. 414, 8 L.R.A. (N.S.) 216, 107 N. W.

371, 11 A. & E. Ann. Cas. 1148, holding that one who loses possession an action of claim and delivery cannot recover in a similar action against the seizing officer since it was his duty to defend the original action and have his rights adjudicated.

Cited in notes in 80 Am. St. Rep. 703, as to when replevin or claim and delivery is sustainable; 5 L.R.A.(N.S.) 496, on right of one not a party to original replevin to recover property seized; 8 L.R.A.(N.S.) 220, 223, 224, on right of one from whom property is replevied to maintain a similar action for its recovery.

Who may maintain trover.

Cited in note in 9 N. D. 632, on who may maintain an action for trover and conversion.

Liability on sheriff's bond.

Cited in Johnson v. Williams, 111 Ky. 289, 54 L.R.A. 220, 98 Am. Rep. 416, 63 S. W. 759, holding sheriff liable on his bond for act of deputy in killing one he supposes to be a criminal attempting to escape although the belief was not without reasonable grounds.

Sheriff's right to indemnity.

Cited in note in 89 Am. St. Rep. 419, on sheriff's right to indemnity while executing civil process.

Liability of sureties on sheriff's bond.

Cited in Lee v. Charmley, 20 N. D. 570, 33 L.R.A.(N.S.) 275, 129 N. W. 448, on liability of sureties for wrongful acts of sheriff.

7 N. D. 45, HENNEY BUGGY CO. v. HIGHAM, 72 N. W. 911.

7 N. D. 46, RED RIVER LUMBER CO. v. CHILDREN OF ISRAEL, 73 N. W. 203.

Foreign corporation doing business in state.

Cited in National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285, holding right to sue on contract not affected by failure of foreign corporation to comply with statutory requirements; State use of H. A. Parr Co. v. Robb-Lawrence Co. 15 N. D. 55, 106 N. W. 406, as decided under a statute which has been changed with respect to the necessity for a foreign corporation to appoint a resident agent within the state.

Necessity for actually recording or indexing mechanic's lien statement.

Cited in Watkins v. Bugge, 50 Neb. 615, 77 N. W. 83, holding that under Neb. Comp. Stat. chap. 54, art. 1, § 2, providing that subcontractor "may file" his claim and thus have a lien for an unpaid balance, and that the said claim shall be recorded, the lien is acquired by making the filing not by the recordation; Turner v. St. John, 8 N. D. 245, 78 N. W. 303, holding that creditors who are not innocent purchasers or encumbrancers gain no precedence over mechanic's lienor by clerk's failure to abstract lien statement.

Lien of subcontractor.

Cited in Langworthy Lumber Co. v. Hunt, 19 N. D. 433, 122 N. W. 80.

holding that subcontractor has direct lien for labor or material furnished contractor which is not affected by contractor's failure to complete contract.

7 N. D. 58, **STATE v. CAMPBELL**, 72 N. W. 935.

Necessity for specifying error.

Cited in *State v. Tough*, 12 N. D. 425, 96 N. W. 1025, holding that error must be affirmatively made to appear and will not be presumed; *Pease v. Magill*, 17 N. D. 166, 115 N. W. 260, holding general exception to matter embraced in different paragraphs of instructions is bad for failure to point out particular error.

Instruction on credibility of witness.

Followed in *State v. Johnson*, 14 N. D. 288, 103 N. W. 565, disapproving an instruction authorizing the jury to reject entire testimony for falsity of some of it; *State v. Winney*, 21 N. D. 72, 128 N. W. 680, holding instruction as to corroboration of witnesses, which states that if any witness has "wilfully testified falsely," sufficient.

7 N. D. 69, **RE CAMP**, 72 N. W. 912.

7 N. D. 70, **STATE v. HAYNES**, 72 N. W. 923.

Necessity for specifying error.

Cited in *State v. Maloney*, 7 N. D. 119, 72 N. W. 927, holding that errors not shown by the record will not be considered on appeal; *State v. Tough*, 12 N. D. 425, 96 N. W. 1025, holding that error must be made affirmatively to appear and will not be presumed.

Impeaching witness as to irrelevant matters.

Followed in *Becker v. Cain*, 8 N. D. 615, 80 N. W. 805, holding that impeachment of witness on cross-examination by showing contradictory statements previously made must be on matters relevant to the issue.

Cited in *Becker v. Cain*, 8 N. D. 615, 80 N. W. 805, holding answer of witness in answer to an irrelevant question binding on party asking the question; *Schnase v. Goetz*, 18 N. D. 594, 120 N. W. 553, holding that collateral matter drawn out on cross-examination cannot be contradicted.

7 N. D. 81, **MATHEWS v. GREAT NORTHERN R. CO.** 72 N. W. 1085.

7 N. D. 88, **PLUMMER v. KELLY**, 73 N. W. 70, Later appeal in 9 N. D. 12, 81 N. W. 77.

What will excuse nonperformance of contract.

Cited in *Coonan v. Cape Girardeau*, 149 Mo. App. 609, 129 S. W. 745, holding party not relieved from contractual obligation because he believes with good cause that other party will not be able to perform.

7 N. D. 95, **ROEHR v. GREAT NORTHERN R. CO.** 72 N. W. 1084.

Evidence of negligence.

Distinguished in *Young v. Great Northern R. Co.* 8 N. D. 345, 79 N. W.

448, holding plowing of fire breaks after fire competent to prove that they were not plowed before.

7 N. D. 99, SCOTTISH AMERICAN MORTG. CO. v. REEVE, 72 N. W. 1088, Appeal from refusal to set judgment aside in 7 N. D. 552, 75 N. W. 910.

7 N. D. 102, NICHOLS & S. CO. v. STANGLER, 72 N. W. 1089.

Trial de novo on appeal.

Followed in *State ex rel. Wiles v. Heinrich*, 11 N. D. 31, 88 N. W. 73, holding that upon appeal from case tried by the court the supreme court does not sit for the correction of errors but tries the case anew upon the evidence and objections thereto can be considered only in connection with the new trial of the facts.

Cited in *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. 49, holding that case tried to the court cannot be tried de novo on appeal where the statement of the case contains no declaration of a desire for retrial of the entire case or any specifications of any facts show appellant's desire to have review; *State ex rel. McClory v. McGruer*, 9 N. D. 566, 84 N. W. 30, holding that the appellate court will not retry a case tried without a jury or any issue of fact involved where no demand for retrial is embodied in the statement of the case; *Hagen v. Gilbertson*, 10 N. D. 546, 88 N. W. 455, holding stipulation by counsel after trial to jury that the jury should be waived and the court make findings of fact not authority for trial de novo on appeal where the statement fails to include evidence which was offered and excluded in the trial to the jury.

Appeal from actions tried by the court.

Cited in *Erickson v. Citizens' Nat. Bank*, 9 N. D. 81, 81 N. W. 46, holding case not tried to a jury so as to permit correction of errors on appeal where counsel on each side moved at close of the testimony for direct verdict, and the court, without exception being taken, made findings of fact and law in plaintiff's favor; *Prescott v. Brooks*, 11 N. D. 93, 90 N. W. 129, on effect of appeal for retrial and holding that such appeal from a portion of the case confers no jurisdiction on appellate court; *Bank Park River v. Norton*, 12 N. D. 497, 97 N. W. 860, holding that no appeal from court action lies except from the judgment and that therefore specifications and assignments of error are not properly on the record and cannot be considered; *Carter v. Carter*, 14 N. D. 66, 103 N. W. 425, holding that upon appeal from court trial the finding of the trial court who heard the testimony is entitled to weight, particularly when the case hinges upon the credibility of witnesses.

Distinguished in *Noble Twp. v. Aasen*, 8 N. D. 77, 76 N. W. 990, holding error assigned in striking out counterclaim at opening of trial before the court without a jury in which issues of fact had been joined by general denial and a reply reviewable on appeal though no evidence was offered under the counterclaim.

Specifications of error.

Cited in *Barnum v. Gorham Land Co.* 13 N. D. 359, 100 N. W. 107.

holding that the only way in which evidence or rulings of court can be presented for review as from jury trial is by means of a statement containing the prescribed specifications and without such specifications the statement must be disregarded.

Sufficiency of statement of case.

Cited in *Security Improv. Co. v. Cass County*, 9 N. D. 553, 84 N. W. 477, holding right to have question of fact retried on appeal lost by failing to incorporate demand for retrial in the statement of the case.

7 N. D. 109, STATE v. COUDOTTE, 72 N. W. 913.

Corroboration of accomplice.

Cited in note in 98 Am. St. Rep. 168, on convicting on testimony of accomplice.

7 N. D. 119, STATE v. MALONEY, 72 N. W. 927.

Necessity for specifying error.

Cited in *State v. Tough*, 12 N. D. 435, 96 N. W. 1025, holding that error should be made affirmatively to appear and will not be presumed.

Including minor offense.

Cited in *Mulloy v. State*, 58 Neb. 204, 78 N. W. 525, holding a conviction for assault and battery permissible under an information charging that defendant did assault, strike, beat, and wound one with intent to inflict great bodily injury; *State v. Climie*, 12 N. D. 33, 94 N. W. 574, holding information for assault and battery with a dangerous weapon supports conviction for assault and battery; *State v. Tough*, 12 N. D. 425, 96 N. W. 1025, holding indictment for breaking and entering a railroad car with intent to steal will support conviction for entering railroad car with such intent.

Sufficiency of verdict.

Cited in *State v. Montgomery*, 9 N. D. 405, 83 N. W. 873, holding verdict not invalid because it finds defendant guilty of an "assault with provocation."

7 N. D. 129, BLACK v. MINNEAPOLIS & N. ELEVATOR CO.

72 N. W. 90, Later appeal in 8 N. D. 96, 76 N. W. 984.

Who may maintain trover.

Cited in note in 9 N. D. 632, on who may maintain trover.

7 N. D. 135, GULL RIVER LUMBER CO. v. LEE, 73 N. W. 430.

Repeal of statute under which lien was acquired.

Distinguished in *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 288, holding mechanic's liens not lost by the repeal without any saving clause of the statute under which they arose.

Overruled in *Hagler v. Kelly*, 14 N. D. 218, 103 N. W. 629, holding that the lien of a judgment for personal property taxes is not extinguished by repeal of the law by which it was authorized.

Amendment in incorporating part of existing statute.

Cited in *State ex rel. Mitchell v. Mayo*, 15 N. D. 327, 108 N. W. 349; *Fargo v. Ross*, 11 N. D. 369, 92 N. W. 449,—holding that an amendment retaining portions of an existing statute will not be construed as a repeal and re-enactment but as a continuation of the parts so retained.

7 N. D. 139, VAN NEST v. SARGENT COUNTY, 73 N. W. 1083.**Recovery of taxes paid by stranger to title.**

Cited in *Bryant v. Nelson-Frey Co.* 94 Minn. 305, 102 N. W. 859, holding that payment of taxes by a volunteer under mistaken belief of ownership creates no obligation on part of owner nor does it render repayment a condition precedent to owner's right to proceed to quiet title.

Recovery back of money paid to redeem from void tax sale.

Distinguished in *Tisdale v. Ward County*, 20 N. D. 401, 127 N. W. 512, holding that fee owner of land not taxable can recover money paid to redeem from tax sale, not previously adjudged void.

7 N. D. 146, NORTHERN LIGHT LODGE NO. 1, I. O. O. F. v. KENNEDY, 73 N. W. 524.**Stipulations for alterations in building contract.**

Cited in *Chicago Lumber & Coal Co. v. Garmer*, 132 Iowa, 282, 109 N. W. 780, upholding clause in building contract for alterations upon written order, payment to be fixed by agreement of parties or in failure of agreement by arbitration and denying owner's liability where architect verbally ordered changes.

Alteration of building contract releasing sureties.

Cited in *McMullen v. United States*, 93 C. C. A. 96, 167 Fed. 460, holding that sureties are deemed to assent to provisions in building contract for additional work at option of owner and ordering such work does not operate to release sureties although materially increasing their liability; *Bartlett v. Illinois Surety Co.* 142 Iowa, 538, 119 N. W. 729, holding that stipulation that agreed changes in building contract will not release sureties is valid; *United States v. Freel*, 92 Fed. 299, holding sureties on the bond of one contracting to build a dry-dock at a principal navy yard, evidently intended for the accommodation of all classes of government vessels, not released by an increase in the cost of $7\frac{1}{2}$ per cent over the contract figures.

7 N. D. 155, STATE v. MARKUSON, 73 N. W. 82.

Followed without discussion in *State v. McNulty*, 7 N. D. 169, 73 N. W. 87.

Right to search warrant in action to abate liquor nuisance.

Cited in *State v. McNulty*, 7 N. D. 169, 73 N. W. 87, upholding statute authorizing officer serving search warrant in action to abate liquor nuisance to take and hold possession of all the personal property found on the premises.

Sufficiency of allegation of former conviction in information.

Cited in *State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682, holding it sufficient if information briefly describes such former conviction.

7 N. D. 169, STATE v. McNULTY, 73 N. W. 87.

Followed without discussion in *State v. O'Grady*, 7 N. D. 171, 73 N. W. 1102.

Who may raise constitutional question.

Cited in *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709, denying right of defendant in proceedings to abate liquor nuisance to attack constitutionality of statute relating to seizure of liquors under search warrants where no warrant has been issued and no liquors seized; *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864, refusing to consider constitutionality of special grazing laws at the instance of one whose damage was received by reason of the general law permitting ranging of stock at certain seasons.

7 N. D. 171, STATE v. O'GRADY, 73 N. W. 1102.**7 N. D. 172, PHOENIX ASSUR. CO. v. McDERMONT, 73 N. W. 91.****7 N. D. 173, HECKMAN v. EVENSON, 73 N. W. 427.****Rights of pedestrian in any part of street.**

Cited in *Shidet v. Jules Dreyfuss Co.* 50 La. Ann. 280, 23 So. 837, holding that a person has a right to assume that the whole width of a sidewalk, along a highway, is clear; *Mahnke v. New Orleans City & L. R. Co.* 104 La. 411, 29 So. 52, holding that a passenger after alighting from a street car may assume that the crossing over the company's tracks is safe, and is not negligent in looking for a car from the other direction instead of at the ground; *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243, holding that a pedestrian may leave the sidewalk where he sees fit and has a right to presume that street is reasonably free from dangerous obstructions.

Negligence as question of fact.

Cited in *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972; *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359,—holding that negligence is a question of fact unless the facts are so clear and indisputable that reasonable men can draw but one conclusion.

Contributory negligence.

Cited in *Davis v. Holy Terror Min. Co.* 20 S. D. 399, 107 N. W. 374, holding alleged contributory negligence of minor in attempting to climb to safety from imminent danger of suffocation must be measured by the actions of an ordinarily prudent man under the same circumstances.

7 N. D. 183, FARGUSSON v. TALCOTT, 73 N. W. 207

Waiver of condition in contract of sale.

Cited in *Ross v. Page*, 11 N. D. 458, 92 N. W. 822, holding that acceptance of part of purchase price in money from assignee waived condition in contract for sale of land that price should be paid out of wheat raised thereon and that contract was nonassignable.

— Delay in enforcing forfeiture.

Cited in *Bucholz v. Leadbetter*, 11 N. D. 473, 92 N. W. 830, holding notice of cancellation of contract for sale of realty came too late when four to six months had elapsed since alleged defaults; *Kicks v. State Bank*, 12 N. D. 576, 98 N. W. 408, holding failure for two years to raise nonpayment of taxes as ground for cancellation of contract of sale operates as waiver of the condition; *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 108, holding failure to assert nonpayment of purchase money note and of taxes as forfeiture of contract of sale is deemed waiver of the forfeiture clause six months or more having elapsed since default; *Timmins v. Russell*, 14 N. D. 487, 99 N. W. 48, holding failure to assert default of contract for sale of land until the land is prepared for seeding another year operates as waiver for forfeiture; *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593, holding that delay in exercising option to forfeit contract upon default of vendee waives the right notwithstanding provision that time is of the essence of the contract; *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642, holding purchaser's failure to make payment at time fixed waived by vendor's failure to declare forfeiture for more than three months thereafter so as to entitle purchaser to specific performance on denying entire purchase price on day next instalment is due where contract makes time as of essence of the contract as to both parties; *Keator v. Ferguson*, 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678, holding thirteen days delay in notifying vendee of default in purchase price payment operates as waiver of condition that time is of the essence of the contract; *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947, holding that failure of vendor to give notice to vendee as to payment of instalments for long period constitutes waiver of right to forfeit contract for nonpayment on time; *Boyum v. Johnson*, 8 N. D. 306, 79 N. W. 149, holding vendor estopped to assert breach of contract requiring vendee to pay taxes on land by failure to demand payment for two years in which they are in arrears or to assert breach of contract in reliance on which vendee has proceeded to raise new crop.

When time is of the essence of a contract.

Cited in *Hanschka v. Vodopich*, 20 S. D. 551, 108 N. W. 28, holding that time is necessarily material to an option contract whether so specified or not; *Standard Lumber Co. v. Miller & V. Lumber Co.* 21 Okla. 617, 99 Pac. 761, holding that no particular form of words is necessary to express the intent of the contractors that time shall be of the essence although statute requires that such intent, if any, must be expressed in the instrument.

7 N. D. 195, OTTO GAS ENGINE WORKS v. KNERR, 73 N. W. 87.

Right to try case de novo on appeal.

Cited in *Hagen v. Gilbertson*, 10 N. D. 546, 88 N. W. 455, holding stipulation by counsel after trial to jury that the jury should be waived and the court make findings of fact not authority for trial de novo on appeal where the statement fails to include evidence which was offered and excluded in the trial to the jury.

7 N. D. 201, UNION NAT. BANK v. MOLINE M. & S. CO. 73 N. W. 527.

Priority of mortgage for future advances.

Cited in *Omaha Coal, Coke & Lime Co. v. Suess*, 54 Neb. 379, 385, 74 N. W. 620, holding that a mortgage to secure future advances, made in the form of a deed absolute, takes priority over judgments against the mortgagor, on which executions are levied on the mortgaged land, as to all sums advanced before the mortgagee knew of the judgments.

Necessity that mortgage for advances be for fixed sum.

Distinguished in *Merchants' State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760, where plaintiff had a deed absolute in terms but intended by the parties as an equitable mortgage.

Status of property pending replevin proceedings.

Cited in *Rosenbaum v. Hayes*, 10 N. D. 311, 86 N. W. 973, holding that the defendant in claim and delivery proceedings, by rebonding, became possessed of the legal right to sell the property and transfer the title; *Semel v. Dunn*, 28 N. Y. Civ. Proc. Rep. 206, 55 N. Y. Supp. 1006, as illustrating the lien of replevin proceedings as fastening suit upon the chattel and requiring its response to the judgment and holding that defendant who rebonds holds custodia legis and not subject to replevin by third parties.

Cited in note in 116 Am. St. Rep. 691, 692, 694, on mortgages to secure future advances.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

Damages and evidence in trover.

Cited in notes in 9 N. D. 636, on damages in actions for trover and conversion; 9 N. D. 635, on evidence in actions for trover and conversion.

7 N. D. 221, REDMON v. CHACEY, 73 N. W. 1081.

Obligation created by warrants on particular fund.

Distinguished in *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357, holding that city council having general authority to bind city does not limit cities' liability by issuing warrants payable out of a particular fund in payment for a municipal local improvement and upon diversion of such fund impairing ability to pay warrants there is a breach of contract for which city is liable generally.

7 N. D. 236, RED RIVER VALLEY LAND & INVEST. CO. SMITH, 74 N. W. 194.

Possession as constructive notice of equities in land.

Cited in *Patnode v. Deschenes*, 15 N. D. 100, 106 N. W. 573, on the conflict of authority as to the effect of grantor's possession after conveyance independent of statute, upon the rule that possession is constructive notice of equities in land.

Cited in notes in 104 Am. St. Rep. 340, on effect of possession of real property as notice; 13 L.R.A.(N.S.) 52, 74, 77, 90, 117, on possession of land as notice of title.

Disapproved in *Crooks v. Jenkins*, 124 Iowa, 317, 104 Am. St. Rep. 321, 100 N. W. 82, holding that mortgagee was charged with notice of such equities of person in possession of land as might have been discovered by inquiry although possession was originally under lease and later under unrecorded deed to secure debt.

Purchaser with notice from one without notice.

Cited in *American Mortgage Co. v. Mouse River Live Stock Co.* 10 N. D. 290, 86 N. W. 965, holding that one taking title to land without notice of existing equities can convey good title to one having notice of such equities.

7 N. D. 246, WELLS COUNTY v. McHENRY, 74 N. W. 241, Late phase of same case in 9 N. D. 68, 81 N. W. 65.

Computation of tax and penalty due.

Cited in *Darling v. Purcell*, 13 N. D. 288, 100 N. W. 726, on the method of computing tax penalty and interest due.

Distinguished in *Nichols v. Roberts*, 12 N. D. 193, 96 N. W. 298, holding that it is proper to compute statutory five per cent penalty upon sum of tax and interest due at time penalty accrues.

Due process in tax sales.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding the exact procedure for foreclosing delinquent taxes is not material so long as there is opportunity for due hearing and defense.

Jurisdictional defects in tax proceedings.

Cited in *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 1 A. & E. Ann. Cas. 1112, holding that failure to verify assessment roll is an omission of no constitutional or jurisdictional essential and will not avoid a tax sale made thereunder.

Limitations of tax lien.

Cited in *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045, holding general statute of limitations inapplicable to tax liens.

Description essential to validate assessment.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding tax invalid where the description on assessment roll was insufficient to identify the property.

Levy by percentage under statute prescribing levy in specific amounts.

Cited in *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227, holding void, tax levied in 1895 based on percentages and not laid in specific amounts as required by existing statute; *Sweigle v. Gates*, 9 N. D. 538, 84 N. W. 481, holding void, assessment and levy of taxes made by percentages and not in specific amount as required by statute.

Distinguished in *Paine v. Germantown Trust Co.* 69 C. C. A. 303, 136 Fed. 527; *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132,—holding that levy by percentage when statute prescribes levy in specific amounts does not invalidate tax or sales made thereunder when such levy was made by the state board of equalization.

Acts curing tax proceedings.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, on the power of the legislature to cure irregularities in tax proceedings where the thing wanting is some thing the necessity for which might have been dispensed with by prior statutes.

Appellate procedure in tax cases.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, as a case wherein a similar tax statute was before the supreme court without any question as to appellate procedure having been raised.

Property exempt from taxation.

Cited in *Slade v. Butte County*, 14 Cal. App. 453, 112 Pac. 485, holding lien lands not taxable prior to approval of selection by United States.

Cited in note in 132 Am. St. Rep. 339, 341, on exemption from taxation or assessment of land owned by governmental bodies, or in which they have an interest.

Unenforceable liens.

Cited in *Tracy v. Wheeler*, 15 N. D. 248, 6 L.R.A. (N.S.) 516, 107 N. W. 68 (dissenting opinion), on the practical worthlessness of a lien which cannot be enforced.

Construction of adopted statutes.

Cited in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A. (N.S.) 157, 109 N. W. 335, as applying the rule that the adoption of a statute of another state implies an adoption of the construction thereof.

Proceeding to determine validity of tax, as a suit.

Cited in *Re Stutsman County*, 88 Fed. 337, holding that a proceeding under N. D. Laws 1897, chap. 67, to determine the validity of taxes, and obtain a sale of the land on which they are levied, is a "suit" within the United States statute permitting removal to the Federal court.

Citation for delinquent tax as evidence of legal tax.

Cited in *Hanson v. Franklin*, 19 N. D. 259, 123 N. W. 386, holding citation for delinquent tax prima facie evidence of legality of tax assessed for such year.

Dak. Rep.—21.

7 N. D. 269, RE EATON, 74 N. W. 870.**Nature of disbarment proceeding.**

Cited in *Re Crum*, 7 N. D. 316, 75 N. W. 257, holding that a proceeding to revoke an attorney's license need not be brought or entitled the name of the state, as it is not a criminal prosecution.

What is a "special proceeding."

Cited in *Carruth v. Taylor*, 8 N. D. 166, 77 N. W. 617, holding a final order in a habeas corpus proceeding not appealable as an order in special proceedings, though such proceeding is civil in its nature; *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905, holding a statutory proceeding for injunction against foreclosure by advertisement is not a "special proceeding" within the Code meaning; *Oliver v. Wilson*, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757, holding order granting peremptory writ of mandamus appealable as a final order in a special proceeding affecting a substantial right; *State ex rel. Bickford v. Fabrick*, 16 N. D. 94, 112 N. W. 74, holding mandamus a special proceeding.

Proceedings carrying costs.

Distinguished in *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905, pointing out that costs were denied in the cited case owing to the peculiar nature of the proceeding and not because it was neither an action or a special proceeding in the Code sense also allowing costs in a proceeding not technically an action on a special proceeding.

— Disbarment.

Cited in *Re Watt*, 154 Fed. 678, holding in absence of statute costs could not be taxed against petitioners in disbarment proceedings; *State ex rel. Dill v. Martin*, 45 Wash. 76, 87 Pac. 1054, holding costs allowed defendants in disbarment proceedings must be taxed against state rather than petitioners.

Distinguished in *Hyatt v. Hamilton County*, 121 Iowa, 202, 63 L.R. 614, 100 Am. St. Rep. 354, 96 N. W. 855, holding attorney appointed to prosecute disbarment proceedings may recover reasonable compensation from county.

7 N. D. 276, FLUEGEL v. HENSCHER, 66 AM. ST. REP. 64, 74 N. W. 996.**Bona fides of purchaser.**

Cited in *Halloran v. Holmes*, 13 N. D. 411, 101 N. W. 310, holding that one cannot set up bona fide purchase where purchase price remained under his control and was paid over only after he had notice of defect in title.

7 N. D. 284, JOHNSON v. GREAT NORTHERN R. CO. 75 N. W. 250.**Negligence at railroad crossing.**

Cited in *Action v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225, holding railway liable for avoidable collision between buggy and car though driver was negligent in getting into perilous position.

Cited in note in 14 L.R.A. (N.S.) 314, on defective condition of crossing as affecting liability to one struck by train.

7 N. D. 288, DEERING & CO. v. HANSON, 75 N. W. 249.

7 N. D. 291, KIRSCHNER v. KIRSCHNER, 75 N. W. 252.

Necessity for affidavit of merits on reopening judgment.

Cited in *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 391, holding that to reopen default judgment entered without fraud by court of competent jurisdiction there must be an affidavit of merits and also a defense going to the merits; *Emmons County v. Thompson*, 9 N. D. 598, 84 N. W. 385, holding affidavits on merits or proposed verified answer necessary on application to vacate for mere irregular judgment any action against land for delinquent taxes; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, holding affidavit of merits and proposed verified answer necessary on motion to vacate default judgment.

7 N. D. 294, STATE v. TOMLINSON, 74 N. W. 995.

7 N. D. 299, STATE v. CRUM, 74 N. W. 992, Later proceedings for disbarment in 7 N. D. 316, 75 N. W. 257.

Nature of contempt proceeding.

Cited in *Noble Twp. v. Aasen*, 10 N. D. 264, 86 N. W. 742, holding that a contempt proceeding is neither a criminal nor a civil action within the meaning of N. D. Rev. Codes 1899, §§ 5454a, 8120, providing for change of judges.

Institution of contempt proceedings.

Distinguished in *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, holding that in constructive contempt proceeds there must be a formal accusation, and affidavit upon information and belief is insufficient to confer jurisdiction.

Appealable orders.

Cited in *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, holding order refusing to vacate final order is not appealable.

7 N. D. 307, RE KAEPLER, 75 N. W. 253.

Appeal of moot questions.

Cited in *Signor v. Clark*, 13 N. D. 35, 99 N. W. 68, holding voluntary payment of judgment and acceptance of satisfaction extinguishes cause of action and waives right to appeal; *Whittaker v. Deadwood*, 12 S. D. 608, 82 N. W. 202 (dissenting opinion), the majority holding the payment under protest, of special assessment certificates to prevent their ripening into a deed not ground for discontinuing an appeal from a judgment refusing to cancel such certificates and declare the assessments void.

Distinguished in *State ex rel. Wiles v. Albright*, 11 N. D. 22, 88 N. W. 729, where appeal from mandamus was allowed after compliance with the mandate of the court since restitution could be had in case of reversal.

7 N. D. 312, FIRST NAT. BANK v. SCOTT, 75 N. W. 254.

7 N. D. 316, RE CRUM, 75 N. W. 257.

Nature of disbarment proceedings.

Cited in *Re Ebbs*, 150 N. C. 44, 19 L.R.A.(N.S.) 892, 63 S. E. 17 A. & E. Ann. Cas. 592 (dissenting opinion), on the nature of disbarment proceedings; *State ex rel. Kehoe v. McRae*, 49 Fla. 389, 38 So. 6 A. & E. Ann. Cas. 580, holding disbarment is not a criminal proceeding and depositions of absent witnesses may be received.

— Right to appeal.

Cited in *Re Durant*, 80 Conn. 140, 67 Atl. 497, 10 A. & E. Ann. Cas. holding that appeal lies from order of permanent disbarment.

— Original or appellate jurisdiction of supreme court.

Cited in *State v. Mosher*, 128 Iowa, 82, 103 N. W. 105, 5 A. & E. Ann. Cas. 984, holding under statute appeal from disbarment brings up entire record for trial de novo.

Distinguished in *Re Burnette*, 73 Kan. 609, 85 Pac. 575, as decided under a statute obliging Supreme Court to try and determine disbarment appeal as the law and evidence may warrant.

7 N. D. 324, McALLISTER v. McALLISTER, 75 N. W. 256.

Grounds for divorce.

Cited in note in 18 L.R.A.(N.S.) 307, 313, on making charges of adultery as ground for divorce.

Conduct excusing language otherwise ground for divorce.

Cited in *Mosher v. Mosher*, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 St. Rep. 654, 113 N. W. 99, holding statements and insinuations by band which were invited by wife's conduct do not constitute grounds for divorce.

7 N. D. 330, WILSON v. RUSTAD, 66 AM. ST. REP. 649, 75 N. W. 260.

Protection of rights under foreign chattel mortgage.

Cited in *Greenville Nat. Bank v. Evans-Snyder-Buel Co.* 9 Okla. 353, 100 Pac. 249, holding that in the absence of statutes providing for the rights of foreign mortgages the rights of the mortgagee will be protected in the state to which said property is removed, to the same extent that they would have been by the law of the place of the contract.

Cited in note in 64 L.R.A. 357, on conflict of laws as to chattel mortgages.

Sufficiency of description of mortgaged chattel.

Cited in *Barrett v. Magner*, 105 Minn. 118, 127 Am. St. Rep. 531, 10 N. W. 245, holding description in chattel mortgage sufficient to constitute constructive notice to subsequent vendee notwithstanding conflict of expert opinion as to age of horse.

Liability for invading rights of mortgagee.

Cited in note in 109 Am. St. Rep. 454, on mortgagees' right of action against third persons for invasion of their rights.

Who may maintain trover.

Cited in note in 9 N. D. 631, 632, on who may maintain trover.

Evidence in trover.

Cited in note in 9 N. D. 635, on evidence in actions on trover and conversion.

7 N. D. 335, RUSSELL v. MEYER, 47 L.R.A. 637, 75 N. W. 262.**Title to support action for injury to realty.**

Cited in *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 20 Okla. 583, 30 L.R.A.(N.S.) 231, 95 Pac. 224, holding equitable owner may sue for permanent injuries to realty by reason of construction of railway; *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31, holding that redelivery of unrecorded deed to grantor and repayment of purchase price by him gives him equitable title.

Cited in note in 30 L.R.A.(N.S.) 231, 232, 234, 243, on equitable title as sustaining action for injury to realty.

Requisites of special verdict.

Cited in note in 24 L.R.A.(N.S.) 2, 24, on what special verdict must contain.

Effect of redelivery of deed.

Cited in note in 18 L.R.A.(N.S.) 1171, on effect of destruction or cancellation, or redelivery to grantor for that purpose, of delivered but unrecorded deed.

7 N. D. 343, KELLY v. CARGILL ELEVATOR CO. 75 N. W. 264.**Evidence in trover.**

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

7 N. D. 348, MONTGOMERY v. FRITZ, 75 N. W. 266.**Burden of proving accounting erroneous.**

Cited in *Wood v. Pehrsson*, 21 N. D. 357, 130 N. W. 1010, holding that party seeking to open account has burden of proof.

7 N. D. 352, STATE v. HAYNES, 75 N. W. 267.**Admissibility of evidence depending on question of fact.**

Cited in *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085, sustaining submission of questions of fact to jury upon proper instructions where question of admissibility of evidence depends upon determination of fact.

Question for jury as to voluntary participation in crime.

Cited in *State v. Kellar*, 8 N. D. 503, 73 Am. St. Rep. 775, 80 N. W. 476, holding question as to voluntary participation by female in crime of incest, for jury.

Necessity for request for instructions.

Cited in *State v. Rosencrans*, 9 N. D. 163, 82 N. W. 422, holding failure to instruct on certain proposition not assignable as error in absence of request therefor; *State ex rel. Pepple v. Banik*, 21 N. D. 417, 131 N. W. 262, holding that written requests for instruction should be present where charge not deemed sufficiently explicit.

**7 N. D. 358, MERCHANTS' NAT. BANK v. BRAITHWAITE,
AM. ST. REP. 653, 75 N. W. 244.**

Retroactive operation of statute.

Cited in note in 111 Am. St. Rep. 455, on retrospective operation of statute of limitations.

Explained in *Osborne v. Lindstrom*, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 561, 81 N. W. 72, holding provision of N. D. Rev. Codes 1901 § 5200, limiting time for bringing actions upon judgments applicable to judgments rendered before its enactment.

Limitations upon execution.

Followed in *Weisbecker v. Cahn*, 14 N. D. 390, 104 N. W. 513, holding that absence of judgment debtor from state does not toll limitation period for issuing execution.

Protection of existing rights upon shortening period of limitation.

Cited in *Wooster v. Bateman*, 126 Iowa, 552, 102 N. W. 521, affirming power of legislature to shorten period of limitations providing reasonable time is given for the protection of existing rights; *Osborne v. Lindstrom*, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72, holding statute cutting down period for commencing actions not void as to pre-existing causes of action for failure to exactly fix time of going into effect where it cannot take effect until after expiration of reasonable time; *State Finance Co. v. Mather*, 15 N. D. 380, 109 N. W. 350, 11 A. & E. Ann. 1112, holding statute limiting foreclosure of tax sale certificates as to protected holders of existing certificates by allowing one year wherein to enforce their rights; *Lamb v. Powder River Live Stock Co.* 67 L. R. A. 558, 65 C. C. A. 570, 132 Fed. 434, holding statute limiting time for bringing action on foreign judgment must give reasonable time for commencement of suit upon existing judgments.

Held obiter in *Osborne v. Lindstrom*, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72, holding void, provision shortening statute period of limitation fixing time for bringing suit on existing causes of action so short that right to sue is practically denied.

Disapproved in *Adams & F. Co. v. Kenoyer*, 17 N. D. 302, 16 L. R. A. (N.S.) 681, 116 N. W. 98, holding that the legislature may shorten period of limitations providing reasonable time is given for the commencement of suits in existing causes.

— Computation of reasonable time for protection of rights.

Cited in *Schauble v. Schulz*, 69 C. C. A. 581, 137 Fed. 389, holding that under state decisions the statute in question became effective as from the date of approval although its taking effect was deferred; *Collier*

Smaltz, 149 Iowa, 230, 128 N. W. 396, holding act giving year from its taking effect to bring action, not unconstitutional; Mulvey v. Boston, 197 Mass. 178, 83 N. E. 402, 14 A. & E. Ann. Cas. 349, holding an allowance of thirty days wherein existing rights may be protected is reasonable time.

Failure of creditor's bill or supplementary proceedings when judgment is barred.

Cited in *John G. Miller & Co. v. Melone*, 11 Okla. 241, 56 L.R.A. 620, 67 Pac. 479, holding that an action in the nature of a creditor's bill must fail where the judgment on which the action is based becomes dormant by lapse of time during the pendency of the action; *Gardiner v. Ross*, 19 S. D. 497, 104 N. W. 220, holding discharge in bankruptcy avoided prior judgment and hence proceedings supplementary to execution fail; *Miller v. Melone*, 11 Okla. 241, 56 L.R.A. 620, 67 Pac. 479, holding that creditor's bill fails upon failure of judgment through lapse of time.

Distinguished in *Brown v. Bell*, 46 Colo. 163, 23 L.R.A.(N.S.) 1096, 133 Am. St. Rep. 54, 103 Pac. 380, holding that statutory right to execution without court procedure upon a judgment obtained before a justice of the peace is not barred by statute barring action upon the judgment, the execution in this instance not being an action.

When receiver may be appointed.

Cited in note in 72 Am. St. Rep. 33, as to when appointment of receiver is proper.

Jurisdiction of state courts over causes arising prior to admission.

Cited in *Ex parte Curlee*, 20 Okla. 192, 1 Okla. Crim. Rep. 145, 95 Pac. 414, holding state court had jurisdiction of criminal offense committed in same county before admission of state, no prosecution having been instituted prior to admission; *Ex parte Howland*, 3 Okla. Crim. Rep. 142, 104 Pac. 927, holding that, on admission of state, territorial district court is succeeded by state district court which can correct record of judgment by former court.

Distinguished in *Campbell v. Coulston*, 19 N. D. 645, 124 N. W. 689, holding state district court had no jurisdiction to vacate on motion judgment rendered in territorial district court in case which had ceased to be pending.

7 N. D. 376, WOODS v. WALSH, 75 N. W. 767.

Waiver of objection to authority of attorney to sign notice of appeal.

Cited in *State ex rel. McClory v. Donovan*, 10 N. D. 610, 88 N. W. 717, holding defendant estopped to deny authority of opposing counsel to sign and serve notice of appeal in action brought by assistant attorney general who while in office employed said counsel as special counsel in the case where they have had charge of the case without objection for several years and have been recognized as the attorneys for the state in all that has been done in the case.

Champerly as defense.

Cited in *Isherwood v. H. L. Jenkins Lumber Co.* 87 Minn. 388, 92 N.

W. 230, holding that defendant cannot avail himself of plaintiff's fraudulent contract as a defense.

Presumption of fraud in conveyance.

Cited in *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W. 245, holding inference of fraud as to creditors not raised by fact that grantees named in deed were children of the one paying the consideration.

7 N. D. 388, INGWALDSON v. SKRIVSETH, 75 N. W. 772, L. appeal in 8 N. D. 544, 80 N. W. 475.

What is seduction.

Cited in note in 76 Am. St. Rep. 660, on what is seduction.

Mental anguish as element of damages.

Cited in note in 33 L.R.A.(N.S.) 99, on mental anguish as element of damages for trespass on woman's person.

7 N. D. 397, COWAN v. FARRELL, 75 N. W. 771.

7 N. D. 399, BETTS v. SIGNOR, 75 N. W. 781.

Counterclaim in action to quiet title.

Cited in *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047, holding that answer in action to quiet title alleging that defendant owns the land and asking for affirmative relief ousting plaintiff and quieting defendant's title embodies counterclaim for lack of reply to which judgment on motion will be proper.

7 N. D. 400, HILLSBORO NAT. BANK v. HYDE, 75 N. W. 781.
Rights of employer and employee in results of latter's labor.

Cited in note in 5 L.R.A.(N.S.) 1107, on rights of employer and employee as to things produced by labor of employee.

7 N. D. 404, SMITH v. SMITH, 75 N. W. 783.

Impeachment of foreign divorce.

Cited in *Sanmons v. Pike*, 108 Minn. 291, 23 L.R.A.(N.S.) 1254, 101 Am. St. Rep. 425, 120 N. W. 540, holding foreign divorce decree is subject to collateral attack for lack of jurisdiction on account of want of domicile in plaintiff.

Residence required of party seeking divorce.

Cited in *Streitwolf v. Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 S. Ct. Rep. 551, holding domicile in good faith for 90 days prerequisite to jurisdiction of divorce suit; *Bechtel v. Bechtel*, 101 Minn. 511, 12 L.R.A.(N.S.) 1100, 112 N. W. 883; *Beeman v. Kitzman*, 124 Iowa, 86, 99 N. W. 171,—holding that "domicile" for the statutory period of residence is prerequisite to jurisdiction of divorce proceedings; *Smith v. Smith*, 10 N. D. 219, 86 N. W. 721, holding bona fide residence for purpose of divorce not obtained by professional penman practising trade in various towns in Dakota for six months previous to bringing divorce suit and thereafter returning to other state and revisiting Dakota for only a week during

following year and a half; *Graham v. Graham*, 9 N. D. 88, 81 N. W. 44, holding jurisdiction to grant divorce not obtained by going into state for sole purpose of acquiring pretended residence with intent to remove as soon as divorce is granted.

Cited in note in 12 L.R.A.(N.S.) 1103, on character of residence essential to jurisdiction in divorce proceeding.

7 N. D. 414, BLACK v. WALKER, 75 N. W. 787.

Section boundaries as questions of fact.

Cited in *Propper v. Wohlwend*, 16 N. D. 110, 112 N. W. 967, holding that the original location of government survey monuments is upon disputed evidence a question for the jury.

Conclusiveness of verdict.

Cited in *Heyrock v. McKenzie*, 8 N. D. 601, 80 N. W. 762, holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 109; *Lang v. Bailes*, 19 N. D. 582, 125 N. W. 891,—holding that verdict for plaintiff will not be disturbed, if there is substantial conflict in evidence; *Action v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225, holding that verdict for plaintiff, supported by substantial evidence, will not be disturbed; *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988, holding that sufficient conflict in evidence to prevent review on appeal exists where evidence has been introduced tending to establish facts inconsistent with those relied on; *Drinkall v. Movius State Bank*, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724, holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; *Magnusson v. Linwell*, 9 N. D. 157, 82 N. W. 743, holding that an appellate court will not review the action of the trial court in denying a motion for a new trial based on the insufficiency of the evidence to sustain the verdict where there is substantial evidence in support of the verdict.

7 N. D. 418, COLER v. COPPIN, 75 N. W. 795, Overruled on later appeal in 10 N. D. 86, 65 N. W. 988.

7 N. D. 422, HEALD v. YUMISKO, 75 N. W. 806.

Boundaries on meandered waters.

Cited in *Barringer v. Davis*, 141 Iowa, 419, 120 N. W. 65, holding that the meander line of a stream is drawn merely for convenience in estimating the area of the adjoining tract and does not constitute a boundary line.

Cited in note in 48 L. ed. U. S. 662, on effect of meander line on boundary of Federal grant.

Returned area of government subdivisions.

Cited in *Propper v. Wohlwend*, 16 N. D. 110, 112 N. W. 967, holding that Federal statute providing that area of public lands shall be deemed that which is returned by the surveyor general has reference merely to the disposal thereof by the government and does not affect the rights of private parties inter sese.

Reference by consent.

Followed in *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46, holding that counsel having consented to reference cannot be heard to object, particularly when objection is first raised on appeal.

Expression of opinion as fraud.

Cited in *Heyrock v. Sererus*, 9 N. D. 28, 81 N. W. 36, holding that statement not predicable on mere expression of opinion as to matter of which other party is clearly competent to judge.

7 N. D. 429, HICKS v. BESUCHET, 66 AM. ST. REP. 665, 75 N. W. 793.

Privilege of person attending court.

Cited in *Underwood v. Fosha*, 73 Kan. 408, 85 Pac. 564, 9 A. & Ann. Cas. 833, holding resident of state exempt from process while attending Federal court in a county other than his residence either as party or a witness, and although not under subpoena.

Cited in notes in 76 Am. St. Rep. 536, 639, on exemption from service of civil process; 14 L.R.A.(N.S.) 664, on privilege of suitor or witness from process as affected by route taken or time consumed.

7 N. D. 435, RE KAEPLER, 75 N. W. 789.

Recovery upon exempt property of insolvent.

Cited in *McKinney v. Cheney*, 118 Ga. 387, 45 S. E. 433, holding that discharge in bankruptcy does not discharge lien of judgment obtained within four months of bankruptcy upon note waiving homestead exemption.

Effect of bankruptcy as to exempt property.

Cited in *Powers Dry Goods Co. v. Nelson*, 10 N. D. 580, 58 L.R.A. 788 N. W. 703, holding attachment of exempt property not affected by bankruptcy proceedings subsequently instituted against debtor.

7 N. D. 440, MASSACHUSETTS LOAN & T. CO. v. TWICHEL, 75 N. W. 786.

Defenses available against transferee of note without indorsement.

Cited in *First Nat. Bank v. Henry*, 156 Ind. 1, 58 N. E. 1057, holding that the maker of a note may set up want of consideration as a defense where the plaintiff received it without indorsement before maturity.

Cited in note in 17 L.R.A.(N.S.) 1110, on transferee, without indorsement, of bill or note payable or indorsed "to order" as bona fide purchaser.

Pleading want of knowledge and information.

Cited in *Haggart v. Ranney*, 73 Ark. 344, 84 S. W. 703, holding that in order to make a denial of knowledge or information equivalent to an express denial want of both knowledge and information sufficient to form a belief must be alleged.

Cited in note in 133 Am. St. Rep. 123, as to when denials on information and belief are permissible.

Meaning of word "assign."

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, on the technical and nontechnical use of the word "assign."

7 N. D. 444, STATE v. McKNIGHT, 75 N. W. 790.**Grounds for dismissing appeal.**

Cited in *Oliver v. Wilson*, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757, holding that motion to dismiss appeal because abstracts and briefs were type written instead of printed and that briefs did not refer to pages of abstract, will be denied in absence of allegation that such requirement was not fulfilled within the times therein provided.

Credibility of witnesses.

Cited in *Carter v. Carter*, 14 N. D. 66, 103 N. W. 425, holding findings of trial court who saw and heard the witnesses is entitled to weight when the case turns upon credibility of witnesses.

**7 N. D. 452, KNEELAND v. GREAT WESTERN ELEVATOR CO.
75 N. W. 907.****7 N. D. 455, CLEVELAND v. McCANNA, 41 L.R.A. 852, 66 AM.
ST. REP. 670, 75 N. W. 908.****Acts of defacto officers.**

Cited in *State ex rel. Bockmeier v. Ely*, 16 N. D. 569, 14 L.R.A.(N.S.) 638, 113 N. W. 711, holding that the acts of a de facto judge of the district court acting in good faith under the mistaken belief that law creating district had become operative are binding.

Set-off defeating exemptions.

Cited in *Long v. Collins*, 15 S. D. 259, 88 N. W. 571, holding a judgment representing proceeds of exempt property cannot be set off to satisfy a judgment existing in favor of the person claiming exemption; *Long v. Collins*, 15 S. D. 259, 88 N. W. 571, denying right to set off judgment representing proceeds of exempt property unlawfully converted under execution in satisfaction of judgment existing in favor of a creditor against the person in whose favor judgment for exempt property was obtained.

Cited in notes in 109 Am. St. Rep. 150, on setting off one judgment against another; 16 L.R.A.(N.S.) 495, on right to set off judgment against another founded upon claim for exempt property or services.

**7 N. D. 460, WELLS-STONE MERCANTILE CO. v. GROVER, 41
L.R.A. 252, 75 N. W. 911, Later cases involving same trust
deed in 9 N. D. 520, 84 N. W. 375; 9 N. D. 551, 84 N. W. 479.****7 N. D. 475, ARNEGAARD v. ARNEGAARD, 41 L.R.A. 258, 75
N. W. 797.****Secret antenuptial deeds.**

Cited in *Ward v. Ward*, 63 Ohio St. 125, 51 L.R.A. 858, 81 Am. St. Rep. 621, 57 N. E. 1095, holding a conveyance by one who has entered

into a contract of marriage, to his sons by a former marriage, with the knowledge or consent of his contemplated wife, and without consideration other than love and affection, a fraud on her marital rights, will not defeat her right to dower at his death after the marriage.

Cited in note in 103 Am. St. Rep. 421, on antenuptial conveyance and fraud of intended wife.

Disapproved in *Daniher v. Daniher*, 201 Ill. 489, 66 N. E. 239; *Wilson v. Wilson*, 32 Utah, 169, 89 Pac. 643,—holding that secret transfer of realty pending marriage is only prima facie fraudulent.

Manual possession of title deeds.

Cited in *Hulet v. Northern P. R. Co.* 14 N. D. 209, 103 N. W. 628, holding that deed to daughter, executed and delivered to father in whose custody it remained unrecorded, was sufficient to immediately pass title to daughter.

Deposit of deed with third person for delivery.

Cited in *Grilley v. Atkins*, 78 Conn. 380, 4 L.R.A.(N.S.) 816, 112 St. Rep. 152, 62 Atl. 337, holding that deed deposited with a third person for delivery to grantee upon grantor's death is not revocable; *Rowley v. Bowyer*, 75 N. J. Eq. 80, 71 Atl. 398, holding valid delivery, without reservation, of deed to third party for delivery to grantee on grantor's death; *O'Brien v. O'Brien*, 19 N. D. 713, 125 N. W. 307, holding it questionable fact to be determined from evidence whether grantor intended to pass with all control over deed or not.

Cited in note in 54 L.R.A. 869, 872, 882, 910, on delivery of deed to third person, on record, or delivery for record, by grantor.

Effect of destruction of unrecorded deed.

Cited in note in 18 L.R.A.(N.S.) 1175, on effect of destruction or concealment, or redelivery to grantor for that purpose, of delivered but unrecorded deed.

Jurisdiction of court in actions affecting realty.

Cited in *Walker v. Ehresman*, 79 Neb. 775, 113 N. W. 218, holding that county court has no jurisdiction to try title and hence cannot decree that devisees the owners of decedent's homestead rights as against heirs at law to whom government patent was issued.

Distinguished in *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 66 St. Rep. 679, 76 N. W. 223, holding a sale by a probate court of a deceased homesteader's realty to pay her debts not void for lack of jurisdiction, although the homestead is by statute exempted from liability for debts contracted before the issuance of the patent.

7 N. D. 503, BUXTON v. SARGENT, 75 N. W. 811.

Constructive notice of defects in title.

Cited in *Advance Thresher Co. v. Esteb*, 41 Or. 469, 69 Pac. 447, holding that subsequent purchaser of land is not charged with notice of levy and execution against it as the property of one who is not the record owner.

Necessity for pleading breach of condition in policy.

Cited in *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 4

113 N. W. 94, holding that defense of breach of condition in fire insurance policy must be specially pleaded.

Validity of lien for taxes.

Distinguished in *McHenry v. Kidder County*, 8 N. D. 413, 79 N. W. 375, holding that validity of lien for taxes as distinguished from adverse estates and interests cannot be determined in action to determine rights arising from purchase at tax sale.

7 N. D. 513, **DONOVAN v. ST. ANTHONY & D. ELEVATOR CO.**
66 AM. ST. REP. 674, 75 N. W. 809.

Who may maintain action.

Cited in notes in 9 N. D. 630, on who may maintain trover; 109 Am. St. Rep. 146, on mortgagee's right of action against third persons for invasion of their rights.

Pleadings in trover.

Cited in note in 9 N. D. 632, on pleadings in action for trover.

7 N. D. 522, **STATE v. WELTNER**, 75 N. W. 779.

7 N. D. 528, **CASS COUNTY v. SECURITY IMPROV. CO.** 75 N. W. 775.

Followed without discussion in *Cass County v. Certain Lands of Darling*, 7 N. D. 599, 75 N. W. 1135; *Cass County v. Certain Lands of Fisher*, 7 N. D. 600, 75 N. W. 1135; *Cass County v. Certain Lands of Roberts*, 7 N. D. 600, 75 N. W. 1135.

Designation of newspaper for publishing tax lists.

Cited in *Darling v. Purcell*, 13 N. D. 288, 100 N. W. 726, holding that filing of resolution designating newspaper for publication of delinquent tax list is jurisdictional.

Distinguished in *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132, where there was no showing that a newspaper had not been designated for the publication, testimony that there was no record of a resolution to that effect being insufficient to negative designation; *Griffin v. Denison Land Co.* 18 N. D. 246, 119 N. W. 1041, holding publication of delinquent tax list in *Bismarck Daily Tribune* and *Bismarck Weekly Tribune* sufficient, under resolution designating *Bismarck Daily Tribune*.

Construction of adopted statute.

Cited in *Oswald v. Moran*, 8 N. D. 111, 77 N. W. 281, holding construction provisionally placed upon adopted statute by court of last resort adopted with such statute; *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, holding that adopted foreign statute will be construed as construed in state from which it is adopted; *Murphy v. Nelson*, 19 S. D. 197, 102 N. W. 691; *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335,—as an example of adoption of construction of adopted statute as presumptively the construction intended by the legislature.

7 N. D. 538, DARLING v. TAYLOR, 75 N. W. 766.

County warrant as creating indebtedness.

Cited in *Lake County v. Keene Five Cent Sav. Bank*, 47 C. C. A. 108 Fed. 505, and *Johnson v. Pawnee County*, 7 Okla. 686, 56 Pac. 1, holding that a county whose indebtedness exceeds the constitutional limit may issue warrants for the current expenses of the county for each year against taxes levied to pay those expenses; *Bryan v. Menefee*, 21 O. 1, 95 Pac. 471, holding that warrant upon fund in treasury or on fund to be created by tax levy already laid is simply an order to pay an audit account out of a fund set aside for that purpose, and as such creates "indebtedness."

7 N. D. 544, LUTHER v. HUNTER, 75 N. W. 916.

7 N. D. 552, SCOTTISH AMERICAN MORTG. CO. v. REEVE, 75 N. W. 910.

Res judicata.

Cited in *Taylor v. Taylor*, 54 Or. 560, 103 Pac. 524, holding that an award of property in divorce proceedings which was acquiesced in by the parties and not questioned upon appeal from the divorce decree is conclusive as to the rights of the parties in later proceedings involving title.

7 N. D. 554, O'LEARY v. BROOKS ELEVATOR CO. 41 L.R.A. 677, 75 N. W. 919.

Actionable negligence.

Cited in *Southern R. Co. v. Williams*, 143 Ala. 212, 38 So. 1013, on the necessity for breach of duty toward person injured in order to give rise to right of action for negligence.

Duty to trespassers or licensees.

Cited in *Birmingham R. Light & P. Co. v. Jones*, 153 Ala. 157, 45 So. 177, holding railway owes no duty to trespasser to keep lookout; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 97; *Wright v. Minneapolis, St. P. & S. Ste. M. R. Co.* 12 N. D. 159, 96 N. W. 324,—holding duty of railway company was to exercise reasonable care to avoid injury to trespassing stock after observing its danger but not to keep a lookout for such stock; *Glaser v. Rothschild*, 106 Mo. App. 480 S. W. 332, holding owner of premises not liable for injury of licensee by falling into elevator pit while proceeding through dimly lighted basement to toilet room at own request.

Cited in note in 69 L.R.A. 514, on care due to sick, infirm, or helpless persons, with whom no contract relation is sustained.

Attractive nuisances.

Cited in note in 19 L.R.A. (N.S.) 1121, on attractive nuisance.

Liability for torts of infant.

Cited in note in 57 L.R.A. 673, on liability of an infant for tort.

7 N. D. 565, THUET v. STRONG, 75 N. W. 922.

What is an "abstract" or statement of case.

Cited in *Hills v. Allison*, 79 Kan. 617, 100 Pac. 651, holding that a complete transcript of the record does not constitute an "abstract" within the meaning of the rule of court; *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76, holding a complete transcript of the testimony does not constitute a proper statement of the case within statute and rule of court.

Sufficiency of record on appeal to entitle to trial de novo.

Cited in *Security Improv. Co. v. Cass County*, 9 N. D. 553, 84 N. W. 477, holding right to have question of fact retried on appeal lost by failing to incorporate demand for retrial in the statement of the case; *Farmers' & M. Nat. Bank v. Davis*, 8 N. D. 83, 76 N. W. 998, holding court's certificate to statement on appeal that it has been "settled and allowed" without mention of evidence and a stipulation of counsel that it contains a true statement of the evidence as required by a statute providing for including only such evidence as is required to explain a particular point to be made on appeal a conclusive showing that "all the evidence" is not contained in the statement so as to entitle appellant to trial de novo; *Blessett v. Turcott*, 20 N. D. 151, 127 N. W. 505 (dissenting opinion), on waiver by counsel of statutory requirements as to statement of case.

Right to amend record on appeal.

Cited in *Montgomery v. Harker*, 9 N. D. 527, 84 N. W. 369, denying power of supreme court to amend the record on appeal so as to include evidence claimed to have been omitted from the record.

7 N. D. 569, Q. W. LOVERIN-BROWNE CO. v. BANK OF BUFFALO, 75 N. W. 923.**7 N. D. 576, WILLIAM DEERING & CO. v. VENUE, 75 N. W. 926.**

Effect of trial de novo on appeal from justice court.

Cited in note in 34 L.R.A.(N.S.) 666, on waiver of lack of, or defects in, service of process, by trial de novo on appeal from justice's court.

7 N. D. 584, McHENRY v. ROPER, 75 N. W. 903.

Necessity for statement of case.

Cited in *Brandenburg v. Phillips*, 18 N. D. 200, 119 N. W. 542, holding statement of case unnecessary to secure modification of judgment for error appearing upon judgment roll.

7 N. D. 587, GRAND FORKS LUMBER & COAL CO. v. TOURTELOT, 75 N. W. 901.

Contracts within statute of frauds.

Cited in notes in 126 Am. St. Rep. 533, on contract to answer for or pay debt of another within statute of frauds; 15 L.R.A.(N.S.) 215, on contemporary promise to pay where benefit inures to another as within statute of frauds.

Distinguished in *Wood v. Dodge*, 23 S. D. 95, 120 N. W. 774, holding oral promise by lessor of farm to pay for machinery furnished lessee, original promise.

— **Parol variation of written contract.**

Cited in *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 1, holding that a specific and exclusive written warranty against manufacturing defects excludes parol evidence of further warranties.

7 N. D. 591, TRIBUNE PRINTING & BINDING CO. v. BARNES, 75 N. W. 904.

Correct result from erroneous reasoning.

Cited in *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314, holding that correctness of an order rather than the reasoning upon which it was made is all that will be considered upon appeal.

Distinguished in *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440, where ground upon which it is sought to sustain the ruling of the trial court was first urged on appeal.

Enactment, amendment, or revision of code or compilation of laws.

Cited in notes in 86 Am. St. Rep. 272, 274, 276, on constitutionality of code amendment or revision; 55 L.R.A. 840, on power of legislature to enact a code or compilation of laws, or amend many or undesignated statutes thereof, by a single statute.

Sufficiency of title of statute.

Cited in note in 79 Am. St. Rep. 476, as to when title of statute embraces only one subject, and what may be included thereunder.

7 N. D. 599, CASS COUNTY v. CERTAIN LANDS, 75 N. W. 1135.

7 N. D. 600, CASS COUNTY v. CERTAIN LANDS, (a) 75 N. W. 1135.

7 N. D. 600, CASS COUNTY v. CERTAIN LANDS, (b) 75 N. W. 1135.

7 N. D. 601, HEWITT v. SCHULTZ, 76 N. W. 230, Reversed, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309.

Contemporaneous construction of statute.

Cited in *Bankers' Mut. Casualty Co. v. First Nat. Bank*, 131 Iowa, 410, 108 N. W. 1046, holding that where ambiguity exists the contemporaneous construction put upon a statute is entitled to great weight.

7 N. D. 612, GJERSTADENGREN v. VAN DUZEN, 66 AM. ST. REP. 679, 76 N. W. 233, Later suit to partition same land in 8 N. D. 424, 79 N. W. 872; 9 N. D. 268, 81 Am. St. Rep. 575, 76 N. W. 230.

Homestead rights upon death of entryman.

Cited in *Demars v. Hickey*, 13 Wyo. 371, 80 Pac. 521, holding that entryman's rights in unpatented homestead constitute no part of his estate.

Council Improv. Co. v. Draper, 16 Idaho, 541, 102 Pac. 7, holding same and that sale by administrator conveyed nothing; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50, holding heirs at law of homesteader take as new homesteaders under preferential law and not as successors to an equitable interest; McCracken v. Sisk, 91 Ark. 452, 121 S. W. 725, holding same with regard to donation lands of state; Bergstrom v. Svenson, 20 N. D. 55, 126 N. W. 497, holding citizen brother of deceased entryman entitled to patent as against alien mother.

Cited in note in 34 L.R.A.(N.S.) 398, on right of entryman to devise claim or interest in public land.

Title conveyed by administrator.

Cited in Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50, holding purchasers at administrator's sale take subject to rule caveat emptor.

Jurisdiction of probate court to try title.

Cited in Altgelt v. Mernitz, 37 Tex. Civ. App. 397, 83 S. W. 891, holding that order of probate court to sell property merely orders sale of decedent's interest therein and constitutes no representation of title upon which purchaser may rely.

Liability of interest in land before patent for debts.

Cited in note in 34 L.R.A.(N.S.) 410, on liability of claim or interest in public lands for debts contracted before patent issued.

Estoppel to deny title.

Followed in Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230, holding one not estopped to assert after acquired title to property by receiving as creditor of estate part of proceeds of sale thereof by him as administrator under mistaken belief of all parties that it belonged to the estate.

Cited in Logan v. Davis, 147 Iowa, 441, 124 N. W. 808, holding that issuance of patent to contract purchaser of forfeited railroad lands does not estop homestead entryman from questioning its validity; Walker v. Ehrsman, 79 Neb. 775, 113 N. W. 218, holding that acquiescence in probate proceedings does not constitute an estoppel to assert title adverse to the estate.

Cited in note in 21 L.R.A.(N.S.) 63, on estoppel of one executing deed as executor or administrator to set up existing title in himself.

Distinguished in Bliss v. Tidrick, 25 S. D. 533, 32 L.R.A.(N.S.) 854, 127 N. W. 852, holding administrator executing void warranty deed of decedent's realty estopped to claim that his private interest did not pass.

7 N. D. 619, JAMESTOWN & N. R. CO. v. JONES, 76 N. W. 227, Reversed in 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568.

Relative rights of railway and settler on public lands.

Cited in Slaght v. Northern P. R. Co. 39 Wash. 576, 81 Pac. 1062, holding railroad gains no rights by act granting right of way over public lands which are superior to prior settlers and that acquiescence of settler
Dak. Rep.—22.

in the construction of the road creates no estoppel; *Denver & R. Co. v. Wilson*, 28 Colo. 6, 62 Pac. 843, holding that an act granting of way over public land subject to approval of filed profile does not convey a right in praesenti and homesteader filing prior to such filing acceptance has priority; *Doughty v. Minneapolis, St. P. & S. Ste. R. Co.* 15 N. D. 290, 107 N. W. 971, holding railroad has no priority over settler who enters after actual location of line but prior to filing and approval of map; *Union P. R. Co. v. Harris*, 76 Kan. 255, 91 Pac. 68, holding that land occupied by settler is not "public land" within purview of granting right of way over such lands.

When right of railroad to land attaches.

Cited in *Comford v. Great Northern R. Co.* 18 N. D. 570, 120 N. W. 875, holding that grant of right of way and station grounds under map of 1875 attached only on their definite location.

7 N. D. 631, CUTTER v. POLLOCK, 76 N. W. 235.

Costs of receivership.

Cited in *Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177, holding a receiver entitled to recover his compensation and expenses from the party at whose instance he was appointed, where the appointment was authorized, and he has no funds from which the same can be paid, and has been obliged to surrender the receivership property to the purchaser in a foreclosure action pending at the time of his appointment.

Cited in note in 25 L.R.A.(N.S.) 412, 413, 416, on liability for costs of receivership where final judgment is against the moving party.

— Apportionment.

Cited in *Frick v. Fritz*, 124 Iowa, 529, 100 N. W. 513, on the apportionment of receivership expenses as between the parties to the proceedings; *Nutter v. Brown*, 58 W. Va. 237, 1 L.R.A.(N.S.) 1083, 52 S. E. 6 A. & E. Ann. Cas. 94, refusing to disturb decree imposing extraordinary costs of receivership upon unsuccessful defendant who claimed four-fifths of the property; *Horn v. Bohn*, 96 Md. 8, 53 Atl. 576, holding that a landlord without sufficient cause procured appointment of receiver to take crop who was subsequently discharged it is proper to require receiver to pay expenses and commissions to be paid out of landlord's share of crop; *Chapman v. Atlantic Trust Co.* 56 C. C. A. 61, 119 Fed. 257, holding that complainant who secured appointment of receiver may be adjudged liable for authorized expenses of receiver in excess of the proceeds of the property upon receiver's sale; *Atlantic Trust Co. v. Chapman*, 208 U. S. 52 L. ed. 535, 28 Sup. Ct. Rep. 406, 13 A. & E. Ann. Cas. 1155, holding that one who procures appointment of receiver to manage property does not thereby become personally liable for expenses of receivership in excess of proceeds of property.

Priority of claims against receiver.

Cited in note in 2 L.R.A.(N.S.) 1068, on priority of claims against property in hands of receiver over recorded liens.

7 N. D. 640, ROLPH v. FARGO, 42 L.R.A. 646, 76 N. W. 242.

Local assessments by front foot rule.

Followed in *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049, upholding statute authorizing paving tax on front foot plan.

Cited in *Whittaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590, holding valid, front-foot rule in assessments for street paving.

Cited in note in 28 L.R.A.(N.S.) 1128, 1130, 1139, 1147, 1159, 1172, 1181, 1201, on assessments for improvements by front-foot rule.

Constitutional equality and uniformity of taxation.

Cited in *Re Lipschitz*, 14 N. D. 622, 95 N. W. 157, holding constitutional provision for equality and uniformity of taxation refers to general taxes on property and does not include occupation tax.

Cited in note in 42 L.R.A. 636, on necessity of special benefits as basis for local assessments.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 8 N. D.

8 N. D. 1, ENGSTAD v. DINNIE, 76 N. W. 292.

Expenditures payable out of the annual appropriation bill.

Cited in *Roberts v. Fargo*, 10 N. D. 230, 86 N. W. 726, holding void, city contract for future lighting of city at \$6,000 per year for ten years, entered into when lighting fund amounted only to 200 or 300 dollars, and when no appropriation from general funds had been made, nor tax laid to meet the obligations; *Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836, holding land condemned for use in the improvement of a street could not be paid for out of a general improvement fund where no item for such improvements was embraced in the general appropriation bill.

Necessity for appropriation to sustain payment of money.

Cited in *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357, holding a municipality, before entering into contracts for the improvement of streets was required to make an appropriation for such expense.

Distinguished in *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357, holding in action on city paving warrants where a sum in the paving fund was entered on books as "appropriations" it was not admissible except on proof to object that no appropriation had been made.

Injunctive relief against unlawful public contract.

Distinguished in *Torgrinson v. Norwich School Dist.* No. 31, 14 N. D. 10, 103 N. W. 414, where it was held that a taxpayer could not maintain an action to enjoin a tax levy, he having a remedy at law.

Estoppel or ratification as to public contract.

Cited in *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23, holding that laches of taxpayer does not deprive him of right to enjoin disbursement of public funds about to be made without authority of law; *Fox v. Walley*,

13 N. D. 610, 102 N. W. 161, holding no question of the ratification of a contract of the county commissioners with a third person to secure the payment of a judgment arose by a failure to act until a third person had expended money, where the board of county commissioners had no authority to make the contract.

8 N. D. 15, TETRAULT v. O'CONNOR, 76 N. W. 225.

Waiver of motion for a directed verdict.

Cited in *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 83 N. W. 221, holding motion for judgment or direction of verdict by defendant at close of plaintiff's case waived by failure to renew a motion for all evidence is in; *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 113 N. W. 872; *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253,—holding the denial of a motion to direct a verdict is not available as error where no further testimony is introduced and the motion is not renewed.

Admissibility of opinions or conclusions of witness.

Cited in *State v. Stevens*, 16 S. D. 309, 92 N. W. 420, holding on prosecution of a bank cashier for receiving money after the insolvency of the bank it was error to allow the public bank examiner to testify as a conclusion that the bank was insolvent; *Tenney v. Rapid City*, 17 S. D. 283, 96 N. W. 96, holding in an action for personal injuries it was error to allow the plaintiff to give her opinion as to the amount of damages she had sustained by the injury; *Red River Valley Nat. Bank v. Monson*, 11 N. D. 423, 92 N. W. 807, holding objection properly sustained to the question, "Did the bank exercise any ownership over the notes?" as calling for a conclusion.

Cited in note in 14 L.R.A.(N.S.) 291, on right of witness to state facts as to what was in possession of property.

8 N. D. 18, CHICAGO, M. & ST. P. R. CO. v. CASS COUNTY, 76 N. W. 239.

Taxation of railroad franchises.

Cited in *Minneapolis, St. P. & S. Ste. M. R. Co. v. Oppegard*, 18 N. D. 1, 118 N. W. 830, holding telegraph line built by railway company, exempt as property reasonably necessary for running of trains and operation of railroad business, when it is used for commercial purposes, from compensation paid by patrons.

Cited in note in 57 L.R.A. 46, on taxation of corporate franchises in the United States.

Construction of the term "roadway" as used of railroad.

Cited in note in 66 L.R.A. 37, on nature of railroad as realty or personalty.

Disapproved in *San Francisco & S. J. Valley R. Co. v. Stockton*, Cal. 83, 84 Pac. 771, holding under the constitutional provision for assessment of railroad property the term "roadway" means the continuous strip of land upon which the road is constructed.

Persons entitled to question constitutionality of statute.

Cited in *Turnquist v. Cass County Drain Comrs.* 11 N. D. 514, 92 N. W. 852, upholding the doctrine that courts would not inquire into the constitutionality of statutory provisions at the instance of persons who are not interested or affected by such provisions.

8 N. D. 23, **HAUG v. GREAT NORTHERN R. CO.** 42 L.R.A. 664, 73 AM. ST. REP. 727, 77 N. W. 97, Later case in Federal court in 42 C. C. A. 167, 102 Fed. 74.

Necessity for allegation of damages in action for wrongful death.

Cited in *Peden v. American Bridge Co.* 120 Fed. 523, holding the declaration in an action by administrator for wrongful death was not deficient where it contained no allegation of damages to next of kin, it appearing by the declaration that the decedent left surviving him a wife and children.

Liability of carrier for death of helpless person ejected from the train.

Cited in *Fagg v. Louisville & N. R. Co.* 111 Ky. 30, 54 L.R.A. 919, 63 S. W. 580, holding defendant company was liable for the death of a trespasser who was ejected from the train in a dangerous place while in a drunken condition with knowledge of the trainmen of such condition and the danger to him from a train shortly to follow.

Distinguished in *Hudson v. Lynn & B. R. Co.* 185 Mass. 510, 71 N. E. 66, where it was held that a street railway company was not liable for the death of a passenger who was ejected from a car while in an intoxicated condition and laid by the side of the tracks where he was struck by another car.

Contributory negligence of passenger.

Cited in *Hanson v. Chicago, R. I. & P. R. Co.* 83 Kan. 553, 31 L.R.A. (N.S.) 624, 112 Pac. 152, holding one not guilty of contributory negligence, as matter of law, in relying on judgment of conductor in alighting in dark from train leaving his station.

Measure of damages for wrongful death.

Cited in *Scherer v. Schlaberg*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, holding that measure of damages recoverable by father for wrongful death of minor, is probable value of services to father, during minority, considering cost of support and maintenance during early part of its life.

8 N. D. 35, **HOLLINSHEAD v. JOHN STUART & CO.** 42 L.R.A. 659, 77 N. W. 89.

Estoppel of owner of negotiable instrument to deny payment.

Cited in *Stolzman v. Wyman*, 8 N. D. 108, 77 N. W. 285, holding indorsee of note secured by mortgage who forwards interest coupons to original payee who collects same and to whom debtor pays principal on assumption of his continued ownership not estopped to set up the indorsement or to deny original payee's agency to collect principal.

Distinguished in *Pennypacker v. Latimer*, 10 Idaho, 618, 81 Pac. where it was held that a person purchasing a note and mortgage under a contract whereby the seller became responsible for the payment of interest and principal and acquired the right of repurchasing at any time was estopped to deny that such seller was not acting as his agent in receiving payment where he failed to properly record the assignment, and gave the mortgagors no notice thereof.

Burden of showing authority to receive payment of negotiable instrument.

Cited in *Hoffmaster v. Black*, 78 Ohio St. 1, 21 L.R.A.(N.S.) 52, 104 Am. St. Rep. 679, 84 N. E. 423, 14 A. & E. Ann. Cas. 877, holding that the burden is on the one making payment of a note at the designated place of payment to show the authority of the one to whom the payment was made to receive payment where the payment was made to a person not having possession of the note properly indorsed.

Payment of negotiable paper.

Cited in *Smith v. First Nat. Bank*, 23 Okla. 411, 29 L.R.A.(N.S.) 104 Pac. 1080, holding the payment of an indebtedness by the purchaser of the mortgaged property to the original mortgagee was insufficient to discharge the note to the assignee of the note before maturity which the mortgage was given to secure; *Marling v. Nommensen*, 127 Wis. 363, 5 L.R.A.(N.S.) 115 Am. St. Rep. 1017, 106 N. W. 844, 7 A. & E. Ann. Cas. 364, upholding the doctrine that the maker of a promissory note can satisfy it by payment to one authorized to receive such payment at the time designated for such payment; *Kohl v. Beach*, 107 Wis. 409, 50 L.R.A. 81 Am. St. Rep. 849, 83 N. W. 657, holding that payment of a mortgage to a subagent who did not have possession of the mortgage or any express authority to make the collection, but who had previously collected the interest thereon, and had caused a foreclosure suit to be started for his fault, does not bind the mortgagee.

Cited in notes in 21 L.R.A.(N.S.) 53, on payment to one found at the place designated, not in possession of securities; 23 L.R.A.(N.S.) 417, 418, on effect of agent's nonpossession of security upon question of authority to receive payment.

Distinguished in *Second Nat. Bank v. Spottswood*, 10 N. D. 114, 10 N. W. 359, holding payment effectual where the person improperly receiving it subsequently pays the proceeds to the holder of the note.

— To person in possession of paper.

Cited in *Corey v. Hunter*, 10 N. D. 5, 84 N. W. 570, holding possession of draft or note cashier's test of agent's ostensible authority to receive payment of same; *Loizeaux v. Fremder*, 123 Wis. 193, 101 N. W. 101, on possession of a promissory note as evidence of authority to collect.

To whom payment may be made generally.

Cited in *City Nat. Bank v. Goodloe-McClelland Commission Co.* 93 N. D. App. 123, holding that a commission merchant who, at the request of the mortgagor, sells mortgaged cattle and pays the proceeds of such sale to the original mortgagee, before the maturity of the debt secured, solely

the assumption that he was the actual owner of the security, cannot justify such payment on the ground that he was an ostensible agent of the purchaser of the security.

Maturity of entire debt on default in instalment.

Cited in *Russell v. Wright*, 23 S. D. 338, 121 N. W. 842, to point that parties to mortgage may provide that default in interest or installments of principal shall mature entire debt.

Effect of assigning secured note before maturity.

Cited in *Smith v. First Nat. Bank*, 23 Okla. 411, 29 L.R.A.(N.S.) 576, 104 Pac. 1080, holding that assignment of note before maturity to bona fide holder carried with a chattel mortgage executed as security.

8 N. D. 44, BEST v. MUIR, 73 AM. ST. REP. 742, 77 N. W. 95.

Followed without discussion in *Best v. Barrett*, 8 N. D. 49, 77 N. W. 1117.

Conversion of mortgaged property.

Cited in *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 280, 91 N. W. 436, holding in an action by a mortgagee against an elevator company for damages occasioned by the conversion of a quantity of grain which was paid for by the satisfaction of claims for labor against the mortgagor the mixing of grain with other grain or the shipping of it out did not constitute a conversion; *Plano Mfg. Co. v. Jones*, 8 N. D. 315, 79 N. W. 338, holding that demand for delivery of grain covered by general storage tickets of elevator company made to the holder does not render him liable for conversion of grain.

Duty of warehouseman.

Cited in note in 136 Am. St. Rep. 239, on duty of warehousemen in care of property.

Who may maintain action.

Cited in notes in 9 N. D. 631, on who may maintain trover; 18 L.R.A. (N.S.) 1268, on right to maintain action to recover property in specie against one not in possession.

8 N. D. 49, BEST v. BARRETT, 77 N. W. 1117.

8 N. D. 50, SECOND NAT. BANK v. FIRST NAT. BANK, 76 N. W. 504.

Transfer of corporate stock.

Cited in note in 67 L.R.A. 663, on validity of pledge of other transfer of stock when not made in books of corporation, as against attachments, executions, or subsequent transfers.

"Trial" defined.

Cited in *State ex rel. Montana C. R. Co. v. District Ct.* 32 Mont. 37, 79 Pac. 546, defining the word "trial" as used in the code.

Reopening case for further evidence.

Cited in *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340, sustaining right

of court to reopen case to permit further evidence after arguments made and findings presented.

8 N. D. 58, MURI v. WHITE, 76 N. W. 503.

Sufficiency of evidence to sustain verdict.

Cited in *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial; *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 109; *Lang v. Bailes*, 19 N. D. 582, 125 N. W. 891, holding that verdict which trial court refused to set aside, will not be disturbed on appeal where there is substantial conflict in evidence.

8 N. D. 59, KAEPLER v. POLLOCK, 76 N. W. 987.

Right to require transcript of reporter's notes.

Criticized in *Myers v. Campbell*, 11 S. D. 433, 78 N. W. 353, holding that the trial judge may properly refuse to settle and sign statement purporting to contain all the evidence received and offered on the trial until a transcript of the reporter's notes is procured where the correctness of the proposed statement is challenged by proposed amendments and objections.

8 N. D. 63, HOWLAND v. INK, 76 N. W. 992.

Sufficiency of evidence to sustain verdict.

Cited in *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial; *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 109; *Lang v. Bailes*, 19 N. D. 582, 125 N. W. 891,—holding that refusal of trial court to set aside verdict will not be reversed where there is substantial conflict of evidence; *Action v. Fargo & M. Street Co.* 20 N. D. 434, 129 N. W. 225, holding that refusal of court to disturb verdict will not be reversed where it is supported by substantial evidence.

8 N. D. 65, DIVET v. RICHLAND COUNTY, 76 N. W. 993.

Sufficiency of expression of subject-matter of act in title.

Cited in *State ex rel. Kol v. North Dakota Children's Home Society*, 10 N. D. 493, 88 N. W. 273, holding that generality of title of act does not render it objectionable if it offered a cover to incongruous and unconnected legislation; *Rio Grande County v. Whelen*, 28 Colo. 435, 65 P. 38, holding an act entitled "an act to provide for the assessment and collection of revenue" is void to the extent that it provides for the recovery of a penalty as containing subject-matter not expressed in its title; *State v. Minneapolis & N. Elevator Co.* 17 N. D. 23, 114 N. W. 4, holding an act entitled "An act requiring elevator companies transacting business in the state to return certificates of inspection and weighmaster's certificates of weight to the local buyer," was not void because provided in addition thereto that the agents post the certificates in conspicuous places; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 8.

holding an act entitled "An act to provide for the allowance and taxation of costs for additional attorney's fees against the defendants in actions to enjoin drainage proceedings was invalid for the reason that the real subject of the act, the taxation of such costs against the plaintiffs in such action, was not express in the title.

Recovery back of taxes paid.

Distinguished in *Paine v. Dickey County*, 8 N. D. 581, 80 N. W. 770, sustaining provision for refunding purchase price to purchasers at tax sales declared void within title.

8 N. D. 69, COLEMAN v. FARGO, 76 N. W. 1051.

Sufficiency of presentment of claims for personal injuries.

Cited in *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359, holding the presentment of a claim for damages for personal injuries to the mayor and auditor of a city was a sufficient compliance with the statutory requirement that the claim be presented to the mayor and the common council, although the presentment of the claim to the auditor was made outside of his office; *Richardson v. Salem*, 51 Or. 125, 94 Pac. 34, holding a complaint in an action against a city for damages for personal injuries was defective on demurrer because it failed to allege the itemizing and verification of the claim presented to the city as required by the statute.

8 N. D. 72, EDMONSON v. WHITE, 76 N. W. 986.

Sufficiency of certificate of record on appeal.

Distinguished in *Erickson v. Kelly*, 9 N. D. 12, 81 N. W. 77, holding sufficient, certificate of trial judge attached to statement of a case tried without a jury that the statement "contains all of the evidence introduced."

Necessity for bringing up evidence on appeal.

Followed in *Geils v. Fluegel*, 10 N. D. 211, 86 N. W. 712, holding that statement on appeal praying trial de novo of an entire case should contain the evidence introduced in support of intervenor's complaint though no issue was joined thereon, where the rights presented thereby formed an essential though distinct part of the determination of the judgment.

Absence from homestead.

Cited in *Smith v. Spafford*, 16 N. D. 208, 112 N. W. 965, on the homestead exemption not being defeated by a temporary absence therefrom; *Broken v. Baumann*, 10 N. D. 453, 88 N. W. 84, holding wife not entitled to homestead rights which will defeat mortgage executed by husband alone because of husband's mere occupancy of shanty a few nights a year for period necessary for acquiring homestead title under Federal laws.

Cited in note in 102 Am. St. Rep. 400, on abandonment of homestead.

8 N. D. 75, KRUMP v. FIRST STATE BANK, 76 N. W. 995.

Recovery back of payments made.

Cited in Fegan v. Great Northern R. Co. 9 N. D. 30, 81 N. W. denying station agent's right to recover from railroad company money paid by him to cover his cashier's defalcation; Dickey County v. Higley 14 N. D. 73, 103 N. W. 423, holding defendant county could not recover from the county superintendent the amounts of salary of his clerks included by mistake in his warrant for salary where it was shown that he had paid the clerks an amount in excess of that received from the county and which was a complete satisfaction for their services.

Worthless check as payment.

Cited in note in 10 L.R.A.(N.S.) 540, on effect of transfer, with indorsement, of worthless check, or note of third person.

8 N. D. 77, NOBLE TWP. v. AASEN, 76 N. W. 990.

Waiver of objection to sufficiency of counter-claim.

Cited in Ennor v. Raine, 27 Nev. 178, 74 Pac. 1, holding the failure of the plaintiff to object that the facts alleged in the answer did not constitute a proper counter-claim constituted a waiver of his objection thereto; Oswald v. Moran, 8 N. D. 111, 77 N. W. 281, holding that a demurrer to counterclaim for money payable on demand on ground that no demand is alleged simply raises question of legal sufficiency of allegations of pleading.

Distinguished in Vidger v. Nolin, 10 N. D. 353, 87 N. W. 593, holding that failure to demur to a counterclaim does not waive the right to object to the jurisdiction of the court of the subject-matter.

Order reviewable on appeal from judgment.

Cited in State ex rel. Minehan v. Meyers, 19 N. D. 804, 124 N. W. 1, holding that order granting motion to strike out certain portions of answer which involved merits may be reviewed on appeal from judgment.

8 N. D. 83, FARMERS' & M. NAT. BANK v. DAVIS, 76 N. W. 991.

Sufficiency of statement on appeal.

Cited in United States Savings & Loan Co. v. McLeod, 10 N. D. 1, 86 N. W. 110, holding that omission of exhibits or copies thereof as well as even of a condensed statement of their contents on appeal from trial in the court where trial de novo is asked for, renders the statement insufficient; Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759, holding that exceptions to findings of fact need not be incorporated in the statement of the case when it contains the statement that a retrial of the whole case is desired; Towne v. St. Anthony & D. Elevator Co. 8 N. D. 2, 77 N. W. 608, holding that statement on appeal need not contain specifications of alleged errors of law and of particulars wherein it is claimed the findings of fact are not supported by the evidence.

— To obtain trial de novo.

Cited in National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285, holding that appellate court cannot try a case de novo in absence of

of a statement of a case; *Mooney v. Donovan*, 9 N. D. 93, 81 N. W. 50, holding that case cannot be tried de novo on appeal where statement of the case does not show that issues appellant wishes to have retried; *State ex rel. McClory v. McGruer*, 9 N. D. 566, 84 N. W. 363, holding that the appellate court will not retry a case tried without a jury or any issue of fact involved where no demand for retrial is embodied in the statement of the case; *Teinen v. Lally*, 10 N. D. 153, 86 N. W. 356, holding that retrial of facts cannot be had on a statement of the case containing no demand for retrial of the whole case or any particular fact although it presents all the evidence; *Ricks v. Bergavendsen*, 8 N. D. 578, 80 N. W. 768, holding that specification of questions of fact desired to be reviewed and the signification of a desire for trial of the entire case anew must be made in the statement of the case; *Erickson v. Citizens' Nat. Bank*, 9 N. D. 81, 81 N. W. 46, denying right to retry entire case or any particular question of fact on appeal where statement of the case contains no expression of a desire therefor and no specification of any facts which he desires to have reviewed; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. 49, holding that case tried to the court cannot be tried de novo on appeal where the statement of the case contains no declaration of a desire for retrial of the entire case or any specifications of any facts show appellant's desire to have review; *Security Improv. Co. v. Cass County*, 9 N. D. 553, 84 N. W. 477, holding right to have question of fact retried on appeal lost by failing to incorporate demand for retrial in the statement of the case.

Sufficiency of certificate on appeal.

Cited in *Eakin v. Campbell*, 10 N. D. 416, 87 N. W. 991, holding judge's certificate not conclusive that statement on appeal contains all the evidence offered in the trial court where it appears on its face that all the evidence has not been incorporated therein.

Distinguished in *Erickson v. Kelly*, 9 N. D. 12, 81 N. W. 77, holding sufficient, certificate of trial judge attached to statement of a case tried without a jury that the statement "contains all of the evidence introduced."

8 N. D. 87, PATTERSON v. WARD, 76 N. W. 1046, Later phase of same case in 9 N. D. 254, 83 N. W. 15.

8 N. D. 90, STATE EX REL. PLAIN v. FALLEY, 76 N. W. 996.

Inquiries by secretary of state on certifying names of nominees.

Cited in *State ex rel. Wolfe v. Falley*, 9 N. D. 450, 83 N. W. 860, denying judicial power of secretary of state in certifying names of nominees filed with him to inquire into regularity or legality of the nominations.

When original writ will issue.

Cited in *State ex rel. Cooper v. Blaisdell*, 17 N. D. 575, 118 N. W. 225, holding mandamus would lie to compel the secretary of state to certify

to the various county auditors the name of relator for printing on official election to be used at the general election.

Cited in note in 58 L.R.A. 855, on original jurisdiction of court of resort in mandamus case.

Distinguished in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 W. 860, holding an original writ would not lie to compel the submission of the question of the division of a county to the voters, it being purely a local question.

8 N. D. 94, McTAVISH v. GREAT NORTHERN R. CO. 76 N. D. 985, Later appeal in 8 N. D. 333, 79 N. W. 443.

Sufficiency of statement of case.

Cited in *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76, holding a transcript of the testimony taken and reported by a referee to the district court without any attempt to eliminate immaterial matter did not constitute a sufficient statement of the case within the meaning of the statute.

8 N. D. 96, BLACK v. MINNEAPOLIS & N. ELEVATOR CO. 76 N. W. 984.

Costs of printing abstract and brief.

Cited in *Ingwaldson v. Skrivseth*, 8 N. D. 544, 80 N. W. 475, holding that cost of printing abstract and brief on appeal where judgment did not exceed \$300 cannot be allowed successful party.

8 N. D. 99, MORRIS v. EWING, 76 N. W. 1047.

8 N. D. 106, BRYNJOLFSON v. THINGVALLA TWP. 77 N. D. 284.

Necessity for assignment of error.

Cited in *Marck v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 86, 105 N. W. 1106; *Wilson v. Kartes*, 11 N. D. 92, 88 N. W. 1023, refusing to relax the rule requiring an appellant to assign the error in his brief; *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 687, holding that judgment appealed from will be affirmed where errors are not assigned in brief.

Sufficiency of findings of court.

Cited in *Chaffee-Miller Land Co. v. Barber*, 12 N. D. 478, 97 N. W. 850, holding in an action to determine adverse claims to land a finding of the court that the plaintiff is the owner and entitled to possession and that defendant has no claim or right to possession are sufficient to support a judgment confirming plaintiff's title.

8 N. D. 108, STOLZMAN v. WYMAN, 77 N. W. 285.

Sufficiency of payment of negotiable instruments.

Cited in *Hoffmaster v. Black*, 78 Ohio St. 1, 21 L.R.A. (N.S.) 52, 100 Am. St. Rep. 679, 84 N. E. 423, 14 A. & E. Ann. Cas. 877, holding

burden on a party making payment of a negotiable note to show the authority of the one to whom paid to collect although payment made at the time and place designated.

Cited in notes in 21 L.R.A. (N.S.) 53, on payment to one found at place designated, not in possession of securities; 23 L.R.A. (N.S.) 418, on effect of agent's non-possession of security upon question of authority to receive payment.

8 N. D. 111, OSWALD v. MORAN, 77 N. W. 281, Later appeal in 9 N. D. 170, 82 N. W. 741.

Statutory proceedings.

Cited in *State ex rel. La Follette v. Chicago, M. & St. P. R. Co.* 16 S. D. 517, 94 N. W. 406, holding in an action to enforce the order of the board of railroad commissioners the complaint must allege a compliance by the board of every material requirement in the proceeding before them.

Construction of statute adopted from another state.

Cited in *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, holding that in adopting statute of another state, legislature is presumed to have adopted construction there given it; *Murphy v. Nelson*, 19 S. D. 197, 102 N. W. 691, upholding the presumption that on the adoption of the statute of another state the construction given the statute in such state is also adopted.

8 N. D. 115, MELDAHL v. DOBBIN, 77 N. W. 280.

Priorities between tax titles.

Cited in *Emmons County v. Bennett*, 9 N. D. 131, 81 N. W. 22, holding that sale of land for taxes cuts off interest acquired by county in purchasing at prior sale based on prior tax; *Oakland Cemetery Asso. v. Ramsey County*, 98 Minn. 404, 116 Am. St. Rep. 377, 108 N. W. 857, considering the status of the tax title derived through a prior sale on a junior lien.

Necessity for valid assessment.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding valid assessment essential to valid tax.

—To set statute of limitations in operation.

Cited in *Roberts v. First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049, holding that a tax sale of property on which there has been no assessment cannot set the statute of limitations running.

Distinguished in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding that a tax deed based upon a void tax will not set the statute of limitations running.

8 N. D. 118, DICKINSON v. BURKE, 77 N. W. 279.

8 N. D. 121, PEOPLES v. EVENS, 77 N. W. 93.

8 N. D. 124, CAMERON v. GREAT NORTHERN R. CO. 77 N. 1016, Later appeal in 8 N. D. 618, 80 N. W. 885.

Right of court to direct verdict.

Cited in *Zink v. Lahart*, 16 N. D. 56, 110 N. W. 931, holding court erred in directing a verdict where it appeared from the record that there was a square conflict in the evidence; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960, holding court erred in directing a verdict for the defendant where it appeared from the record that there was evidence reasonably tending to sustain plaintiff's cause; *Scheff v. Schlager*, 18 N. D. 421, 24 L.R.A. (N.S.) 520, 122 N. W. 1000 (dissenting opinion), on right of court to direct verdict where verdict could not be returned except based upon conjecture, surmise or speculation.

Duty of master to furnish safe machinery and appliances.

Cited in *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183, holding a master might be held liable for injuries due to the failure to keep appliances in repair where an inspection would have disclosed defective condition.

Who is a vice principal.

Cited in notes in 75 Am. St. Rep. 621, on who is a vice principal; 54 L.R.A. 103, on vice principalship as determined with reference to character of the act which caused the injury.

Burden of proof where it appears that the accident might have occurred from various causes.

Cited in *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183, holding where it appeared that the accident might have occurred from several various causes the burden was on the plaintiff to show that the accident occurred through the fault of the defendant company.

Cited in note in 33 L.R.A. (N.S.) 1106, on burden of proof as to contributory negligence.

Contributory negligence as for the jury.

Cited in *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960, holding on the evidence the question of contributory negligence was one for the jury; *Carr v. Minneapolis, St. P. & S. M. R. Co.* 16 N. D. 217, 112 N. W. 972, holding it was a question for the jury on the facts whether the plaintiff was guilty of contributory negligence in driving his cattle out on land which connected directly with defendant's right of way.

Presumption as to exercise of due care.

Cited in *Northern P. R. Co. v. Spike*, 57 C. C. A. 384, 121 Fed. 1, upholding the presumption of the exercise of due care from the natural instinct of self-preservation in the absence of countervailing evidence; *Kephart v. Continental Casualty Co.* 17 N. D. 380, 116 N. W. 349, holding in the absence of proof to the contrary that it would be presumed that an injury was due to accidental causes; *Bell v. Clarion*, 1 Iowa, 126, 84 N. W. 962, holding that the natural instinct of self-preservation raises an "inference" of absence of contributory negligence which is supplanted by direct evidence to the contrary, but not a "presumption."

which must be overcome; *Myers v. Chicago, St. P. M. & O. R. Co.* 37 C. C. A. 137, 95 Fed. 406, which holds that the presumption in favor of an injured employee arising from the natural instinct of self-preservation stands in the place of positive evidence of want of contributory negligence and is sufficient to warrant a recovery of damages because of his employer's negligence, in the absence of countervailing testimony.

Cited in notes in 116 Am. St. Rep. 112, 118, on presumption of exercise of care; 11 L.R.A. (N.S.) 845, on presumption of due care by person whose death was unwitnessed, as preventing nonsuit.

Appealable orders.

Followed in *Hanberg v. National Bank*, 8 N. D. 328, 79 N. W. 336, holding judgment upon an order to show cause why an action should not be dismissed, not appealable.

Cited in *Dibble v. Hanson*, 17 N. D. 21, 114 N. W. 371, 16 A. & E. Ann. Cas. 1210, holding an order for the dismissal of an action is not an appealable order; *Ottow v. Friese*, 20 N. D. 86, 126 N. W. 503, holding that judgment signed by presiding judge finally determining rights of parties, and entered in judgment book, a final judgment; *Owen v. National Hatchet Co.* 147 Iowa, 393, 121 N. W. 1076, holding entry on court's journal, dated and signed by judge "Arguments commenced and concluded, Decree granted for plaintiff as prayed and judgment is rendered against defendants for costs, Defendant excepts," an appealable judgment.

Distinguished in *McTavish v. Great Northern R. Co.* 8 N. D. 333, 79 N. W. 443, holding a direction by the court that a party have and recover judgment for a specified amount, and that the clerk "is hereby ordered to render judgment accordingly," merely an order for judgment, and not a final judgment itself.

Effect of irregular entry of verdict.

Cited in *Hagler v. Kelly*, 14 N. D. 218, 103 N. W. 629, considering the effect of the irregularity of the entry of judgment on its validity.

Effect of motion for judgment on pleadings.

Cited in *Haug v. Great Northern R. Co.* 42 C. C. A. 167, 102 Fed. 74, holding that a motion by defendant for judgment on the pleadings is in fact a demurrer, and that a final judgment has the same effect as res judicata as if final judgment had been entered on sustaining a demurrer to the complaint.

8 N. D. 136, **UNITED STATES SAV. & L. CO. v. SHAIN**, 77 N. W. 1006.

Followed without special discussion in *Hale v. Cairns*, 8 N. D. 145, 44 L.R.A. 261, 73 Am. St. Rep. 746, 77 N. W. 1010.

Conflict of laws as to usury.

Cited in notes in 55 L.R.A. 949, as to whether *lex rei sitæ* with respect to interest and usury necessarily controls in action to foreclose a mortgage on real property; 62 L.R.A. 65, on conflict of laws as to interest and usury.

Dak. Rep.—23.

Validity of acts of unlicensed foreign corporation.

Cited in National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285, holding right to sue on contract not affected by failure of foreign corporation to comply with statutory requirements.

Distinguished in State use of Hart-Parr Co. v. Robb-Lawrence Co., 9 N. D. 55, 106 N. W. 406, explaining how the enactment of a subsequent statute affected the validity of the acts of an unlicensed foreign corporation.

Rights of borrowing member of insolvent loan association.

Distinguished in Hale v. Cairns, 8 N. D. 145, 44 L.R.A. 261, 73 N. W. 746, 77 N. W. 1010, holding that borrowing member of insolvent loan association stands as creditor sharing pro rata in the assets of association amount paid for stock.

— Right to have payments on stock applied in cancellation.

Cited in Fidelity Sav. Asso. v. Bank of Commerce, 12 Wyo. 315, 32 Pac. 448, holding a member of a building and loan association who assigns his shares of stock as collateral security for a loan does not by the payment of dues on stock reduce the amount due on the loan.

Distinguished in Clarke v. Olson, 9 N. D. 364, 83 N. W. 519, sustaining borrowing stockholder's right to have monthly dues paid by him deducted from amount due association on its becoming insolvent.

8 N. D. 145, HALE v. CAIRNS, 44 L.R.A. 261, 73 AM. ST. REP. 746, 77 N. W. 1010, Later case involving same association.
9 N. D. 364, 83 N. W. 519.

Application of payments on building association stock to satisfaction of loan.

Cited in Hale v. Gullick, 13 S. D. 637, 84 N. W. 196, holding immaterial in determining amount due on mortgage to land association, question whether mortgagor paid a premium for privilege of obtaining lien; Taylor v. Clark, 74 Ark. 220, 85 S. W. 231, holding a member of an insolvent stock association was not entitled in an action to have mortgage to secure a loan foreclosed, to have premium payments credited on the debt; People's Bldg. & L. Asso. v. McPhilamy, 81 Miss. 61, 32 L.R.A. 743, 95 Am. St. Rep. 693, 32 So. 1001; Anselme v. American Sav. & L. Asso. 63 Neb. 525, 88 N. W. 665; Scaife v. Scammon Investment & Sav. Asso. 71 Kan. 402, 80 Pac. 957,—holding a borrowing stockholder in an insolvent stock association is not entitled to have payments on stock applied in satisfaction of his indebtedness; Hale v. Kline, 113 Iowa, 85 N. W. 814, holding that in the settlement of the affairs of an insolvent mutual loan association, where the value of the stock cannot be determined, a borrowing member whose stock has not matured will be held to the amount of money actually received by him, with interest thereon, the premium actually paid by him and interest on monthly installments of interest paid by him, and the amount of dues paid by him cannot be set-off against the loan, but the stock must be treated the same as that of nonborrowing members; Phelps v. American Sav. & L. Asso. 121 Minn. 343, 80 N. W. 120, holding that upon the foreclosure of a mortgage given

to a building and loan association, the borrowing member was not entitled to have the amounts paid as stock dues applied to the mortgage under the rule for partial payments; report of special master in *Coltrane v. Baltimore Bldg. & L. Asso.* 110 Fed. 293, holding that a borrowing member of a building and loan association, insolvent and in process of being wound up in equity, is entitled to have credited on his advances from the corporation all sums paid to it as premium or interest for or upon such advances, even though such amounts had been legally exacted and collected; *Hale v. Phillips*, 68 Ark. 382, 59 S. W. 35, holding that a member of an insolvent building and loan association who has received an advance upon his stock may apply against his debt the interest and premiums, but cannot receive or be credited with anything on account of dues paid upon his shares until his proportion of the assets is determined; *Reddick v. United States Bldg. & L. Asso.* 106 Ky. 94, 49 S. W. 1075, holding that by-laws establishing the rights of withdrawing members, and Ky. Stat. § 860, declaring that upon thirty days' notice a member may withdraw the value of his shares at the date of the notice, apply only to going concerns, and do not give such a member a preference in the distribution of the assets of an insolvent concern.

Distinguished in *Clarke v. Olson*, 9 N. D. 364, 83 N. W. 519, sustaining borrowing stockholder's right to have monthly dues paid by him deducted from amount due association on its becoming insolvent.

Conflict of laws as to usury.

Cited in *Georgia State Bldg. & L. Asso. v. Shannon*, 80 Miss. 642, 31 So. 900, on the laws governing the question of usury in a loan from a foreign loan association to a citizen of the state.

§ N. D. 153, *DINNIE v. JOHNSON*, 77 N. W. 612.

Sufficiency of delivery to satisfy the statute of frauds.

Cited in *St. Anthony & D. Elevator Co. v. Cass County*, 14 N. D. 601, 106 N. W. 41; *Grant v. Milim*, 20 Okla. 672, 95 Pac. 424; *Reeves & Co. v. Bruening*, 13 N. D. 157, 100 N. W. 241,—holding a delivery to satisfy the statute of frauds must be followed by an acceptance of the property; *Tinkelpaugh-Kimmel Hardware Co. v. Minneapolis Threshing Mach. Co.* 20 Okla. 187, 95 Pac. 427, holding the petition in an action to recover the purchase price of a threshing machine set forth a void contract where it set forth an oral order and a delivery on behalf of the purchaser but failed to set forth any acceptance.

Cited in note in 96 Am. St. Rep. 216, on acceptance of goods to satisfy statute of frauds.

Discretionary powers of trial court.

Cited in *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765,—holding the granting of a new trial because of the insufficiency of the evidence rested within the sound legal discretion of the trial court; *State v. Howser*, 12 N. D. 495, 98 N. W. 352, holding same on trial for criminal conspiracy.

8 N. D. 158, ANDERSON v. TODD, 77 N. W. 599.**What is a substantial compliance with contract.**

Cited in Connor v. Trapp, 127 Iowa, 742, 104 N. W. 333, holding appellants contracted for a four-inch well, the digging of a three-inch well did not constitute a substantial compliance with the contract.

Right to recover on substantial performance of contract.

Cited in notes in 134 Am. St. Rep. 679, 683, 689, on right of building contractor to recover for substantial performance of his contract. L.R.A.(N.S.) 338, 340, on recovery upon substantial performance of building contract.

Evidence of substantial compliance.

Cited in Braseth v. State Bank, 12 N. D. 486, 98 N. W. 79, holding in an action where the terms of a contract are not substantially complied with evidence that the building is a good one and is suitable for the purposes for which constructed is not admissible.

Waiver of imperfect performance of contract.

Cited in Franklin v. Schultz, 23 Mont. 165, 57 Pac. 1037, holding taking possession of a building erected under contract does not waive compliance with the contract, when the intent to insist upon the contract is manifest; Marchand v. Perrin, 19 N. D. 794, 124 N. W. 1112, holding making of payments and taking possession of and occupying building does not of itself amount to waiver of substantial performance.

Cited in note in 115 Am. St. Rep. 258, 261, on acceptance of work as waiver of imperfect performance.

8 N. D. 162, FIRST M. E. CHURCH v. FADDEN, 77 N. W.**8 N. D. 166, CARRUTH v. TAYLOR, 77 N. W. 617.****Appealable orders.**

Cited in State ex rel. Jackson v. Kennie, 24 Mont. 45, 60 Pac. 1037, holding an order denying a writ of habeas corpus not within Mont. Code, §§ 2270, 2272, providing for an appeal by defendant from (1) a final judgment of conviction, (2) an order denying motion for new trial and (3) an order after judgment affecting substantial rights of the party. Tracy v. Scott, 13 N. D. 577, 101 N. W. 905, holding an order of the court denying a motion to vacate an order enjoining the foreclosure of a mortgage is not an appealable order.

Finality of habeas corpus order.

Cited in Ex parte Johnson, 1 Okla. Crim. Rep. 414, 98 Pac. 461; State ex rel. Styles v. Beaverstad, 12 N. D. 527, 97 N. W. 548,—holding an order of the district court discharging a writ of habeas corpus and mandating the petitioner was not res judicata.

Jurisdiction of supreme court to issue prerogative writ.

Cited in note in 13 L.R.A.(N.S.) 771, on exclusiveness of jurisdiction of highest court to issue remedial writs for prerogative purposes.

8 N. D. 182, RADFORD v. JOHNSON, 77 N. W. 601.**Location of disputed boundaries by monuments.**

Cited in *Propper v. Wohlwend*, 16 N. D. 110, 112 N. W. 967, holding in an action involving the location of a disputed boundary line the evidence of the location of the original monuments controls over the field notes, plats and other evidence of its location; *Nystrom v. Lee*, 16 N. D. 561, 114 N. W. 478, on the competency of field notes as evidence in the determination of boundary lines.

Cited in note in 129 Am. St. Rep. 999, on location of boundaries.

Presumption as to the correctness of results arrived at by surveyor.

Cited in *Seabrook v. Coos Bay Ice Co.* 49 Or. 237, 89 Pac. 417, holding it necessary that a surveyor in testifying that a certain corner is an established corner must show how he arrived at such result.

8 N. D. 186, JAMES v. WILSON, 77 N. W. 603.**New theory on appeal.**

Cited in *Fifer v. Fifer*, 13 N. D. 20, 99 N. W. 763, holding where an action was tried with the consent of the parties on the theory that it was an action to try title and right of possession the plaintiff will not be heard on appeal to assert that the action is one of forcible entry and detainer.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

Evidence in trover.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

8 N. D. 191, PRONDZINSKI v. GARBUTT, 77 N. W. 1012, Later appeals in 9 N. D. 239, 83 N. W. 23; 10 N. D. 300, 86 N. W. 969.**Involuntary trustees.**

Cited in *Currie v. Look*, 14 N. D. 482, 106 N. W. 131, holding in an action by a trustee in bankruptcy to subject certain real estate which had been transferred to the bankrupt's wife to the payment of his debts, the bankrupt's wife was merely a trustee for title.

Right to trial by jury.

Cited in *Avery Mfg. Co. v. Crumb*, 14 N. D. 57, 103 N. W. 410, refusing to reverse a judgment in an action to foreclose a chattel mortgage because of the refusal of the trial court to give a trial by jury.

8 N. D. 198, KUHNERT v. ANGELL, 77 N. W. 1015, Later appeal in 10 N. D. 59, 88 Am. St. Rep. 675, 84 N. W. 579.**8 N. D. 200, TOWNE v. ST. ANTHONY & D. ELEVATOR CO. 77 N. W. 608.****Conversion of stored grain.**

Cited in *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D.

280, 91 N. W. 436, holding a conversion of wheat by the defendant did take place on the shipping of the wheat out of defendant's elevator when his possession was rightful and no demand had been made by the person entitled to possession; *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266, holding that there was no conversion of stored grain where there was no demand or refusal to deliver to person rightfully entitled thereto.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

Distinguished in *Willard v. Monarch Elevator Co.* 10 N. D. 400, 87 N. W. 996, holding delivery to lessee, of tickets representing grain when elevator company had express notice was claimed by lessor under chattel mortgage and which it had agreed to withhold until lessee's performance of obligations thereunder, a conversion of the grain represented thereby.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

Damages in trover.

Cited in note in 9 N. D. 636, on damages in actions for trover and conversion.

8 N. D. 210, LANE v. O'TOOLE, 78 N. W. 77.

What constitutes conversion.

Cited in *Omlie v. Farmers' State Bank*, 8 N. D. 570, 80 N. W. 60, holding purchaser of grain from one purchasing land under contract giving him title to crops until default not guilty of its conversion, where no evidence of default is introduced.

Evidence admissible under general denial.

Cited in *Vallancey v. Hunt*, 20 N. D. 579, 34 L.R.A. (N.S.) 473, 129 N. W. 455, holding that counterclaim and set-off cannot be proved in claim and delivery, under general denial.

8 N. D. 215, O. S. PAULSON MERCANTILE CO. v. SEAVER, 78 N. W. 1001.

Admissibility of agent's declarations.

Cited in note in 131 Am. St. Rep. 321, on declarations and acts of agents.

8 N. D. 220, MARTIN v. LUGER FURNITURE CO. 77 N. W. 1003.

Amendment of pleadings.

Cited in *Hardman v. Kelley*, 19 S. D. 608, 104 N. W. 272, holding trial court erred in refusing to allow defendant to amend his answer by inserting certain defenses because inconsistent with other defenses previously set up; *Webb v. Wegley*, 19 N. D. 606, 125 N. W. 562, holding trial court should show liberality in allowance of amendments, where it appears that ends of justice will be promoted.

Cited in note in 3 L.R.A.(N.S.) 264, on relation of new pleadings to statutes of limitations.

3 N. D. 226, BENOIT v. REVOIR, 77 N. W. 605.

Right to continuance.

Cited in *Hood v. Fay*, 15 S. D. 84, 87 N. W. 528, holding plaintiff not entitled to continuance to secure rebutting proofs where he must be presumed to have known from grounds stated for attachment that defendant would probably move for dissolution.

3 N. D. 233, GLYNN v. GLYNN, 77 N. W. 594.

Right of divorced wife to have alimony.

Distinguished in *France v. France*, 79 App. Div. 291, 79 N. Y. Supp. 579, holding the invalidity of an agreement of husband with wife to pay her alimony in case she did not contest the divorce proceedings was not available to him as a defense in proceedings to recover instalments due thereunder.

Husband's right to alimony, etc.

Cited in *State ex rel. Hagert v. Templeton*, 18 N. D. 525, 25 L.R.A.(N.S.) 234, 123 N. W. 283, holding that husband has no right to alimony, suit money and counsel fees.

Right to have allowance for support and maintenance in divorce proceedings.

Cited in *State ex rel. Hagert v. Templeton*, 18 N. D. 525, 25 L.R.A.(N.S.) 234, 123 N. W. 283, holding a trial court properly refused to entertain jurisdiction to hear an application for an order requiring a wife suing for divorce to pay husband certain sums for maintenance pending the litigation and for attorneys' fees.

3 N. D. 241, ST. LUKE'S HOSPITAL ASSO. v. GRAND FORKS COUNTY, 77 N. W. 598.

Liability of county for care of poor.

Cited in *Ogden City v. Weber County*, 26 Utah, 129, 72 Pac. 433 (dissenting opinion), on the liability of county for supplies furnished paupers.

3 N. D. 243, WARNKEN v. LANGDON MERCANTILE CO. 77 N. W. 1000.

Conflict of laws as to sale of personality.

Cited in note in 64 L.R.A. 834, on conflict of laws as to sales of personal property.

Who may maintain trover.

Cited in note in 9 N. D. 632, on who may maintain trover.

3 N. D. 245, TURNER v. ST. JOHN, 78 N. W. 340.

Filing excessive claim for lien.

Cited in note in 29 L.R.A.(N.S.) 310, on effect of filing excessive mechanics' lien.

Effect of omission of jurat from affidavit.

Cited in *James v. Logan*, 82 Kan. 285, 108 Pac. 81, 136 Am. St. R. 105, holding the omission of the jurat from a paper purporting to be affidavit and approved by the court as such and made the basis of a judicial action is a mere irregularity which will not render the proceedings subject to collateral attack; *Sebesta v. Supreme Court of Nebraska*, 77 Neb. 249, 109 N. W. 166, on the effect of a failure to attach a jurat to an affidavit.

Effect of failure to sign affidavit.

Cited in *Baumer v. French*, 8 N. D. 319, 79 N. W. 340, holding that attaching of a notary's jurat to a signed written statement does not make it an affidavit where the subscriber never swore thereto.

Right of purchaser on foreclosure of mechanic's lien to priority.

Distinguished in *Bastien v. Barras*, 10 N. D. 29, 84 N. W. 559, holding that a purchaser at a foreclosure sale under a mechanic's lien takes only the rights secured by the judgment and cannot claim the priority to which the lien was originally entitled, but which was lost by failure to claim and establish the same in the foreclosure proceeding.

Right to reopen case.

Cited in *State v. Albertson*, 20 N. D. 512, 128 N. W. 1122, holding it not error to permit state after it had rested to reopen case for introduction of testimony of witness whose name was on information.

8 N. D. 263, CRANDELL v. BARKER, 78 N. W. 347.**Conflict of laws as to wills.**

Cited in *Knox v. Barker*, 8 N. D. 272, 78 N. W. 352, holding valid and interpretation of will bequeathing mortgage on land governed by law of testator's domicile.

Cited in note in 2 L.R.A.(N.S.) 411, 413, on conflict of laws as to wills.

Rule in Shelley's case.

Cited in *Knox v. Barker*, 8 N. D. 272, 78 N. W. 352, holding that rule in Shelley's Case operates under Pennsylvania laws to convey absolute title to mortgage of property in Dakota under devise by testator to daughters for life with remainder in fee to their heirs.

Cited in note in 29 L.R.A.(N.S.) 974, 1040, 1062, 1146, 1158, 1161, on rule in Shelley's case.

8 N. D. 272, KNOX v. BARKER, 78 N. W. 352.**Conflict of laws as to wills.**

Cited in note in 2 L.R.A.(N.S.) 411, on conflict of laws as to wills.

Rule in Shelley's case.

Cited in note in 29 L.R.A.(N.S.) 1147, 1157, on rule in Shelley's case.

8 N. D. 274, WEBSTER v. McGAUVREAN, 78 N. W. 80.

§ N. D. 277, **STATE EX REL. BAKER v. BOUCHER**, 78 N. W. 988.

§ N. D. 282, **FOSTER v. FURLONG**, 78 N. W. 986.

Modification of written contract by parol.

Cited in *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088, holding a written contract for the sale of real estate could not be modified by an unexecuted oral agreement; *Annis v. Burnham*, 15 N. D. 577, 103 N. W. 549, holding the executory terms of a written contract were not subject to modification by parol.

Rights of junior mortgagors paying prior encumbrances.

Cited in *Windt v. Covert*, 152 Cal. 350, 93 Pac. 67, holding a grantee in a conveyance operating as a mortgage compelled for his own protection to satisfy a prior mortgage may add the amount thereof to the amount for which the conveyance is security; *Merchants' State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760, holding a person paying taxes and interest on a prior mortgage for the protection of a lien is entitled to be credited with such payments.

§ N. D. 286, **STATE v. KLECTZEN**, 78 N. W. 984, 11 AM. CRIM. REP. 324.

Validity of occupation taxes.

Distinguished in *Re Lipschitz*, 14 N. D. 622, 95 N. W. 157, holding an act providing for the taxation of the occupation of hawking and peddling was a valid exercise of legislative power.

§ N. D. 292, **STATE v. KOERNER**, 73 AM. ST. REP. 752, 78 N. W. 981, 11 AM. CRIM. REP. 570.

Intoxication as a defense to crime.

Cited in *State v. O'Malley*, 14 N. D. 200, 103 N. W. 421, holding on a prosecution for robbery the court erred in charging in effect that the intent to steal should be conclusively presumed from the unlawful and forcible taking unless the defendant was so intoxicated as to be incapable of forming an intent.

§ N. D. 297, **STIERLEN v. STIERLEN**, 78 N. W. 990.

Sufficiency of service of notice of appeal.

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding the filing of the notice of appeal in the office of the clerk of the district court of the district in which the judgment appealed from is entered is sufficient notice to the clerk within the meaning of the statute.

Effect of delay in the filing of a notice of appeal.

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding a delay of ten days between the service and the filing of the notice of appeal will not defeat the appeal.

8 N. D. 301, STATE v. HOGAN, 45 L.R.A. 166, 73 AM. ST. R. 759, 78 N. W. 1051, Later case involving same contract N. D. 329, 83 N. W. 237.

8 N. D. 306, BOYUM v. JOHNSON, 79 N. W. 149.

Waiver of conditions of contract for sale of land.

Cited in *Ross v. Page*, 11 N. D. 458, 92 N. W. 822, holding a provision in a contract for the sale of land that no assignment thereof should be valid was waived by the acceptance from the assignee of a part payment on the purchase price.

— Time conditions.

Cited in *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088, holding a vendor to declare a forfeiture of a contract for the sale of land by reason of default in payments required to be made within a specified time waived by a failure to make an essence of such contract; *Timmins v. Russell*, 13 N. D. 487, 99 N. W. 48, holding a vendor waived his right to cancel a contract for the sale of land by failing to proceed promptly to cancel the contract after the discovery of the defaults; *Graham v. Merchant*, 43 Or. 294, 72 Pac. 1088, holding a vendor accepting a partial payment after it was due could not declare a forfeiture because of delay without giving the vendee notice so that he might have a reasonable time in which to perform; *Keator v. Ferguson*, 20 S. D. 473, 129 S. Rep. 947, 107 N. W. 678, holding the act of a vendor in receiving payment without objection after it was due and permitting rent to remain unpaid without objection amounted to waiver of a provision making time of the essence of the contract.

8 N. D. 309, HILL v. WILSON, 79 N. W. 150.

8 N. D. 311, KINNEBERG v. KINNEBERG, 79 N. W. 337.

New trial for misconduct of juror.

Cited in *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527, holding that proceeding for new trial for misconduct of juror, must aver and prove affirmatively that both counsel and himself were ignorant of misconduct until after trial.

8 N. D. 315, PLANO MFG. CO. v. JONES, 79 N. W. 338.

Who may maintain trover.

Cited in note in 9 N. D. 631, on "who may maintain trover."

8 N. D. 319, BAUMER v. FRENCH, 79 N. W. 340.

Necessity for specifications of error.

Cited in *Lund v. Upham*, 17 N. D. 210, 116 N. W. 88; *Barnum v. Upham Land Co.* 13 N. D. 359, 100 N. W. 1079,—holding the statement in the case must be disregarded on appeal where it does not embody specifications of error; *D. S. B. Johnston Land-Mortg. Co. v. Case*, 13 S. D. 28, 82 N. W. 90, holding that alleged error in denying new trial

cannot be considered on appeal except in so far as disclosed by the judgment roll where the settled statement of facts or bill of exceptions used on the motion contained no specifications of the particulars in which the evidence was claimed to be insufficient or of the errors of law occurring at the trial; *McNish v. Wolven*, 22 S. D. 621, 119 N. W. 999, holding that on motion for new trial for insufficiency of evidence, bill of exceptions, which contains no specifications as to particular errors relied on, must be disregarded.

Amendment of record on appeal.

Cited in *Montgomery v. Harker*, 9 N. D. 527, 84 N. W. 369, denying power of supreme court to amend the record on appeal so as to include evidence claimed to have been omitted from the record; *Scott v. Jones*, 9 N. D. 551, 84 N. W. 479, holding that the supreme court will not remand a record for the purpose of having the court change or correct its findings where the record and findings correspond.

Impeachment of witness.

Cited in note in 82 Am. St. Rep. 49, on evidence to show credibility or bias of witness.

8 N. D. 328, HANBERG v. NATIONAL BANK, 79 N. W. 336.

Appealable orders of dismissal.

Cited in *Dibble v. Hanson*, 17 N. D. 21, 114 N. W. 371, 16 A. & E. Ann. Cas. 1210, holding an order for the dismissal of an action is not an appealable order; *Larson v. Walker*, 17 N. D. 247, 115 N. W. 838, holding an order denying an application to set aside a previous order made without notice, striking a cause from the calendar and dismissing the same is not an appealable order.

8 N. D. 329, MARES v. WORMINGTON, 79 N. W. 441.

8 N. D. 333, McTAVISH v. GREAT NORTHERN R. CO. 79 N. W. 443.

Followed without special discussion in *Young v. Great Northern R. Co.* 8 N. D. 345, 79 N. W. 448.

Finality of judgment.

Cited in *Dallam v. Sanches*, 56 Fla. 779, 47 So. 871, holding an order in an action of ejectment whereupon it is ordered, considered and adjudged that judgment be entered up for the defendant and that she have her costs is not a final judgment but merely an order for such judgment; *Ottow v. Friese*, 20 N. D. 86, 126 N. W. 503, holding judgment signed by presiding judge finally determining rights of parties and entered in judgment book, a final judgment.

Distinguished in *Hagler v. Kelly*, 14 N. D. 218, 103 N. W. 629, holding entry in judgment book was a finality where direction therein that clerk enter judgment was mere surplusage.

Presumption arising from setting of fires by railroads.

Cited in *Woodward v. Chicago, M. & St. P. R. Co.* 75 C. C. A. 591,

145 Fed. 577, on how the statutory presumption from the setting of fires by railroads may be overcome.

Evidence of the negligent setting of fires by locomotive.

Cited in *Chenoweth v. Southern P. Co.* 53 Or. 111, 99 Pac. 86, holding in an action for the negligent setting of fires from a locomotive evidence that the same engine shortly after set fires beyond the right of way was admissible on the question of negligence; *Glanz v. Chicago, M. & St. P. R. Co.* 119 Iowa, 611, 93 N. W. 575, holding in an action for the setting of fires by a locomotive evidence of the setting of other fires by the same engine was admissible.

Distinguished in *Woodward v. Chicago, M. & St. P. R. Co.* 58 C. C. 402, 122 Fed. 66, where it was held that evidence on the part of the plaintiff that the setting of a fire a considerable distance from the track by a spark from the engine was evidence of its defective condition was admissible where defendant company by experts raised the question whether the starting of such fire was evidence of a defective condition.

Question for jury as to negligence.

Cited in *Great Northern R. Co. v. Coats*, 53 C. C. A. 382, 115 Fed. 402 (dissenting opinion), majority holding that question whether engine properly managed when sparks setting fire were emitted should not be withdrawn from jury merely because testimony of employees in charge that it was properly managed is not directly contradicted.

Evidence of condition on other occasions.

Cited in note in 32 L.R.A.(N.S.) 1155, on admissibility of evidence of condition before and after accident of property whose defects are alleged to have caused injury.

8 N. D. 345, YOUNG v. GREAT NORTHERN R. CO. 79 N. W. 448.

Evidence of condition at other times.

Cited in note in 32 L.R.A.(N.S.) 1155, on admissibility of evidence of condition before and after accident of property whose defects are alleged to have caused injury.

8 N. D. 347, BRAY v. BOOKER, 79 N. W. 293.

8 N. D. 364, MARSHALL v. ANDREWS, 79 N. W. 851.

Conversion by warehouseman.

Cited in *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 280, 91 N. W. 436, holding no action would lie for the conversion of goods by a warehouseman until there had been a demand by the party entitled to possession and a refusal.

New theory on appeal.

Cited in *Fifer v. Fifer*, 13 N. D. 20, 99 N. W. 763, holding where action was tried in the district court on the theory that it was one to title and right to possession it cannot be asserted on appeal that it was an action of forcible entry and detainer.

Evidence in trover.

Cited in note in 9 N. D. 365, on evidence in actions for trover and conversion.

8 N. D. 369, PEOPLE'S STATE BANK v. FRANCIS, 79 N. W. 853.**Wife as husband's surety.**

Cited in *Roberts v. Roberts*, 10 N. D. 531, 88 N. W. 289, on relation of surety between husband and wife executing mortgage on homestead for husband's debts.

8 N. D. 376, EDDIE v. EDDIE, 73 AM. ST. REP. 765, 79 N. W. 856.**Legitimation of illegitimate children.**

Cited in *Allison v. Bryan*, 21 Okla. 557, 18 L.R.A.(N.S.) 931, 97 Pac. 282, 17 A. & E. Ann. Cas. 468, holding under the statute the father of an illegitimate child may legitimize it by taking it into his family with the consent of his wife and recognizing it as his own even though against the consent of its mother.

Distinguished in *Morton v. Morton*, 62 Neb. 420, 87 N. W. 182, holding that the phrase "adopted into his family" in Neb. Comp. Stat. chap. 23, § 31, referring to the inheritability of an illegitimate child, means taken in, given the family name, and treated and currently recognized as a child, and does not refer to Code Civ. Proc. tit. 25, chap. 2, §§ 796, 801, providing for the adoption of the child of another; *Moen v. Moen*, 16 S. D. 210, 92 N. W. 13, holding under the statute the act of a nonresident alien in recognizing writing that an illegitimate child was his own had the effect after the passage of the statute to confer on such child the right to inherit his real estate.

8 N. D. 382, COMMERCIAL BANK v. RED RIVER VALLEY NAT. BANK, 79 N. W. 859.**Who is real party in interest.**

Cited in note in 64 L.R.A. 586, as to who is real party in interest within statutes defining parties by whom action must be brought.

Damages recoverable for negligence in the collection of bills of exchange.

Disapproved in *Hendricks v. Jefferson County Sav. Bank*, 153 Ala. 636, 14 L.R.A.(N.S.) 686, 45 So. 136, holding the measure of damages recoverable from a bank for its negligence in not collecting a check deposited for collection is only the amount the depositor will lose thereby.

Liability of collecting agent for negligence in collection.

Cited in *Hill v. American Surety Co.* 107 Wis. 19, 81 N. W. 1024, 82 N. W. 691, holding the assignee under a voluntary assignment for creditors prima facie liable for damages to creditors resulting from his failure to exercise the diligence of an ordinarily prudent man in procuring insurance upon the assigned property; *Pinkney v. Kanawha Valley Bank*, 68 W.

Va. 254, 32 L.R.A. (N.S.) 987, 69 S. E. 1012, holding it negligence collecting bank to send checks direct to drawee bank.

Cited in note in 77 Am. St. Rep. 616, 625, 626, on duties of b acting as collecting agents.

8 N. D. 392, RICHARD v. STARK COUNTY, 79 N. W. 863.

Title of act.

Cited in State ex rel. Kol v. North Dakota Children's Home Society N. D. 493, 88 N. W. 273, holding that generality of title of act does not render it objectionable if it offered a cover to incongruous and unconnected legislation; Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. affirming that the constitutional provision that no bill shall embrace more than one subject which shall be expressed in the title is mandatory on courts and the legislature; State ex rel. Erickson v. Burr, 16 N. D. 581, N. W. 705, holding the title of an act "defining the boundaries" of certain judicial districts and providing for terms of court in such districts sufficient although the act provided that the judge of a certain district should be elected at a certain election; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841, holding an amendatory act was valid where the subject matter of the amendment was germane to the subject of the act which the amended section is a part, and is within the title of the original act; State v. Minneapolis & N. Elevator Co. 17 N. D. 23, 114 N. W. holding an act entitled an "act requiring elevator companies transacting business in the state to return certificates of inspection and weighmaster certificates of weight to the local buyer" was not invalid because it provided that such agents should post the certificates in conspicuous place Ward v. Gradin, 15 N. D. 649, 109 N. W. 57; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385,—on invalidity in title of act to enlarge county boundaries.

Requisites in passage of act.

Cited in Schaffner v. Young, 10 N. D. 245, 86 N. W. 733, holding void an attempted change of county boundaries by N. D. Laws, 1899, chap. 10, which makes no provision for complying with the requirement of N. D. Const. § 168, requiring the submission of the act to the voters of the counties concerned, for approval.

Quo warranto against illegal county organization.

Distinguished in State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385, refusing original prerogative writ of quo warranto which was sought by private relator against attorney-general's consent and at a much delay and where county government of large territory would be disorganized.

8 N. D. 395, MILLER v. SCHALLERN, 79 N. W. 865.

Mandatory statutes as to election ballots.

Cited in Howser v. Pepper, 8 N. D. 484, 79 N. W. 1018, holding requirement of North Dakota statute that ballot must have precinct stamp and initials of inspector, constitutional and mandatory; Perry v. Hackman, 11 N. D. 356, 92 N. W. 385.

11 N. D. 148, 90 N. W. 483, holding a provision of a statute that in the canvass of votes any ballot which is not indorsed by the official stamp and initials shall be void and shall not be counted was mandatory.

Marking official ballot.

Cited in *Lorin v. Seitz*, 8 N. D. 404, 79 N. W. 869, holding void, ballots which fail to show initials of election precinct officer.

Cited in note in 47 L.R.A. 807, 809, on marking official ballot.

Power of legislature to prescribe method of determining qualification of electors.

Cited in *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95, holding that legislature may prescribe method by which qualification of voters may be proved.

8 N. D. 404, LORIN v. SEITZ, 79 N. W. 869.

Marking official ballot.

Cited in *Newhouse v. Alexander*, 27 Okla. 46, 30 L.R.A.(N.S.) 602, 110 Pac. 1121, holding ballot improperly indorsed, not competent evidence in election contest.

Cited in note in 47 L.R.A. 809, on marking official ballot.

8 N. D. 406, KAEPLER v. RED RIVER VALLEY NAT. BANK, 79 N. W. 869.

Sufficiency of affidavit made upon information and belief.

Cited in *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283, holding an affidavit made upon information and belief which is uncorroborated and does not show the facts required confers no jurisdiction under the statute to issue a search warrant; *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, upholding the doctrine that an affidavit made upon information and belief was insufficient to sustain constructive criminal contempt proceedings; *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035 (dissenting opinion), on the sufficiency on affidavits based upon information and belief.

Cross-examination.

Cited in *Mathews v. Hanson*, 19 N. D. 692, 124 N. W. 1116, holding latitude to be allowed in cross-examination is largely discretionary with civil courts; *Campbell v. Coulston*, 19 N. D. 645, 124 N. W. 689 (dissenting opinion), on limitations on cross-examination.

Distinguished in *Schwobel v. Fugina*, 14 N. D. 375, 104 N. W. 848, where it was held that it was proper on cross-examination of the defendant to prove that he asserted title in himself, although such cross-examination had no relation to the matters on which he testified on direct examination.

8 N. D. 413, McHENRY v. KIDDER COUNTY, 79 N. W. 875.

Who may bring action to quiet title.

Cited in *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W.

245, holding action to quiet title maintainable by any person having or equitable interest in land against one claiming adverse estate or est therein.

Delegation of legislative power.

Cited in *Picton v. Cass County*, 13 N. D. 242, 100 N. W. 711, 3 A. Ann. Cas. 345, holding an act providing for the enforcement of the payment of taxes upon real property which gives to the boards of commissioners authority to institute proceedings for that purpose not a delegation of legislative power.

Remedies for the collection of taxes.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322 (dissenting opinion), on the exclusiveness of the statutory remedy for the enforcement of tax liens.

Priority between tax liens and sales.

Cited in *Oakland Cemetery Asso. v. Ramsey County*, 98 Minn. 404, Am. St. Rep. 377, 108 N. W. 857, upholding that under the statute the state may enforce the lien of a tax delinquent and unpaid subsequent to a prior sale on a later lien.

Mode of enforcing tax.

Cited in *Storey v. Murphy*, 9 N. D. 115, 81 N. W. 23, holding that county commissioner has no power under N. D. Laws, 1897, chap. 7, to employ additional counsel to assist the state's attorney in an action to enforce the collection of taxes until an answer has been filed by the

8 N. D. 419, *CLENDENING v. HAWK*, 79 N. W. 878, Later appeal in 10 N. D. 90, 86 N. W. 114.

Who may maintain trover.

Cited in *Swank v. Elwert*, 55 Or. 487, 105 Pac. 901, holding that a party to chattel mortgage has right of action for conversion against the party.

Cited in note in 9 N. D. 631, on who may maintain trover.

Evidence and damages in trover.

Cited in notes in 9 N. D. 634, on evidence in actions for trover and conversion; 9 N. D. 636, on damages in actions for trover and conversion.

8 N. D. 424, *GJERSTADENGEN v. HARTZELL*, 79 N. W. 880. Later appeal in 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230.

Sham pleadings.

Cited in *Pacific Mill Co. v. Inman*, 50 Or. 22, 90 Pac. 1099, holding that truth or falsity of amended pleadings must be determined from the records.

Cited in note in 113 Am. St. Rep. 646, 650, 652, on sham pleadings.

Denials on information and belief.

Cited in notes in 133 Am. St. Rep. 109, 118, 119, as to when denial on information and belief are permissible; 30 L.R.A.(N.S.) 780, on denial

upon information and belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge.

Jurisdiction of probate court.

Cited in *Walker v. Ehresman*, 79 Neb. 775, 113 N. W. 218, holding a county court had no jurisdiction to determine the title to real estate entered by a decedent to be in the devisees named in the entry man's will to the exclusion of the heirs at law in whose name the patent was issued.

8 N. D. 430, FIRST NAT. BANK v. MINNEAPOLIS & N. ELEVATOR CO. 79 N. W. 874.

Measure of damages for conversion.

Cited in *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319, 83 N. W. 221, holding want of reasonable diligence in prosecuting action so as to deprive plaintiff of right to highest market value between conversion and verdict not shown by delay of nearly two years arising from disqualification of judge.

Cited in note in 9 N. D. 636, on damages in actions for trover and conversion,

8 N. D. 432, RED RIVER VALLEY NAT. BANK v. BARNES, 79 N. W. 880.

Sufficiency of consideration for the execution of a mortgage.

Cited in *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576, holding a note was a sufficient consideration to sustain a mortgage given as collateral security although the mortgage was executed two months after the note was given.

Effect of mortgage of stock of goods without change of possession.

Cited in *F. A. Patrick & Co. v. Grand Forks Mercantile Co.* 13 N. D. 12, 99 N. W. 55, holding where a mortgagor continues in possession of a stock of merchandise under an agreement with the mortgagee and continues to buy goods without giving any notice of his relation to the mortgagee the latter may be held liable by one selling goods to the mortgagor; *F. Meyer Boot & Shoe Co. v. C. Shenkberg Co.* 11 S. D. 620, 80 N. W. 126, holding mortgagor's retention of chattels under agreement to sell same and apply balance after replenishing stock and supplying own needs to payment of debt, not per se evidence of actual fraud.

Distinguished in *Bergman v. Jones*, 10 N. D. 520, 88 Am. St. Rep. 739, 88 N. W. 284, holding void as against creditors, mortgage on stock of merchandise by which mortgagors are to retain possession, sell the goods, replenish stock, pay current expenses, and a small monthly amount to themselves and apply only net profits to the debt.

8 N. D. 444, O'TOOLE v. OMLIE, 79 N. W. 849.

Mortgage of realty in form of absolute conveyance.

Followed in *Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677, holding deed absolute in form with an agreement to reconvey and intended as security, constituted a mortgage.

Dak. Rep.—24.

Cited in *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289, holding an absolute deed with an agreement to sell and reconvey lands to the parties for the same consideration within a certain time constitute a mortgage.

Admissibility of parol evidence to prove deed absolute in form and mortgage.

Cited in *Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677, holding a deed absolute in form may be proved by parol evidence to be a mortgage between the parties.

Possession of land as notice of rights of occupant.

Cited in *Dickson v. Dows*, 11 N. D. 407, 92 N. W. 798, affirming that possession of land amounts to constructive notice of the rights of a possessor therein; *Patnode v. Deschenes*, 15 N. D. 100, 106 N. W. 411, on the effect of a grantor's possession after conveyance as notice.

Cited in note in 13 L.R.A.(N.S.) 52, on possession of land as notice of title.

Vendor's right to crops.

Cited in *Lane v. O'Toole*, 8 N. D. 210, 78 N. W. 77, holding that a contract for the purchase of land by which the possession of the land and crops is surrendered to the purchaser, except in default of payment, is such a condition precedent to the vendor's rights of possession of the crops.

Review of accounting on appeal.

Cited in *Avery Mfg. Co. v. Crumb*, 14 N. D. 57, 103 N. W. 411, refusing to make an accounting between the parties on appeal where the evidence a new trial is to be granted.

8 N. D. 451, SMITH v. SECURITY LOAN & T. CO. 79 N. W. 245.

Later appeals in 9 N. D. 306, 79 N. W. 245; 11 N. D. 66, 79 N. W. 1033.

Implied trusts.

Cited in *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W. 245, holding that a passive trust vesting the entire title and estate in the beneficiaries was created by a deed absolute on its face but for the benefit of a third person; *Carter v. Carter*, 14 N. D. 66, 103 N. W. 411, on the creation of trusts by implication.

Statute of uses.

Cited in note in 16 L.R.A.(N.S.) 1158, on statute of uses in United States.

Foreclosing deed as mortgage.

Distinguished in *David Bradley & Co. v. Helgersen*, 14 S. D. 59, 10 N. W. 634, holding that a warranty deed given to a specified person as trustee for the sole purpose of securing the payment of certain notes and interest may be foreclosed as a mortgage.

Title by tax sale.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding a

chaser at a tax sale acquired upon the termination of the period of redemption an absolute right to the land although no deed had as yet issued to him.

§ N. D. 456, WILSON v. CASS COUNTY, 79 N. W. 985.

§ N. D. 461, ROSENBAUM v. HAYES, 79 N. W. 987, Later appeal in 10 N. D. 311, 86 N. W. 973.

§ N. D. 474, ROBERTS v. FIRST NAT. BANK, 79 N. W. 993.

Sufficiency of consideration.

Cited in *Chilson v. Bank of Fairmont*, 9 N. D. 96, 81 N. W. 33, holding mere doing of act which one is under legal obligation to perform, not rendered a sufficient consideration by mere fact that it saved other party expense and trouble of law suit.

Parol to vary terms of written instrument as against stranger.

Cited in *Re Shields Bros.* 134 Iowa, 559, 10 L.R.A.(N.S.) 1061, 111 N. W. 963, holding parol evidence was admissible as against tax official to show that a land contract listed by him for taxation was in fact intended by the parties as a mere option to purchase.

§ N. D. 464, HOWSER v. PEPPER, 79 N. W. 1018.

Construction of election statutes.

Cited in *Bingham v. Broadwell*, 73 Neb. 605, 103 N. W. 323; *Bloedel v. Cromwell*, 104 Minn. 487, 116 N. W. 947,—declaring that the voter should be favored on doubtful constructions of election statutes.

Cited in note in 30 L.R.A.(N.S.) 607, on scope and effect of election law provisions for preserving ballots.

Irregularities affecting the validity of ballots.

Cited in *Bloedel v. Cromwell*, 104 Minn. 487, 116 N. W. 947, affirming the rejection of ballots which were signed by the voter and ballots which had no mark opposite the name of the candidate for the contested office; *Potts v. Folsom*, 24 Okla. 731, 28 L.R.A.(N.S.) 460, 104 Pac. 353, holding where the statute provided that a straight ticket might be voted by stamping a cross in the circle below the party designation the act of the voter in putting a cross after part of the party candidates did not affect the vote for the straight ticket; *Moody v. Davis*, 13 S. D. 86, 82 N. W. 410, holding that ballot marked by cross in circles at head of ticket which contains only name of candidate for county commissioner and also in circle at head of other ticket containing names of other candidates for supreme court judges but not candidate for county commissioner, cannot be counted; *Potts v. Folsom*, 24 Okla. 731, 28 L.R.A.(N.S.) 460, 104 Pac. 353, holding under statute mark placed in circle at head of party column controls voter's choice, and that extra markings opposite names of candidates were without effect.

Marking ballots generally.

Cited in notes in 91 Am. St. Rep. 686, on right of elector to vote for

candidate not named on official ballot; 47 L.R.A. 819, 825, 830, 841, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Admissibility of ballots in evidence.

Cited in *McMahon v. Crockett*, 12 S. D. 11, 80 N. W. 136, holding ballots not admissible to overturn official count in election contest where contestant opened several of the ballot boxes for avowed purpose of ascertaining result of vote on all officers and took one box away, the contents of which were different on trial from time of delivery to him.

Decision of tie vote at election.

Cited in note in 47 L.R.A. 558, on decision of tie vote at election.

8 N. D. 499, ANHEIER v. SIGNOR, 79 N. W. 983.

Right of purchaser pendente lite to appear in a cause.

Cited in *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, refusing to dismiss an appeal because the appellant assigned the subject matter of the action after judgment and before the appeal was taken, it appearing that the appeal was taken and prosecuted by the assignee.

8 N. D. 504, ROBERTS v. FIRST NAT. BANK, 79 N. W. 1049.

Description of property for taxation.

Cited in *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 1049, holding "S. E. 4" insufficient description to support assessment and sale.

Effect of subsequent legislation on validity of tax sales.

Cited in *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132, holding a sale of land for taxes under authority of statute could not be affected by subsequent legislation repealing the prior law; *Blakemore v. Cooper*, 15 N. D. 5, 4 L.R.A. (N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566, holding the provisions of a statute that the tax sale certificates would be prima facie evidence of the regularity of the tax proceedings could not be taken away by subsequent legislation.

Running of limitations in case of void tax sale.

Cited in *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, holding that the deed issued upon a void tax sale is nevertheless sufficient "color of title" to serve as a basis upon which a party in open possession, adverse, and undisputed possession may found absolute legal title under the statute; *N. D. Rev. Codes, 1899, § 3491a*; *Nind v. Myers*, 15 N. D. 400, 8 L.R.A. (N.S.) 57, 109 N. W. 335, holding a sale made for the nonpayment of taxes for two different years could not be vitiated after the lapse of time for questioning the sale by reason of the fact that the tax for one of the years was void; *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding statute of limitations not set in motion by tax deed based on void tax; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, holding that limitations do not run against right to redeem from sale for delinquent taxes based on void assessment; *Sweigle v. Gates*, 9 N. D. 538, 84 N. W. 481, holding that limitations do not run against action by owner to quiet title against persons claiming under tax deeds executed by officer acting for jurisdiction.

Cited in note in 27 L.R.A.(N.S.) 348, 350, 352, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes.

Taxation of separate tracts as a whole.

Cited in *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding the taxation of two separate and distinct tracts of land as one tract rendered the tax proceedings invalid; *State Finance Co. v. Bowdle*, 16 N. D. 193, 112 N. W. 76, holding an assessment as one tract, two smaller tracts belonging to different persons whose title was of record was invalid; *Griffin v. Denison Land Co.* 18 N. D. 246, 119 N. W. 1041, holding two quarters of same section which only touch at corners not "contiguous" so as to constitute one tract for purpose of taxation.

Description of owner in assessment of real estate.

Distinguished in *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844; *Hartzler v. Freeman*, 12 N. D. 187, 96 N. W. 294,—where because of difference in statute the provisions of an act imposing a tax upon real estate which requires real estate to be assessed in the name of the owner are directory.

Necessity for assessor's affidavit to validity of tax proceedings.

Cited in *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding a tax sale of realty was not invalidated by the failure to attach to the assessment roll the prescribed assessor's affidavit.

Necessity for assessments to validity of tax proceedings.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322 (dissenting opinion), on the right to set aside a tax sale because of irregularities in the tax proceedings; *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212, on the necessity of assessments to the validity of tax sales.

Effect of interest of municipal officer on contract with municipality.

Cited in *Diver v. Keokuk Sav. Bank*, 126 Iowa, 691, 102 N. W. 542, 3 A. & E. Ann. Cas. 669, holding after the completion of improvements which have been accepted by the city a taxpayer could not restrain the collection of assessment certificates because of the violation of a statute prohibiting members of the city counsel from being interested in any contract to be performed for the city.

Assessments by front foot rule.

Cited in note in 28 L.R.A.(N.S.) 1128, 1147, 1159, 1201, on assessments for improvements by front-foot rule.

Right to recover back taxes paid.

Cited in *McHenry v. Brett*, 9 N. D. 68, 81 N. W. 65, denying right of purchaser at void tax sale to recover from owner amount of subsequent valid taxes voluntarily paid by him; *Paine v. Dickey County*, 8 N. D. 581, 80 N. W. 770, holding a county liable to refund illegal taxes.

8 N. D. 515, LAY v. EMERY, 79 N. W. 1053.

Compensation of partner for services.

Cited in note in 17 L.R.A.(N.S.) 416, on right of partner to compensation for services to partnership.

Defense to action on stated account.

Cited in note in 6 L.R.A.(N.S.) 820, on right to defend action on stated account by showing breach of contract on which founded.

Burden of proving accounting erroneous.

Cited in Wood v. Pehrsson, 21 N. D. 357, 130 N. W. 1010, holding burden on party seeking to open accounting to overthrow presumption that is correct.

8 N. D. 534, TROST v. CASSELTON, 79 N. W. 1071.**Sufficiency of presentation of claim against city.**

Cited in Touhey v. Decatur, — Ind. —, 32 L.R.A.(N.S.) 350, 93 N. W. 540, holding newspaper notice to city officers of accident on streets compliance with statutory requirement that written notice be given before action is maintained against city.

Effect of variance between notice of defective sidewalk and proof thereof.

Cited in Rusch v. Dubuque, 116 Iowa, 402, 90 N. W. 80, holding defendant in an action to recover for personal injuries caused by a defective condition of a sidewalk was not prejudiced by a variance between the notice of the place where the accident occurred and the proof as to where it occurred when the evidence of plaintiff was to the effect that walk for some distance was in the same condition.

— Admissibility of parol to cure defective notice.

Cited in Sollenbarger v. Lineville, 141 Iowa, 203, 119 N. W. 618, 18 S. D. & E. Ann. Cas. 991, holding the written notice containing the description of the place where an accident due to the defective condition of sidewalk occurred could not be aided by the statements of the injured person made when he presented his claim to the town counsel.

8 N. D. 539, STATE v. CRAWFORD, 46 L.R.A. 312, 73 AM. S. D. REP. 772, 80 N. W. 193, 14 AM. CRIM. REP. 117.**8 N. D. 544, INGWALDSON v. SKRIVSETH, 80 N. W. 475.****8 N. D. 545, STATE v. CURRIE, 80 N. W. 475.****Unlawful sale of liquor.**

Cited in State v. Ball, 19 N. D. 782, 123 N. W. 826, holding that "beer" is malt liquor and intoxicating.

Cited in note in 25 L.R.A. (N.S.) 446, on proof of sale of "beer" sustaining conviction under statutes prohibiting sale of vinous, malt, fermented or intoxicating liquors.

8 N. D. 548, STATE v. ROZUM, 80 N. W. 477.**Right to preliminary examination in criminal case.**

Cited in State v. Gottlieb, 21 N. D. 179, 129 N. W. 460, holding that there is no constitutional right to preliminary examination to criminal cases.

Waiver of sufficiency of complaint on preliminary examination.

Cited in *State v. Wisnewski*, 13 N. D. 649, 102 N. W. 883, 3 A. & E. Ann. Cas. 907, holding an information might be filed for the offense charged by the complaint in justice court although the offense was not described with technical accuracy where on the preliminary hearing the defendant waived examination.

Immaterial variance between complaint and information.

Cited in *State v. Heffernan*, 22 S. D. 513, 25 L.R.A.(N.S.) 868, 118 N. W. 1027, holding a variance between the complaint before the committing magistrate and the information as to the time of the commission of the crime was immaterial; *State v. O'Neal*, 19 N. D. 425, 124 N. W. 68, holding fact that description of locality of commission of offense, was more specific in information than in complaint, immaterial.

Sufficiency of information.

Cited in *State v. Fordham*, 13 N. D. 494, 101 N. W. 888, holding an information for the statutory crime of robbery was sufficient to charge a taking with intent to steal; *State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682, holding information for keeping and maintaining common nuisance, as second offense, sufficient where there is brief description of former conviction; *State v. Winbauer*, 21 N. D. 161, 129 N. W. 97, holding information insufficient where accused would be misled and perplexed in preparing his defense; *State v. Ball*, 19 N. D. 782, 123 N. W. 826; *State v. Kruse*, 19 N. D. 203, 124 N. W. 385,—holding particularity of description of place where intoxicating liquors were sold unnecessary where prosecution is only against person.

Proceeding to adjudicate liquor nuisance.

Cited in *State ex rel. Kelly v. Nelson*, 13 N. D. 122, 99 N. W. 1077, holding a place where intoxicating liquor is sold illegally can only be adjudged a nuisance in an equitable action when the owner or keeper thereof is a party defendant.

Cross-examination of witness.

Cited in *State v. Malmberg*, 14 N. D. 523, 105 N. W. 614, holding it was proper on cross-examination for the purpose of discrediting the witness to show by him the existence of ill-will towards the adverse party; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482, holding question on cross-examination whether or not accused taking witness stand in his own defense is a professional gambler, competent to test his credibility.

Evidence to discredit party.

Cited in *State v. Constantine*, 48 Wash. 218, 93 Pac. 317, holding it proper in a criminal prosecution to show the attempt of a party to suppress evidence as tend to prove that his cause lacks honesty.

8 N. D. 559, **STATE v. EKANGER**, 80 N. W. 482.

Review of rulings of trial court on appeal.

Cited in *Bemis v. Omaha*, 81 Neb. 352, 116 N. W. 31, holding in the absence of evidence of an abuse of discretion in the decision of a challenge

for cause the ruling of the lower court will not be set aside; *State v. Werner*, 16 N. D. 83, 112 N. W. 60, refusing to reverse because of ruling of the trial court on the question of the actual bias of a juror where no abuse of discretion appears from the record; *State v. Fu*, 20 N. D. 555, 129 N. W. 360, holding that decision of lower court a qualification of juror who states that he has formed opinion will be disturbed only when it clearly appears that there was abuse of discretion.

Cross-examination to discredit witness.

Cited in *State v. Malmberg*, 14 N. D. 523, 105 N. W. 614, holding the cross-examination of a party questions tending to bring out the effect of his ill-will towards the adverse party may be asked for the purpose of discrediting the witness.

Cited in note in 82 Am. St. Rep. 36, on evidence to show credibility of witness.

Privilege of witness.

Cited in note in 75 Am. St. Rep. 337, 339, on privilege of witness against incriminating testimony.

8 N. D. 563, STATE v. KELLAR, 73 AM. ST. REP. 775, 80 N. W. 476.

Who are accomplices.

Cited in *State v. Goodsell*, 138 Iowa, 506, 116 N. W. 605, holding under 14 having sexual intercourse with her father presumptively capable of appreciating the crime and therefore not an accomplice.

Cited in note in 138 Am. St. Rep. 281, on who is an accomplice.

Conviction on testimony of accomplice.

Cited in note in 98 Am. St. Rep. 159, 178, on convicting on testimony of accomplice.

8 N. D. 565, PLUMMER v. BORSHEIM, 80 N. W. 690.

Constitutionality of class statutes.

Cited in *Minneapolis & N. Elevator Co. v. Traill County*, 9 N. D. 50, 50 L.R.A. 266, 82 N. W. 727, upholding statute for taxing all grain elevators, etc., to operators, and giving them lien for amount of tax against owner; *Re Connolly*, 17 N. D. 546, 117 N. W. 946, holding an act which provided that counties not having more than a certain population may on the petition of the inhabitants equalling one-third of the voters proceedings for a county seat removal may be initiated was unconstitutional as special legislation.

8 N. D. 570, OMLIE v. FARMERS' STATE BANK, 80 N. W. 689.

Passing of title on conditions.

Cited in *Thurston v. Osborne-McMillan Elevator Co.* 13 N. D. 508, 82 N. W. 892, on a chattel mortgage of a crop of grain by the vendee under a contract to purchase under which the title to the crop remains in

vendor until the performance of certain conditions as being of no effect until the performance of such conditions.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

§ N. D. 573, BRUMMOND v. KRAUSE, 80 N. W. 686.

Effect of relationship on contracts between parties.

Distinguished in *Fjone v. Fjone*, 16 N. D. 100, 112 N. W. 70, where it was held that the evidence sustained a conveyance by a mother to her son as being based upon a sufficient consideration.

§ N. D. 578, RICKS v. BERGSVENDSEN, 80 N. W. 768.

Necessity and sufficiency of statement of case to obtain trial de novo on appeal.

Cited in *National Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 285, holding that appellate court cannot try a case de novo in absence of a statement of a case; *Mooney v. Donovan*, 9 N. D. 93, 81 N. W. 50, holding that case cannot be tried de novo on appeal where statement of the case does not show what issues appellant wishes to have retried; *Security Improv. Co. v. Cass County*, 9 N. D. 553, 84 N. W. 477, holding right to have question of fact retried on appeal lost by failing to incorporate demand for retrial in the statement of the case; *Teinen v. Lally*, 10 N. D. 153, 86 N. W. 356, holding that retrial of facts cannot be had on a statement of the case containing no demand for retrial of the whole case or any particular fact although it presents all the evidence; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. 49, holding that case tried to the court cannot be tried de novo on appeal where the statement of the case contains no declaration of a desire for retrial of the entire case or any specifications of any facts show appellant's desire to have review; *Erickson v. Citizen's Nat. Bank*, 9 N. D. 81, 81 N. W. 46, denying right to retry entire case or any particular question of fact on appeal where statement of the case contains no expression of a desire therefor and no specification of any facts which he desires to have reviewed; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. 49; *Douglas v. Glazier*, 9 N. D. 615, 84 N. W. 552,—holding request for retrial in appellate court made in notice of appeal not sufficient to entitle appellant to retrial.

§ N. D. 581, PAINE v. DICKEY COUNTY, 80 N. W. 770.

Necessity that subject of act be expressed in the title.

Cited in *Rio Grande County v. Whelen*, 28 Colo. 435, 65 Pac. 38, holding an act entitled "An act to provide for the assessment and collection of revenue" is void in as far as it provides for a penalty because containing subject-matter not expressed in the title; *State ex rel. Kol v. North Dakota Children's Home Society*, 10 N. D. 493, 88 N. W. 273, holding that act having but a single purpose expressed in title may embrace all matters naturally and reasonably included therein and all measures which may facilitate accomplishment of legislative purpose; *Erickson v. Cass*

County, 11 N. D. 494, 92 N. W. 841, holding an amendatory statute not unconstitutional as embracing subjects not contained in the title v. it did not relate directly to the provisions of the amended act.

Cited in note in 79 Am. St. Rep. 464, as to when title of statute embraces only one subject, and what may be included thereunder.

County as party to action between other parties to adjudicate title.

Cited in *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding county virtually a party to an action to determine adverse claims to land where the judgment rendered therein adjudicates its liability as a grantor of a tax sale.

Validity of tax sale, how affected by subsequent legislation.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding the validity of a tax sale could not be impaired by subsequent legislation which had the effect of repealing the statute under which the tax proceedings were had.

8 N. D. 585, DONOVAN v. ST. ANTHONY & D. ELEVATOR CO. L.R.A. 721, 73 AM. ST. REP. 779, 80 N. W. 772.

Effect of failure to properly execute and record chattel mortgage.

Cited in note in 137 Am. St. Rep. 475, on effect of failure to execute and record chattel mortgage as prescribed by statute.

Interest as affecting right to attest instrument.

Cited in *Betts-Evans Trading Co. v. Bass*, 2 Ga. App. 718, 59 S. E. 2d 847, holding an officer having authority by law to attest an instrument disqualified from so doing where he was a stockholder in a corporation interested in the instrument which he attested; *Ames v. Parrott*, 61 N. D. 847, 87 Am. St. Rep. 536, 86 N. W. 503, holding an attachment plaintiff incompetent to witness the levy and declaration thereof by the sheriff under Neb. Code Civ. Proc. § 205, requiring the sheriff to declare in the presence of two residents of the county that he levies the property in suit of the plaintiff.

Distinguished in *Cross v. Robinson Point Lumber Co.* 55 Fla. 37, 15 So. 6, 15 A. & E. Ann. Cas. 588, holding by reason of statute a witness to a deed was not an incompetent witness thereto because of interest.

Sufficiency of acknowledgment.

Cited in *American Mtg. Co. v. Live Stock Co.* 10 N. D. 290, 86 N. W. 965, holding a recorded chattel mortgage by a corporation insufficient to carry constructive notice where the notary's certificate fails to show the officer executing it was in fact the president of the corporation.

Evidence in trover.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

3 N. D. 590, OLIVER v. WILSON, 73 AM. ST. REP. 784, 80 N. W. 757.

Mandamus to compel official action.

Cited in *State ex rel. Wiles v. Albright*, 11 N. D. 22, 88 N. W. 729, holding mandamus would not lie to the county auditor on the complaint of the county superintendent of schools because of the refusal of the county auditor to issue a warrant for his salary which the auditor claimed was fraudulently represented.

Cited in note in 125 Am. St. Rep. 502, on duties, performance of which may be compelled by mandamus.

Time for taking of an appeal.

Cited in *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085, on the additional time given by statute for the taking of an appeal only applying when the orders require the subsequent settlement of a statement of the case.

Consideration of stipulation of facts on appeal from order.

Cited in *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701, holding that stipulation of facts used in connection with motion to strike out allegations of answer may be considered in reviewing order granting motion.

Liability of public officers.

Cited in note in 95 Am. St. Rep. 119, on liability of ministerial officers for nonperformance and misperformance of official duties.

3 N. D. 595, PECKHAM v. VAN BERGEN, 80 N. W. 759, Later appeal in 10 N. D. 43, 84 N. W. 566.

Right to trial by jury.

Followed in *Hanson v. Carlblom*, 13 N. D. 361, 100 N. W. 1084, holding it a mistrial, where a law case is tried by the court after defendant's demand for a jury trial; *Spencer v. Beiseker*, 15 N. D. 140, 107 N. W. 189, holding an equity action in which a jury is called to find the facts is not an action tried without a jury within the meaning of the statute.

Right to trial de novo on appeal.

Cited in *Hagen v. Gilbertson*, 10 N. D. 546, 88 N. W. 455, holding stipulation by counsel after trial to jury that the jury should be waived and the court make findings of fact not authority for trial de novo on appeal where the statement fails to include evidence which was offered and excluded in the trial to the jury.

3 N. D. 600, BECKER v. DUNCAN, 80 N. W. 762.

Review of denial of new trial.

Cited in *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 109; *Action v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225; *Lang v. Bailes*, 19 N. D. 582, 125 N. W. 891,—holding that refusal of court to disturb verdict will not be reversed where it is supported by substantial evidence.

8 N. D. 601, HEYROCK v. MCKENZIE, 80 N. W. 762.

Right to new trial on the grounds of newly discovered evidence.

Cited in Libby v. Barry, 15 N. D. 286, 107 N. W. 972, holding newly discovered evidence of merely an impeaching nature did not furnish sufficient grounds for the granting of a new trial; State v. Albertson, 20 N. D. 512, 128 N. W. 1122, holding that impeaching evidence does not furnish good ground for new trial; State v. Smith, 18 S. D. 341, 100 N. W. 100, holding the trial court did not err in refusing to grant a new trial on the grounds of newly discovered evidence where it appears that such evidence could not have changed the result; Breeden v. Martens, 21 N. D. 357, 112 N. W. 960, holding denial of new trial for newly discovered evidence not reviewable where there was no manifest abuse of discretion.

Discretionary power of trial court to grant new trial.

Cited in Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 95 Am. St. Rep. 693, 88 N. W. 724, refusing to reverse the ruling of trial court refusing to grant a new trial because of the insufficiency of the evidence to sustain the verdict where it appears there was substantial evidence on which the verdict might rest.

Conclusiveness of verdict on conflicting evidence.

Cited in Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 95 Am. St. Rep. 693, 88 N. W. 724; Lang v. Bailes, 19 N. D. 582, 115 N. W. 891,—holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Action v. Fargo & M. Street R. Co., 20 N. D. 434, 129 N. W. 225,—holding that refusal of court to direct verdict will not be reversed where it is supported by substantial evidence.

8 N. D. 603, CANFIELD v. ROBERTSON, 80 N. W. 764.

8 N. D. 606, PAULSON v. NICHOLS & S. CO. 80 N. W. 765, L.R.A. 95 Am. St. Rep. 693, 88 N. W. 724, appeal in 10 N. D. 440, 87 N. W. 977.

8 N. D. 608, FIRST NAT. BANK v. MICHIGAN CITY BANK, 80 N. W. 766.

Liability of bank for acts of cashier.

Distinguished in First Nat. Bank v. Bakken, 17 N. D. 224, 116 N. W. 92, holding it was a question for the jury whether the cashier of a bank was acting in collecting drafts drawn against deposits for grain and misappropriating the money when he was acting as the agent of the bank.

8 N. D. 613, ROLETTE COUNTY v. PIERCE COUNTY, 80 N. W. 804.

Waiver of right to appeal.

Cited in Signor v. Clark, 13 N. D. 35, 99 N. W. 68, in support of the doctrine that an appeal may be waived by acts and conduct.

— Satisfaction of judgment.

Cited in Re Black, 32 Mont. 51, 79 Pac. 554, holding parties have no right to a new trial where the judgment is satisfied.

accepted the provisions of a decree and satisfied them are not at liberty to appeal from an order overruling a motion for a new trial; *Whittaker v. Deadwood*, 12 S. D. 608, 82 N. W. 202 (dissenting opinion), holding redemption of special assessment certificates to prevent their ripening into a deed, the payment being made under protest not ground for discontinuing appeal from judgment rights to cancel such certificates and declaring the special assessment void.

Record of "order for judgment" as a final judgment.

Cited in *Hagler v. Kelly*, 14 N. D. 218, 103 N. W. 629, holding the record of the order for judgment in the proper form required for a judgment would when signed by the judge and attested by the clerk constitute a valid judgment.

8 N. D. 615, *BECKER v. CAIN*, 80 N. W. 805.

Evidence to impeach witness.

Cited in *Schnase v. Goetz*, 18 N. D. 594, 120 N. W. 553, holding that one who on cross-examination, for purpose of discrediting witness, asks whether he has not engaged in unlawful business, is precluded by negative answer from showing by other witnesses that such testimony was false.

Cited in note in 82 Am. St. Rep. 43, on evidence to show credibility or bias of witness.

8 N. D. 618, *CAMERON v. GREAT NORTHERN R. CO.* 80 N. W. 885.

Duties of servant created by regulations of employer.

Cited in *Scott v. Eastern R. Co.* 90 Minn. 135, 95 N. W. 892, on the assumption by servant of the obligation created by the rules and regulations of the master.

8 N. D. 627, *GILMAN v. GILBY TWP.* 73 AM. ST. REP. 791, 80 N. W. 889.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 9 N. D.

9 N. D. 1, **OSBORNE v. LINDSTROM**, 46 L.R.A. 715, 81 AM. ST. REP. 516, 81 N. W. 72.

Application of statute shortening period of limitations.

Cited in *Davidson v. Witthaus*, 106 App. Div. 182, 94 N. Y. Supp. 428, holding provision limiting time for bringing action for failure of corporation directors to make report according to amended law applies to actions arising out of breach of prior law under clause providing six months for the protection of existing rights; *Schauble v. Schulz*, 69 C. C. A. 581, 137 Fed. 389, holding statute limiting rights that "have been or hereafter may be" is retrospective in its operation.

Cited in notes in 111 Am. St. Rep. 457, 459, 460, on retrospective operation of statutes of limitation; 133 Am. St. Rep. 77, on effect of statute of limitations on judgments and executions and proceedings for their enforcement; 1 L.R.A.(N.S.) 528, on constitutionality of statutes shortening period of limitations.

-Protection of existing rights.

Cited in *Clark v. Beck*, 14 N. D. 287, 103 N. W. 755; *Adams & F. Co. v. Kenoyer*, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98,—holding that the legislature may reduce period of limitations providing reasonable time is given for the protection of existing rights; *Lamb v. Powder River Live Stock Co.* 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434, holding that a statute limiting time for action on judgments of courts of foreign states must allow reasonable time for protection of existing rights.

-Reasonable time.

Cited in *Mulvey v. Boston*, 197 Mass. 178, 83 N. E. 402, 14 A. & E. Ann. Cas. 349, holding that deferring the taking of effect of an act shortening period of limitations gives opportunity for the assertion of existing

rights and that thirty days is a reasonable time; *Wooster v. Bate*, 126 Iowa, 552, 102 N. W. 521, holding that the time between enactment and taking effect of statute reducing period of limitations should be included in computing whether reasonable time has been allowed for action of existing rights; *Power v. Kitching*, 10 N. D. 254, 88 Am. St. 691, 86 N. W. 737, holding seven months after approval by governor four months after taking effect reasonable period in statute reducing time for allowing redemption for previous taxes; *State Finance Co. v. Mat*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding the allowance of a year from the taking effect of statute reducing limitations amply protects existing rights; *Tipton v. Smythe*, 78 Ark. 39, L.R.A.(N.S.) 714, 115 Am. St. Rep. 44, 94 S. W. 678, 8 A. & E. Ann. Cas. 521, holding six months a reasonable period; *Lamb v. Powder River Live Stock Co.* 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434, on what constitutes reasonable time; *Schauble v. Schulz*, 69 C. C. A. 581, 137 Fed. 389, holding that one who had a year to bring action under the new statute was reasonably protected.

Questioned in *Adams & F. Co. v. Kenoyer*, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98, on the propriety of computing period between passage of act and taking effect thereof as time for protection of existing rights.

9 N. D. 12, ERICKSON v. KELLY, 81 N. W. 77.

Sufficiency of statement on appeal.

Cited in *United States Savings & Loan Co. v. McLeod*, 10 N. D. 111, 81 N. W. 110, holding that omission of exhibits or copies thereof and of a condensed statement of their contents on appeal from trial by court where trial de novo is asked for, renders the statement insufficient.

Limited in *Kipp v. Angell*, 10 N. D. 199, 86 N. W. 706, holding that presumption established by certificate of court that a statement of cases embraces all the evidence offered at the trial may be rebutted by statement itself when it shows on its face that part of the evidence has been omitted.

9 N. D. 19, McCABE v. ÆTNA INS. CO. 47 L.R.A. 641, 81 N. W. 426.

Binding contract of insurance.

Cited in *Benner v. Fire Asso. of Philadelphia*, 229 Pa. 75, 140 Am. St. Rep. 706, 78 Atl. 44, holding that insurance company may by preliminary contract bind itself to issue or renew policy in future; *Wheaton v. Liverpool & L. & G. Ins. Co.* 20 S. D. 62, 104 N. W. 850, holding that when the premium is paid and the policy written and agent notifies insured that insurance is in effect nondelivery of the policy does not affect the binding nature of the contract.

9 N. D. 28, HEYROCK v. SURERUS, 81 N. W. 36.

Rights of bona fide purchaser.

Cited in *Henniges v. Paschke*, 9 N. D. 489, 81 Am. St. Rep. 588, 84

W. 350, holding the rights of a purchaser in good faith as against one claiming under a prior unrecorded equitable assignment of a mortgage not affected by the fact that the land purchased was worth more than he paid for it.

9 N. D. 30, FEGAN v. GREAT NORTHERN R. CO. 81 N. W. 39.

Recovery of money paid under mistake of fact.

Cited in *James River Nat. Bank v. Weber*, 19 N. D. 702, 124 N. W. 952, holding that negligent failure to avail oneself of knowledge of facts at one's command will not defeat recovery of money paid under mistake where such negligence did not result in loss or damages to other party.

9 N. D. 40, PLANO MFG. CO. v. STOKKE, 81 N. W. 70.

9 N. D. 43, LOCKREN v. RUSTAN, 81 N. W. 60.

Effect of conveyance in fraud of creditors.

Cited in note in 67 L.R.A. 899, on effect on legal title of conveyance of land in fraud of creditors.

Moral obligation as consideration for reconveyance.

Cited in *Anderson v. Anderson*, 17 N. D. 275, 115 N. W. 836, holding that moral obligation to reconvey property rather than duress was the moving cause of the conveyance under consideration.

Validity of reconveyance where original conveyance void.

Cited in *Summers v. Glenwood Gold & S. Min. Co.* 15 S. D. 20, 86 N. W. 749, holding that one who became creditor of grantee prior to void conveyance cannot complain of reconveyance after he obtained judgment.

9 N. D. 49, KNEELAND v. GREAT WESTERN ELEVATOR CO. 81 N. W. 67.

Competency of evidence as to amount of damages.

Cited in *Tenney v. Rapid City*, 17 S. D. 283, 96 N. W. 96, holding testimony of plaintiff as to amount of damages sustained by reason of personal injuries was incompetent.

9 N. D. 55, PETERSON v. ST. ANTHONY & D. ELEVATOR CO. 81 AM. ST. REP. 528, 81 N. W. 59.

Right of action for invasion of rights.

Cited in notes in 9 N. D. 631, on who may maintain trover; 109 Am. St. Rep. 452, on mortgagees' right of action against third persons for invasion of their rights.

9 N. D. 57, MAHON v. SURERUS, 81 N. W. 64.

Right to mechanic's lien.

Cited in *Gull River Lumber Co. v. Briggs*, 9 N. D. 485, 84 N. W. 349, sustaining right to mechanic's lien for materials or labor in construction of buildings unless furnished under contract with one having some estate
Dak. Rep.—25.

or interest in the lien; *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. holding that mechanics' lien will not attach to interest of vendor under executory contract where vendee is in possession and makes improvements on land covered by such contract.

— On homestead prior to patent.

Cited in *Green v. Tenold*, 14 N. D. 46, 116 Am. St. Rep. 638, 103 N. 398, holding that no lien can attach to homesteaders rights in lands which are still the property of the United States.

Cited in note in 34 L.R.A. (N.S.) 409, on liability of claim or interest in public lands for debts contracted before patent issued.

— On building distinct from the land.

Cited in *Zabriskie v. Greater America Exposition Co.* 67 Neb. 581, L.R.A. 369, 93 N. W. 958, 2 A. & E. Ann. Cas. 687, holding that mechanics' lien attaches to building erected upon leased premises with covenant to remove at end of term; *Keel v. Ingersoll*, 27 Okla. 117, 111 Pac. 214, holding that mechanics' lien does not attach to buildings or improvements separate and apart from land on which same are located.

Cited in note in 62 L.R.A. 371, 375, 383, on mechanics' liens upon buildings distinct from land.

Criticized in *Green v. Tenold*, 14 N. D. 46, 116 Am. St. Rep. 638, N. W. 398, holding that there may be separate lien on building alone enforceable by sale and removal of building.

9 N. D. 60, LEALOS v. UNION NAT. BANK, 81 N. W. 56.

Who may recover Federal penalty for usury against national bank.

Cited in *McCarthy v. First Nat. Bank*, 23 S. D. 269, 23 L.R.A. (N.S.) 335, 121 N. W. 853, holding that the recovery of double interest for usury against a national bank under federal statute is a personal right of the person making such payment.

Cited in note in 56 L.R.A. 693, 694, on forfeiture or other effect of taking or reserving illegal interest by national bank.

9 N. D. 68, MCHENRY v. BRETT, 81 N. W. 65.

Tax lien as vested right.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding that statutory lien for taxes paid by tax sale purchaser is a vested right which cannot be destroyed by subsequent legislation.

Tax sale based on void proceedings.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322 (dissenting opinion), on the absence of any right arising from tax sale where there was no lawful assessment or levy.

Rights on redemption from void tax sale.

Cited in *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, holding no lien on property established by redemption from tax sale in good faith or payment of current taxes by one claiming title under void tax deed.

9 N. D. 73, NORTHERN P. R. CO. v. McCLURE, 47 L.R.A. 149, 81 N. W. 52.

Contract exempting railway from fire liability.

Cited in *Missouri, K. & T. R. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159, sustaining clause in contract for building side track exempting railway from fire liability; *Kennedy Bros. v. Iowa State Ins. Co.* 119 Iowa, 20, 91 N. W. 831, holding that a condition in a lease exempting railway from fire risk by reason of proximity to tracks ran with the land and was effective against successor of lessee holding over after expiration of lease.

Covenants running with the land.

Cited in *Martin v. Royer*, 19 N. D. 507, 125 N. W. 1027, holding that covenant to plow in cropper's contract went with land.

Cited in note in 82 Am. St. Rep. 669, on what covenants run with the land.

Action on covenant by remote grantee.

Cited in *Bull v. Beiseker*, 16 N. D. 290, 14 L.R.A.(N.S.) 514, 113 N. W. 870, holding that in order to assert breach of covenant in deed the assignee of remote grantee must allege and prove privity of estate or of contract.

9 N. D. 81, ERICKSON v. CITIZENS' NAT. BANK, 81 N. W. 46.

Trial de novo on appeal.

Cited in *State ex rel. Wiles v. Heinrich*, 11 N. D. 31, 88 N. W. 734, on the necessity for trial de novo upon appeal from court trial and the consideration of objection to the evidence only in connection with the new trial of the facts but holding that error on the face of the record may be reached without statement of facts.

— Sufficiency of statement of case to justify.

Cited in *Mooney v. Donovan*, 9 N. D. 93, 81 N. W. 50, holding that case cannot be tried de novo on appeal where statement of the case does not show what issues appellant wishes to have retried; *Teinen v. Lally*, 10 N. D. 153, 86 N. W. 356, holding that retrial of facts cannot be had on a statement of the case containing no demand for retrial of the whole case or any particular fact, although it presents all the evidence; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. 49, holding that case tried to the court cannot be tried de novo on appeal where the statement of the case contains no declaration of a desire for retrial of the entire case or any specifications of any facts show appellant's desire to have review.

— In absence of statement of case.

Cited in *National Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 285, holding that appellate court cannot try a case de novo in absence of a statement of a case.

Effect of both parties moving for directed verdict.

Cited in *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860, holding that where both parties moved for directed verdict the case stands as a trial by the court and motion for new trial cannot be considered.

Pleading statutory penalty.

Cited in *Sheets v. Prosser*, 16 N. D. 180, 112 N. W. 72, holding in order to recover statutory penalty the particular statutory provision relied upon must be pleaded.

9 N. D. 87, JULIN v. BOWMAN, 81 N. W. 51.

9 N. D. 88, GRAHAM v. GRAHAM, 81 N. W. 44.

Residence for purpose of divorce.

Cited in *Andrews v. Andrews*, 176 Mass. 92, 57 N. E. 333, holding that under *Dak. Comp. Laws*, § 2578, *Laws S. D.* 1890, chap. 105, § 1, forbidding divorce unless plaintiff has in good faith been a "resident of the territory," makes domicile a prerequisite to a valid decree; *Smith v. Smith*, 9 N. D. 219, 86 N. W. 721, holding bona fide residence for purpose of divorce not obtained by professional penman practising trade in various towns of Dakota for six months previous to bringing divorce suit, and thereafter returning to other state and revisiting Dakota for only a few days during following year and a half.

Cited in note in 12 L.R.A.(N.S.) 1100, on character of residence essential to jurisdiction in divorce proceeding.

9 N. D. 92, HAYES v. TAYLOR, 81 N. W. 49.

Demand therefor essential to trial de novo on appeal.

Cited in *Security Improv. Co. v. Cass County*, 9 N. D. 553, 84 N. W. 477, holding right to have question of fact retried on appeal lost by failure to incorporate demand for retrial in the statement of the case; *ex rel. McClory v. McGruer*, 9 N. D. 566, 84 N. W. 363, holding that where an appellate court will not retry a case tried without a jury or any question of fact involved where no demand for retrial is embodied in the statement of the case; *Teinen v. Lally*, 10 N. D. 153, 86 N. W. 356, holding that a statement of facts cannot be had on a statement of the case containing a demand for retrial of the whole case or any particular fact although the statement presents all the evidence; *Douglas v. Glazier*, 9 N. D. 615, 84 N. W. 363, holding request for retrial in appellate court made in notice of appeal not sufficient to entitle appellant to retrial.

9 N. D. 93, MOONEY v. DONOVAN, 81 N. W. 50.

Sufficiency of statement of case on appeal.

Cited in *Lund v. Upham*, 17 N. D. 210, 116 N. W. 88, holding that the absence of particular specifications as to wherein the evidence is insufficient to support the verdict such objection will not be considered on appeal; *State ex rel. Minehan v. Myers*, 19 N. D. 804, 124 N. W. 363, holding that statement of facts used in connection with motion to set aside verdict, may be considered in reviewing order granting motion, though not incorporated in statement of case.

— To authorize trial de novo.

Followed in *National Cash Register Co. v. Wilson*, 9 N. D. 112, 81 N. W. 363.

385, holding that appellate court cannot try a case de novo in absence of a statement of a case; *Hayes v. Taylor*, 9 N. D. 92, 81 N. W. 49, holding that case tried to the court cannot be tried de novo on appeal where the statement of the case contains no declaration of a desire for retrial of the entire case or any specifications of any facts show appellant's desire to have review.

Cited in *Teinen v. Lally*, 10 N. D. 153, 86 N. W. 356, holding that retrial of facts cannot be had on a statement of the case containing no demand for retrial of the whole case or any particular fact although it presents all the evidence.

Review of mandamus.

Cited in *State ex rel. Wiles v. Heinrich*, 11 N. D. 31, 88 N. W. 734, questioning whether mandamus is appealable as from trial by court without jury.

9 N. D. 96, CHILSON v. BANK OF FAIRMOUNT, 81 N. W. 33.

Sufficiency of objection to complaint.

Cited in *Schweinber v. Great Western Elevator Co.* 9 N. D. 113, 81 N. W. 35, holding insufficient, general objection to admission of evidence because complaint does not state facts sufficient to constitute a cause of action; *James River Nat. Bank v. Purchase*, 9 N. D. 280, 83 N. W. 7, holding insufficient, objection at opening of trial to introduction of any evidence on ground that complaint does not state a cause of action where attention is not directed to particular defect relied on; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357, holding objection to the introduction of evidence on the ground that complaint fails to set up cause of action is insufficient where it fails to point out the alleged deficiency.

9 N. D. 100, RICHARDSON v. CAMPBELL, 81 N. W. 31.

Procedure on appeal from justice.

Followed in *Lough v. White*, 14 N. D. 353, 104 N. W. 518, holding that service of both notice and undertaking within the statutory period is prerequisite to jurisdiction of appeal from Justice.

Cited in *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860, holding that on appeal from justice court there must first be a service of notice and of undertaking on adverse party and then a filing of the notice and undertaking in the clerk's office; *Deardoff v. Thorstensen*, 16 N. D. 355, 113 N. W. 616, holding that on appeal from Justice service and filing of notice and undertaking must be within the statutory period; *Aneta Mercantile Co. v. Groseth*, 20 N. D. 137, 127 N. W. 718, holding stipulation to continue case over term not waiver of prerequisites to transfer of jurisdiction from justice of peace to district court.

9 N. D. 104, DOBLER v. STROBEL, 81 AM. ST. REP. 530, 81 N. W. 37.

9 N. D. 108, SLUGA v. WALKER, 81 N. W. 282.

Time for entering judgment in justice court.

Cited in *State ex rel. Collier v. Houston*, 36 Mont. 178, 92 Pac. 471, 10 A. & E. Ann. Cas. 1027, holding that a Justice loses jurisdiction by trying the case under advisement without consent of the parties; *Peterson v. Hansen*, 15 N. D. 198, 107 N. W. 528, holding that statutory provision that Justice shall enter judgment "immediately" must be construed to mean "within reasonable time."

9 N. D. 112, NATIONAL CASH-REGISTER CO. v. WILSON, 81 N. W. 285.

Effect of failure to bring up all evidence on appeal.

Cited in *Eakin v. Campbell*, 10 N. D. 416, 87 N. W. 991, holding judgment on certificate not conclusive that statement on appeal contains all the evidence offered in the trial court where it appears on its face that all evidence has not been incorporated therein.

Failure of foreign corporation to bring itself within state law.

Cited in *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 893, holding that failure to bring a bona fide contract of a foreign corporation is not rendered void by its failure to comply with statutory prerequisites as to doing business within state; *Underwood Typewriter Co. v. Figgott*, 60 W. Va. 532, 15 E. 664, on same point.

Questioned in *State use of Hart-Parr Co. v. Robb-Lawrence Co.* 15 N. D. 55, 106 N. W. 406, but holding that burden is not upon foreign corporation to prove compliance with state laws as prerequisite to right of action.

9 N. D. 113, SCHWEINBER v. GREAT WESTERN ELEVATOR CO. 81 N. W. 35.

Form of objection to sufficiency of complaint.

Cited in *James River Nat. Bank v. Purchase*, 9 N. D. 280, 83 N. W. 100, holding insufficient, objection at opening of trial to introduction of evidence on ground that complaint does not state a cause of action where attention is not directed to particular defect relied on; *Pine Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357, refusing to consider objection based upon objection to complaint which failed to point out specific wherein it was deficient.

Who may maintain trover.

Cited in note in 9 N. D. 631, on who may maintain trover.

Evidence in trover.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

9 N. D. 115, STOREY v. MURPHY, 81 N. W. 23.

Right of taxpayer to question acts of county board.

Distinguished in *Torgrinson v. Norwich School Dist.* No. 31, 14 N. D. 10, 103 N. W. 414, where a taxpayer sought to enjoin the levy of a

Authority of county to employ special counsel.

Cited in *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161, holding county board is without authority to employ special counsel and that since such a contract is void it is not susceptible of ratification.

Authority of county to contract for collection of taxes.

Cited in *State ex rel. Workman v. Goldthait*, 172 Ind. 210, 87 N. E. 133, 19 A. & E. Ann. Cas. 737; *State v. Dickinson County*, 77 Kan. 540, 16 L.R.A.(N.S.) 476, 95 Pac. 392; *Stevens v. Henry County*, 218 Ill. 468, 4 L.R.A.(N.S.) 339, 75 N. E. 1024, 4 A. & E. Ann. Cas. 136 (reversing 120 Ill. App. 344),—denying authority of county board to employ "tax ferrets."

Authority of county commissioners to contract.

Cited in *Grannis v. Blue Earth County*, 81 Minn. 55, 83 N. W. 495, holding ultra vires and void, a contract with county commissioners for the performance of services in discovering unassessed personalty, since other officers are charged by law with seeing that all such property is assessed and placed on the tax rolls.

9 N. D. 131, EMMONS COUNTY v. BENNETT, 81 N. W. 22.**Effect of tax sale.**

Cited in *Oakland Cemetery Asso. v. Ramsey County*, 98 Minn. 404, 116 Am. St. Rep. 377, 108 N. W. 857, on the operation of a tax sale to cut off all prior tax liens; *Patton v. Cass County*, 13 N. D. 351, 102 N. W. 174, holding that lands sold for taxes and bid in by state cannot, after becoming forfeited lands, be again sold for later taxes.

Appellate procedure in tax cases.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, as an instance of a similar statute being before the supreme court without any question of appellate procedure having been raised.

9 N. D. 134, OWEN v. COOK, 47 L.R.A. 646, 81 N. W. 285.**Negligence as matter of law.**

Cited in *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, holding that negligence is question of law only when conceded facts are such as would lead fair minded men to but one conclusion.

9 N. D. 140, CRAIG v. HERZMAN, 81 N. W. 288, Affirmed in 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703.**Priorities between mortgage and mechanic's lien.**

Cited in *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423, holding that court may direct sale of mortgaged property under mechanic's lien and distribute the proceeds according to priorities.

9 N. D. 146, STATE v. PEOPLE, 82 N. W. 749.**9 N. D. 149, STATE v. KING, 82 N. W. 423.**

9 N. D. 151, NORTHWOOD TRUST & SAFETY BANK v. M. NUSSON, 82 N. W. 748.

9 N. D. 154, MAGNUSSON v. LINWELL, 82 N. W. 746.

Conclusiveness of decision on motion for new trial.

Cited in *Lowry v. Piper*, 20 N. D. 637, 127 N. W. 1046, holding that overruling motion for new trial will not be reversed where there was evidence of substantial character to support it.

9 N. W. 157, MAGNUSSON v. LINWELL, 82 N. W. 743.

Conclusiveness of verdict on conflicting evidence.

Cited in *Flath v. Casselman*, 10 N. D. 419, 87 N. W. 988, holding that sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial; *Action v. Fargo & M. Street R. Co.*, 10 N. D. 434, 129 N. W. 225, holding that refusal of trial court to direct verdict will not be reversed where verdict was supported by substantial evidence; *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 1046; *Lang v. Bailes*, 19 N. D. 582, 125 N. W. 891,—holding that refusal of court to set aside verdict will not be reversed, where there is substantial conflict in evidence.

9 N. D. 163, STATE v. ROSENCRANS, 82 N. W. 422.

Possession of stolen property.

Cited in note in 101 Am. St. Rep. 497, on possession of stolen property as evidence of guilt.

9 N. D. 165, STATE v. YOUNG, 82 N. W. 420.

Circumstantial evidence.

Cited in note in 97 Am. St. Rep. 781, on circumstantial evidence.

Instructions on burden of proof.

Followed in *State v. Johnson*, 14 N. D. 288, 103 N. W. 565, holding that instruction that each link of chain of circumstantial evidence need not be proved beyond reasonable doubt is prejudicial error in criminal prosecution.

9 N. D. 170, OSWALD v. MORAN, 82 N. W. 741.

Necessity for new notice of trial after remand.

Disapproved in *Re Olson*, 17 S. D. 1, 94 N. W. 421, holding new notice of trial after remand of case is unnecessary under statute providing that case remains upon calendar after notice of trial until disposed of.

9 N. D. 175, STATE v. MURPHY, 82 N. W. 738.

Sufficiency of affidavit for continuance.

Cited in *State v. Stevens*, 19 N. D. 249, 123 N. W. 888, holding that affidavit insufficient which fails to show probability of procuring witnesses nor truth of matters to be proved by him, nor inability to prove facts without other witnesses.

9 N. D. 182, **MERCHANT v. PIELKE**, 82 N. W. 878, Later phases of same case in 9 N. D. 245, 83 N. W. 18; 10 N. D. 48, 84 N. W. 574.

9 N. D. 186, **STATE v. MESSNER**, 82 N. W. 737.

9 N. D. 188, **MAHNKEN v. MAHNKEN**, 82 N. W. 870.

Mental suffering as ground for divorce.

Cited in *De Roche v. De Roche*, 12 N. D. 17, 94 N. W. 767, 1 A. & E. Ann. Cas. 221, holding evidence of mental suffering inflicted upon spouse sufficient to support decree of divorce; *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479, holding that grievous mental suffering may be sufficient to warrant divorce under statute, though not productive of perceptible bodily injury.

9 N. D. 192, **GARDNER v. GARDNER**, 82 N. W. 872.

9 N. D. 204, **SEARL v. SHANKS**, 82 N. W. 734.

Extent of justice's jurisdiction.

Cited in *Brown v. State*, 55 Tex. Crim. Rep. 572, 118 S. W. 139, on the territorial jurisdiction of a Justice of the peace.

9 N. D. 208, **WEBSTER v. FARGO**, 56 L.R.A. 156, 82 N. W. 732, Affirmed in 181 U. S. 294, 45 L. ed. 912, 21 Sup. Ct. Rep. 693.

Assessments according to frontage.

Cited in *State ex rel. Wheeler v. Ramsey County Dist. Ct.* 80 Minn. 293, 83 N. W. 183, upholding statute charging entire cost of paving on abutters, according to frontage; *Job v. Alton*, 189 Ill. 263, 59 N. E. 622, holding the same in the case of the construction of a sidewalk; *Whittaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590, upholding constitutionality of act authorizing assessments for local improvements by front-foot rule; *State v. Robert P. Lewis Co.* 82 Minn. 390, 53 L.R.A. 421, 85 N. W. 207, 86 N. W. 611, holding that an assessment of an annual frontage tax on lots in front of which water pipes are laid is not a taking of property without due process of law; *King v. Portland*, 38 Or. 402, 55 L.R.A. 812, 63 Pac. 2, holding that an assessment upon abutting property of the cost of a street improvement will be upheld whenever it is not patent and obvious that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners.

Cited in note in 23 L.R.A.(N.S.) 1128, 1147, 1181, on assessments for improvements by front-foot rule.

Apportionment of local assessment.

Cited in *Voris v. Pittsburg Plate Glass Co.* 163 Ind. 599, 70 N. E. 249, on the constitutionality of apportionment of local improvement assessment according to the frontage rule; *State ex rel. Hendricks v. Marion*

County, 170 Ind. 595, 85 N. E. 513, on validity of statute providing for apportionment of expense of local improvements according to benefits.

9 N. D. 213, MINNEAPOLIS & N. ELEVATOR CO. v. TRAIL COUNTY, 50 L.R.A. 266, 82 N. W. 727.

Assessment of personal property in hands of an agent.

Cited in Pioneer Fuel Co. v. Molloy, 131 Mich. 465, 91 N. W. 750, holding that the assessment of personal property of a nonresident under statute to the person having control makes such person liable and not the person who was erroneously supposed to have been owner of the property.

9 N. D. 224, WHITHED v. ST. ANTHONY & D. ELEVATOR CO. 50 L.R.A. 254, 81 AM. ST. REP. 562, 83 N. W. 238.

Rights of tenant in crops.

Cited in Bidgood v. Monarch Elevator Co. 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561, holding that a tenant does not acquire an interest in grain raised by him so that a mortgage executed thereon by him will attach where it was raised under a contract with the landlord where the title remained in the latter until the crop was divided between the tenant which was never done, but instead the entire crop was delivered to the elevator and storage checks issued to each for the respective shares.

Right of purchaser at foreclosure to profits pending redemption.

Cited in Little v. Worner, 11 N. D. 382, 92 N. W. 456, holding that purchaser in possession under mortgage foreclosure before expiration of period of redemption is not required to account for profits from land a refusal so to do does not extend period of redemption pending determination of rights of parties.

What is "rent."

Cited in Kendall v. Uland, 83 Neb. 527, 120 N. W. 152, defining rent and affirming it to be payable in money or produce; Martin v. Royer, 11 N. D. 504, 125 N. W. 1027, to point that rent may be paid in money for services.

9 N. D. 239, PRONDZINSKI v. GARBUTT, 83 N. W. 23, Lat. appeal in 10 N. D. 300, 86 N. W. 969.

Mode of correcting errors in judgment.

Distinguished in State ex rel. McClory v. Donovan, 10 N. D. 203, 86 N. W. 709, holding that a review, revision, or correction of errors of law cannot be obtained by motion in the trial court.

Setting aside judgment for irregularity.

Cited in Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 108, questioning whether entry of judgment pending motion for relief from default was not such an irregularity as would alone entitle defendant to have judgment set aside.

Entry of judgment without findings.

Cited in School Dist. No. 3 v. Western Tube Co. 13 Wyo. 304, 80 P. 155, holding that entry of judgment without findings constitutes mere

an irregularity for which the judgment may be vacated or reversed, but does not render it void.

Non appealable orders.

Followed in *Lough v. White*, 13 N. D. 387, 100 N. W. 1084, refusing to consider appeal from order dismissing appeal from justice court.

Cited in *Dibble v. Hanson*, 17 N. D. 21, 114 N. W. 371, 16 A. & E. Ann. Cas. 1210, holding an order dismissing an action is non appealable.

What is a double appeal.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, holding appeal from judgment and from two orders denying motion for new trial, made upon same grounds after judgment not double appeal.

Distinguished in *State ex rel. Laird v. Gang*, 10 N. D. 331, 87 N. W. 5, holding appeal from entire case in which an order denying motion to quash and an order overruling demurrer to complaint had been passed as well as final judgment entered not bad for duplicity when taken after expiration of time limited for appeal from the orders.

Disapproved in *Kinney v. Brotherhood of American Yeoman*, 15 N. D. 21, 106 N. W. 44, as approving cases holding that single appeal could not be taken from a judgment and an order but holding such approval to have been purely obiter.

9 N. D. 245, **MERCHANTS v. PIELKE**, 83 N. W. 18, Later phase of same case in 10 N. D. 48, 84 N. W. 574.

9 N. D. 249, **SHEPARD v. HANSON**, 83 N. W. 20, Reaffirmed on later appeal in 10 N. D. 194, 86 N. W. 704.

Indorsee in possession of negotiable paper.

Cited in *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614, affirming that burden is not upon holder of negotiable instrument to prove that he is bona fide taker in due course.

Powers of guardians.

Cited in note in 89 Am. St. Rep. 283, on common law powers of guardians.

9 N. D. 254, **FOOGMAN v. PATTERSON**, 83 N. W. 15.

Selection of homestead.

Cited in *Brokken v. Baumann*, 10 N. D. 453, 88 N. W. 84, holding that failure to file a declaration of homestead tends to show that the owner of the land never intended to reside thereon.

Encumbrance of lands in absence of homestead declaration.

Cited in *Wegner v. Lubenow*, 12 N. D. 95, 95 N. W. 442, holding that failure of wife to join in lease does not invalidate the same where homestead has not been selected and there remains ample area from which it may be set aside.

9 N. D. 263, CASS COUNTY v. AMERICAN EXCH. STATE BANK
83 N. W. 12, Reaffirmed on later appeal in 11 N. D. 238,
N. W. 59.

Effect of erasure of one signature on bond.

Cited in *Hilleboe v. Warner*, 17 N. D. 594, 118 N. W. 1047, holding that erasure of one signature releases all sureties who signed after erasure of signature and prior to the erasure; *Cass County v. American Exch. State Bank*, 11 N. D. 238, 91 N. W. 59, holding the bond valid as to all who signed without reference to erased signature and invalid as to one who signed subsequent to erased signature but prior to its erasure.

9 N. D. 268, GJERSTADENGEN v. HARTZELL, 81 AM. ST. REP.
575, 83 N. W. 230.

Estoppel to plead statute of frauds.

Cited in note in 134 Am. St. Rep. 177, on estoppel to plead statute of frauds in actions on contracts not to be performed within a year.

9 N. D. 278, KADLEC v. PAVIK, 83 N. W. 5.

Presumption against unlawful act.

Cited in *Holten v. Beck*, 20 N. D. 5, 125 N. W. 1048, holding that shareholder will not be presumed to be acting unlawfully.

9 N. D. 280, JAMES RIVER NAT. BANK v. PURCHASE, 83 N. W. 7.

9 N. D. 283, WELTER v. LEISTIKOW, 83 N. W. 9.

9 N. D. 285, BALLOU v. BERGVENDSEN, 83 N. W. 10.

Authority of broker with whom property is "listed."

Cited in *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253; *Brandt v. Britten*, 11 N. D. 376, 92 N. W. 453,—holding that a "listing contract" confers no authority upon broker to execute a contract for sale; *Larsen v. O'Hara*, 98 Minn. 71, 116 Am. St. Rep. 342, 107 N. W. 821, 8 A. E. Ann. Cas. 849, holding that a broker's authority to find a buyer confers no implied authority to execute a contract of sale; *Balkema v. Searle*, 116 Iowa, 374, 89 N. W. 1087, holding that an offer to sell leasehold property leaving terms of payment and disposition of rents uncertain confers upon broker no authority further than to find a buyer; *Lichten v. Daggett*, 23 S. D. 380, 121 N. W. 862, holding that letter from owner to real estate agent, stating price of land and terms, and asking that agent communicate with him, did not authorize agent to execute contract for purchase of land.

Cited in note in 17 L.R.A.(N.S.) 212, on power of real-estate broker to make contract of sale.

9 N. D. 290, **MCDONALD v. NORDYKE MARMON CO.** 83 N. W. 6.

Notice prerequisite to foreclosure by advertisement.

Cited in *Grandin v. Emmons*, 10 N. D. 223, 54 L.R.A. 610, 88 Am. St. Rep. 680, 86 N. W. 723, holding publication of notice of foreclosure under power of sale once each week for six successive weeks sufficient, though only thirty seven days elapse between first publication and day of sale; *Orvik v. Casselman*, 15 N. D. 34, 105 N. W. 1105, holding that sale on fortieth day after first publication of notice sufficiently complies with statute or to notice requisite in foreclosure by advertisement and prescribing six publications upon consecutive weeks.

9 N. D. 293, **MCDONALD v. BEATTY**, 83 N. W. 224, Later appeal in 10 N. D. 511, 88 N. W. 281.

Extension of time for settling case for review.

Cited in *Peterson v. Hansen*, 15 N. D. 198, 107 N. W. 528, holding that the discretion of the trial court to extend time for settling statement of the case will be disturbed only where there was manifest abuse; *Smith v. Hoff*, 20 N. D. 419, 127 N. W. 1047, holding it abuse of discretion to deny reasonable extension of time for settling statement of case, where appeal is being prosecuted bona fide upon meritorious grounds and there was reasonable excuse for failure to take preliminary steps within time limited; *Folsom v. Norton*, 19 N. D. 722, 125 N. W. 310, holding that order granting extension should not be granted where affidavits do not show sufficient reason therefor.

Settlement of statement of case after appeal.

Distinguished in *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479, holding that district court had jurisdiction after appeal to settle statement of case.

9 N. D. 303, **DAKOTA INVEST. CO. v. SULLIVAN**, 81 AM. ST. REP. 584, 83 N. W. 233.

9 N. D. 306, **DALRYMPLE v. SECURITY LOAN & T. CO.** 83 N. W. 245, Decision on the merits in 11 N. D. 65, 88 N. W. 1033.

Demurrer for misjoinder of parties.

Cited in *Mader v. Plano Mfg. Co.* 17 S. D. 553, 97 N. W. 843, holding that misjoinder of parties cannot be reached by demurrer in the absence of prejudice thereby; *Randall v. Johnstone*, 20 N. D. 493, 128 N. W. 687, holding that demurrer for nonjoinder will not be sustained where demurrant has no interest in having omitted party made a defendant, and is in no way prejudiced by omission.

9 N. D. 319, **FIRST NAT. BANK v. RED RIVER VALLEY NAT. BANK**, 83 N. W. 221.

Waiver of objection to ruling on motion for directed verdict.

Cited in *Madsen v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 654, 113

N. W. 872; Ward v. McQueen, 13 N. D. 153, 100 N. W. 253,—holding defendant waives objection to refusal to direct verdict at close of plaintiff's case where he thereafter introduces evidence and fails to renew motion at the end of close of all the evidence.

Presumption of consideration.

Cited in Grimarud Shoe Co. v. Jackson, 22 S. D. 114, 115 N. W. 6, holding that written agreement raises presumption of sufficient consideration therefor.

Measure of damages for conversion.

Cited in note in 9 N. D. 636, on damages in actions for trover and conversion.

9 N. D. 325, ANDREWS v. STATE BANK, 83 N. W. 235.

9 N. D. 329, MOONEY v. WILLIAMS, 83 N. W. 237.

Bona fide holder of negotiable paper.

Cited in National Bank v. Pick, 13 N. D. 74, 99 N. W. 63, holding that a corporate payee of negotiable paper which may not enforce the same without notice imposed on indorsee by proof that note was obtained by fraud, not having complied with statute as to doing business in state, may nevertheless transfer the same in due course of business to a bona fide purchaser who may enforce.

Burden of proving good faith in purchase of note.

Cited in First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867, holding that burden of proving purchase for value before maturity in good faith without notice imposed on indorsee by proof that note was obtained by fraud. Porter v. Andrus, 10 N. D. 558, 88 N. W. 567, holding that proof of unauthorized and fraudulent delivery of note by payee's agent casts burden on plaintiff of proving purchase for value in due course.

9 N. D. 331, LADEROUTE v. CHALE, 83 N. W. 218.

9 N. D. 337, BOYD v. VON NEIDA, 83 N. W. 329.

Constructive rejection of claim against estate.

Cited in Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558; Singer Austin, 19 N. D. 546, 125 N. W. 560,—holding failure of administrator to act on claim during ten days after presentation a rejection thereof.

Distinguished in Re Smith, 13 N. D. 513, 101 N. W. 890, holding that the constructive rejection of a claim against a decedent's estate without raising right of action thereon, does not bar right of administrator to voluntarily settle.

9 N. D. 339, NORTHWESTERN TELEPH. EXCH. CO. v. NORTH DAKOTA P. R. CO. 83 N. W. 215.

Right to bring in additional parties.

Cited in St. Paul, M. & M. R. Co. v. Blakemore, 19 N. D. 134, 122 N. W. 1.

W. 333, holding that additional parties cannot be brought in, by order of court, after entry of judgment in pending action.

9 N. D. 346, ST. ANTHONY & D. ELEVATOR CO. v. BOTTINEAU COUNTY (ST. ANTHONY & D. ELEVATOR CO. v. SOUCIE), 50 L.R.A. 262, 83 N. W. 212.

Avoiding seizure under illegal personal property tax.

Cited in Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260, holding that plaintiff had an adequate remedy at law and equity will not interfere to prevent collection of taxes on personalty; Schaffner v. Young, 10 N. D. 245, 86 N. W. 733, holding that the collection of a tax upon personal property will be enjoined only where the property is exempt, the tax unauthorized, or imposed by a void statute, or the collection is attempted to be enforced by officers acting outside their jurisdiction.

Duress or voluntary payment.

Cited in C. & J. Michel Brewing Co. v. State, 19 S. D. 302, 70 L.R.A. 911, 103 N. W. 40, holding that payment of taxes by nonresident to avoid prosecution for sale of liquor without such payment was not a payment under duress notwithstanding unconstitutionality of the law imposing the tax.

Recovery back of money paid.

Cited in Chicago & N. W. R. Co. v. Rolfsen, 23 S. D. 405, 122 N. W. 343, holding that illegal personal property tax, paid under protest, may be recovered back.

Cited in note in 94 Am. St. Rep. 429, on recovery back of voluntary payment.

9 N. D. 353, STATE v. BELYEA, 83 N. W. 1.

Included lesser offense.

Cited in State v. Climie, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. Rep. 211, holding indictment for assault and battery with a dangerous weapon supports conviction for included offense of assault and battery.

Cited in notes in 21 L.R.A.(N.S.) 15, on conviction of lower or different degree in prosecution for homicide; 63 L.R.A. 907, 913, 920, on homicide in attempting or committing abortion.

9 N. D. 364, CLARKE v. OLSON, 83 N. W. 519.

Deposit of securities by foreign building and loan association.

Cited in Lewis v. Clark, 64 C. C. A. 138, 129 Fed. 570, holding that the deposit of securities with state officers by a foreign building and loan association as a condition precedent to doing business in the states waives any right of the association or its stock holders to question the validity of the trust created although it results in a preference to the resident stockholders.

Cited in note in 9 L.R.A.(N.S.) 462, on validity and effect of statute

requiring deposit of securities by building and loan association as prerequisite to right to transact business.

Availability of defense of ultra vires.

Cited in *Tourtelot v. Whithed*, 9 N. D. 467, 84 N. W. 8, holding the defense of ultra vires cannot be set up by either party to a executed contract with a corporation, where such contract is not prohibited by positive law and is ultra vires only because of the circumstances under which it was made.

9 N. D. 379, *RE SIMPSON*, 83 N. W. 541, Motion for reinstatement in 11 N. D. 526, 93 N. W. 918.

Jurisdiction of disbarment proceedings.

Cited in *Re Thatcher*, 80 Ohio St. 492, 89 N. E. 39, holding that disbarment proceedings are inherently within the jurisdiction of the supreme court regardless of the failure of the constitution to specifically confer such jurisdiction.

— Grounds for disbarment.

Cited in *Re Voss*, 11 N. D. 540, 90 N. W. 15, holding that wilful failure of prosecuting attorney to exercise his duties in the enforcement of penal statutes is a statutory misdemeanor involving moral turpitude warranting his removal from office and disbarment; *Re Egan*, 22 S. D. 355, 117 N. W. 874, holding that specification of certain grounds of disbarment by statute does not prevent disbarment for other grounds.

Cited in note in 19 L.R.A.(N.S.) 414, on disbarment or suspension of attorney for withholding client's money or property.

— Sufficiency of evidence.

Cited in *Re Burnette*, 70 Kan. 229, 78 Pac. 440, holding that a charge of accusation is not alone sufficient to support disbarment even in the absence of accused.

Admission of depositions in disbarment proceedings.

Distinguished in *State v. Mosher*, 128 Iowa, 82, 103 N. W. 105, 108 N. W. 221, 82 & E. Ann. Cas. 984, holding that depositions are admissible in evidence in disbarment proceedings.

9 N. D. 405, *STATE v. MONTGOMERY*, 83 N. W. 873.

Included lesser offense.

Cited in *State v. Climie*, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. 211, holding indictment for assault and battery with a dangerous weapon supports conviction for assault and battery.

9 N. D. 409, *STATE v. STEWART*, 83 N. W. 869.

Obtaining money by false pretenses.

Cited in *State v. Brown*, 143 Wis. 405, 127 N. W. 956, holding it sufficient to constitute false pretenses, that they were calculated to and did deceive.

Cited in notes in 6 L.R.A.(N.S.) 370, on offense of obtaining money by false pretenses as affected by improbability of representations, or by failure to investigate; 6 L.R.A.(N.S.) 366, on reliance on, as element of offense of obtaining property by, false pretenses.

9 N. D. 419, *STATE v. RYAN*, 83 N. W. 865.

What is a false token.

Distinguished in *State v. Stewart*, 9 N. D. 409, 83 N. W. 869, holding that a false certificate by which one obtains money from a county may be a false token, although it is invalid in neither creating, nor purporting to create, any liability against the county, and he would not have obtained the money if the county officers had not been negligent.

9 N. D. 428, *JOY v. ELTON*, 83 N. W. 875.

Parties bound by judgment.

Cited in *Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392, holding that an order discharging an assignee for benefit of creditors is a final judgment in effect and as such is binding on all parties in interest who have submitted to the jurisdiction; *Sjoli v. Hogenson*, 19 N. D. 82, 122 N. W. 1008, holding final decree of distribution conclusive as against bondsmen of administrator.

9 N. D. 450, *STATE EX REL. WOLFE v. FALLEY*, 83 N. W. 860.

Original writ to protect political rights involving sovereignty of state.

Cited in note in 58 L.R.A. 855, on original jurisdiction of court of last resort in mandamus case.

Distinguished in *State ex rel. Steele v. Fabrick*, 17 N. D. 532, 117 N. W. 860, holding sovereignty or franchises of state not directly affected by proceedings for division of county; *State ex rel. Steele v. Fabrick*, 17 N. D. 532, 117 N. W. 860, holding that proceedings for the division of a county do not so affect the sovereignty or franchises of the state as to invoke the original jurisdiction of the supreme court.

Jurisdiction of dispute within party as to candidates.

Cited in *State ex rel. Granvold v. Porter*, 11 N. D. 309, 91 N. W. 944; *State ex rel. Howells v. Metcalf*, 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923,—holding that the courts have jurisdiction to determine which of two candidates presented to the proper public officer for place upon the ballot is the true nominee of the party; *State ex rel. Buttz v. Lindahl*, 11 N. D. 320, 91 N. W. 950, as an example of the supreme court assuming jurisdiction to determine which of two candidates truly represents the selection of the party; *Allen v. Burrow*, 69 Kan. 812, 77 Pac. 555, 2 A. & E. Ann. Cas. 539, holding that the courts may assume jurisdiction to settle controversies as to which of two candidates shall be placed upon Australian ballot where the tribunal erected by statute for that purpose has become disqualified.

Dak. Rep.—26.

What candidates entitled to have names on ballot.

Cited in *State ex rel. Fossler v. Lavik*, 9 N. D. 461, 83 N. W. 914, holding it duty of auditor to place on official ballot, nominations made by regular county convention of political party where two lists have been presented to him.

9 N. D. 458, KEOGH v. SNOW, 83 N. W. 864.

9 N. D. 461, STATE EX REL. FOSSER v. LAVIK, 83 N. W. 914.

Original jurisdiction of Supreme Court to protect political rights.

Cited in note in 58 L.R.A. 865, on original jurisdiction of court of last resort in mandamus case.

Distinguished in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860, holding sovereignty or franchises of state not directly affected by proceedings for division of county; *State ex rel. Byrne v. Wilcox*, 11 N. D. 329, 91 N. W. 955, refusing original writ of injunction at instance of private citizen to prevent change of election precincts of city the sovereignty of the state not being involved.

Judicial determination of authority of political convention.

Cited in *State ex rel. Buttz v. Lindahl*, 11 N. D. 320, 91 N. W. 950, holding that courts have jurisdiction to determine which of two rival conventions is the regular convention of the party.

Distinguished in *Walling v. Lansdon*, 15 Idaho, 282, 97 Pac. 396, holding that the courts will follow the law and go as far as is legally necessary to determine the legality of party conventions and the authority of delegates to participate therein.

— Right of delegates to participate.

Cited in *State ex rel. Granvold v. Porter*, 11 N. D. 309, 91 N. W. 944, holding that political convention has exclusive jurisdiction to determine the qualifications of its members.

Distinguished in *Walling v. Lansdon*, 15 Idaho, 282, 97 Pac. 396, holding that a minority of legally elected delegates cannot seat illegally elected delegates and thus deprive the legal majority of the right to organize and control the convention.

9 N. D. 464, STATE EX REL. ANDERSON v. FALLEY, 83 N. W. 913.

Formal filing of candidacy for elective office.

Cited in *Remster v. Sullivan*, 36 Ind. App. 385, 75 N. E. 860, holding that designation of the office and filing certification within statutory time are mandatory prerequisites to candidacy; *State ex rel. Eastham v. Dewey*, 73 Neb. 396, 102 N. W. 1015 (dissenting opinion), on mandatory nature of provision for filing nomination certificate within certain time; *Napton v. Meek*, 8 Idaho, 625, 70 Pac. 945, holding provision that nominee must file his declination at least thirty days before election is mandatory.

Time for filing certificate of nomination.

Cited in *State ex rel. Miller v. Burnham*, 20 N. D. 405, 127 N. W. 504.

holding fact that last day falls on Sunday or legal holiday does not change rule as to time for filing certificates of nominations.

9 N. D. 467, TOURTELOT v. WHITHED, 84 N. W. 8.

Powers of bank.

Cited in note in 50 L. ed. U. S. 537, on power of national bank to take corporate stock in satisfaction of debt or as collateral security.

Estoppel to set up ultra vires.

Cited in *Hunt v. Hauser Malting Co.* 90 Minn. 282, — N. W. —, holding stockholders of corporation which with their knowledge purchased and drew dividends for many years upon bank stock are estopped to set up ultra vires to escape liability when bank becomes insolvent; *Hill v. Shilling*, 69 Neb. 152, 95 N. W. 24, holding that a savings bank having acquired corporate stock in a bona fide effort to secure its investments must share the liability as well as other stockholders; *First Nat. Bank v. Bakken*, 17 N. D. 224, 116 N. W. 92, holding that bank must account for funds collected by its cashier as its agent though he acted ultra vires where it received benefit of transaction.

Illegal contract as distinguished from ultra vires.

Cited in *State ex rel. Carroll v. Corning State Sav. Bank*, 136 Iowa, 79, 113 N. W. 500, holding that creditors whose loans to savings bank were absolutely prohibited by law may not share with other creditors upon bank's insolvency and there is no estoppel created by the benefits received.

9 N. D. 480, ANDERSON v. GORDON, 52 L.R.A. 134, 83 N. W. 993.

9 N. D. 482, McCORMICK HARVESTING MACH. CO. v. RAE, 84 N. W. 346.

Extension of time releasing surety.

Cited in *Clark v. Gerstley*, 26 App. D. C. 205, holding that in order to release surety a plea that there has been extension of time for payment must show that the extension was agreed upon in a way to bind the principal and for a definite time; *Windhorst v. Bergendahl*, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544, holding giving of new note payable one year later constitutes sufficient consideration for extension to discharge nonassenting surety.

9 N. D. 485, GULL RIVER LUMBER CO. v. BRIGGS, 84 N. W. 349.

Mechanics' lien on building alone.

Followed in *Green v. Tenold*, 14 N. D. 46, 116 Am. St. Rep. 638, 103 N. W. 398, holding that no mechanics' lien can attach to building unless the owner has some salable interest in the land and hence buildings on homestead prior to issuance of patent are exempt.

Cited in *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703,

sustaining statute creating right to mechanics' lien upon buildings erected on government land the statute being subsequent to and in remedy of doctrine of the cited case.

Cited in note in 62 L.R.A. 371, 375, on mechanics' liens upon buildings distinct from land.

Distinguished in *Salzer Lumber Co. v. Clafin*, 16 N. D. 601, 113 N. W. 1036, holding mechanic's lien will attach to buildings on land held under contract for deed and subsequent termination of the contract will not affect the lien.

Disapproved in *Green v. Tenold*, 14 N. D. 46, 116 Am. St. Rep. 638, N. W. 398 (dissenting opinion), on the propriety of mechanic's lien upon building alone.

9 N. D. 489, HENNIGES v. PASCHKE, 81 AM. ST. REP. 588, N. W. 350.

Rights of assignee of mortgage as against subsequent good faith purchaser.

Cited in note in 15 L.R.A. (N.S.) 1033, on rights of assignee of mortgage as against subsequent bona fide purchasers or encumbrancers relying on apparent discharge.

9 N. D. 498, CHILSON v. HOUSTON, 84 N. W. 354.

Fraudulent misrepresentations as to value.

Cited in *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032, holding false representations as to value, knowingly made with intent to deceive by one with full knowledge of character and condition of property, relied upon by one with slight knowledge of property and without other means of obtaining full knowledge, constitute such fraudulent misrepresentation as warrants rescission of contract.

Election of remedies for false representations.

Cited in *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026, holding that election to sue for deceit acts as a ratification of the contract and precludes rescission thereof.

9 N. D. 504, OLSON v. O'CONNER, 81 AM. ST. REP. 595, 84 N. W. 359.

Evidence of ownership of property.

Cited in *Jantzen v. Emanuel German Baptist Church*, 27 Okla. 473, 104 Pac. 1127, holding evidence as to ownership of property involved in dispute admissible where facts are clearly within knowledge of witnesses.

Ownership as a matter of opinion.

Cited in *Cate v. Fife*, 80 Vt. 404, 68 Atl. 1, sustaining the exclusion of testimony that witness owned the property when ownership was the ultimate fact to be determined in the case; *Red River Valley Nat. Bank v. Monson*, 11 N. D. 423, 92 N. W. 807, holding question "Did bank exercise any ownership over these notes?" called for a conclusion and was properly overruled.

Interest presumed from husband working wife's farm.

Cited in *Thurston v. Osborne-McMillan Elevator Co.* 13 N. D. 508, 101 N. W. 892, holding fact that husband works wife's farm does not overcome presumption of her ownership of crop.

Creditor's right to attack conveyance to wife.

Cited in note in 90 Am. St. Rep. 530, on attacks by creditors on conveyances made by husbands to wives.

9 N. D. 512, LOKKEN v. MILLER, 84 N. W. 368.**Acceptance obligation of another as payment.**

Cited in *Plano Mfg. Co. v. Doyle*, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529, holding agreement of creditor's agent to assume the debt which agreement is repudiated by the creditor does not operate as a payment.

9 N. D. 515, GREGG v. BALDWIN, 84 N. W. 373.**9 N. D. 520, WELLS-STONE MERCANTILE CO. v. AULTMAN, M. & CO. 84 N. W. 375, Later case involving same deed in 9 N. D. 551, 84 N. W. 479.****9 N. D. 527, MONTGOMERY v. HARKER, 84 N. W. 369.****Certificate of insurance commissioner as prerequisite to right to issue policies.**

Cited in *Montgomery v. Whitbeck*, 12 N. D. 385, 96 N. W. 327, holding that a policy written prior to issuance of insurance commissioner's certificate is of no force to bind the company.

Necessity for demanding retrial on appeal.

Cited in *Security Improv. Co. v. Cass County*, 9 N. D. 553, 84 N. W. 477, holding right to have question of fact retried on appeal lost by failing to incorporate demand for retrial in the statement of the case.

Effect of nonpayment of premium.

Cited in *J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co.* 18 N. D. 253, 119 N. W. 1048, holding that no recovery can be had on policy of mutual fire insurance company for loss occurring after cancelation for nonpayment of premium as provided for in by-laws.

9 N. D. 536, RAVICZ v. NICKELLS, 84 N. W. 353.**Pleading defense or counterclaim.**

Cited in *Regan v. Jones*, 14 N. D. 591, 105 N. W. 613, holding that facts available as either a counterclaim or defense when specifically pleaded as a defense cannot be construed as a counterclaim.

9 N. D. 538, SWEIGLE v. GATES, 84 N. W. 481.**Invalidity of tax deed.**

Cited in *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227, holding tax

deed otherwise regular and valid, worthless if issued pursuant to sale based on illegal notice.

Irregularities in tax as avoiding sale.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, as not decided with reference to statutory provision curing defects in tax not questioned prior to tax sale unless such defects were jurisdictional.

Sufficiency of description in notice of tax sale.

Cited in *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97, holding insufficient description of property in notice of tax sale as "a w 4 of s e 4" of specified section, township and range.

Limitations started by void tax sale.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding statute of limitations not set in motion by tax deed based on void tax; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, holding that limitations do not run against right to redeem from sale for delinquent taxes based on void assessment.

Cited in notes in 27 L.R.A.(N.S.) 348-352, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes; 8 L.R.A.(N.S.) 161, on applicability of statute limiting time for attack on tax sale, to sale under proceedings void for jurisdictional defects, under which no possession taken.

Distinguished in *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, holding a deed issued upon a void tax sale sufficient color of title to serve as a basis upon which a party in open, adverse, and undisputed possession under, it may found a legal title under N. D. Rev. Codes 1899, § 3491a; *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, where limitations had run against right to question tax sale for taxes of two years and the validity of the sale as to one year's taxes was not questionable; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding that under later statute limiting time for questioning tax sale an erroneous inclusion of void taxes in a sale otherwise valid is a mere irregularity which is not fatal to the sale.

Listing realty in owner's name.

Cited in *Hertzler v. Freeman*, 12 N. D. 187, 96 N. W. 294, as construing a statute wherein assessor was specifically directed to list real estate in name of true owner and holding a different statute to require the same by implication.

Distinguished in *Hertzler v. Freeman*, 12 N. D. 187, 96 N. W. 294, holding that in the absence of mandatory statute the listing of tax in the name of another than the owner is not fatal to its validity; *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, as not applicable under later statutes wherein the method of listing tax is not made mandatory.

9 N. D. 551, *SCOTT v. JONES*, 84 N. W. 479.

9 N. D. 553, **SECURITY IMPROV. CO. v. CASS COUNTY**, 84 N. W. 477.

Right to trial de novo on appeal.

Cited in *Douglas v. Glazier*, 9 N. D. 615, 84 N. W. 552, holding that new trial cannot be had on appeal in case tried by the court where statement of the case specifies no issue of fact which appellant desired to have retried.

— Necessity for demanding.

Cited in *Bank of Park River v. Norton*, 14 N. D. 143, 104 N. W. 525, denying a review of the evidence where appeal was not for trial de novo from trial by court; *Douglas v. Richards*, 10 N. D. 366, 87 N. W. 600, holding insufficient, demand in statement on appeal that court "retry every question of fact and of law which in any way pertains to such tax."

9 N. D. 559, **TRONSON v. COLBY UNIVERSITY**, 84 N. W. 474.

9 N. D. 566, **STATE EX REL. MCCLORY v. McGRUER**, 84 N. W. 363.

Stores of liquor as evidence of nuisance.

Cited in *State ex rel. Kelly v. Nelson*, 13 N. D. 122, 99 N. W. 1077, holding that finding of liquor upon premises of accused in prima facie evidence of a liquor nuisance only when such finding is made under authority of search warrant.

Liquor nuisance by one holding permit to sell.

Cited in *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709, holding disregarded druggist's permit no protection from prosecution for sale of intoxicating liquors; *State v. Erickson*, 14 N. D. 139, 103 N. W. 389, holding that a permit to sell liquor does not exempt the holder from the statute regarding liquor nuisance where there are illegal sales.

Necessity for demanding trial de novo.

Cited in *Security Improv. Co. v. Cass County*, 9 N. D. 553, 84 N. W. 477, holding right to have question of fact retried on appeal lost by failing to incorporate demand for retrial in the statement of the case; *Bank of Park River v. Norton*, 14 N. D. 143, 104 N. W. 525, refusing to review evidence where in appeal from court trial appellant has not demanded trial de novo.

9 N. D. 575, **BOLTON v. DONAVAN**, 84 N. W. 357.

Appealable orders.

Cited in *Northern P. R. Co. v. Barlow*, 20 N. D. 197, 126 N. W. 233, holding order which involves merits of action or some part thereof, appealable; *Robertson Lumber Co. v. Jones*, 13 N. D. 112, 99 N. W. 1082, holding order granting change of venue, appealable; *St. Paul, M. & M. R. Co. v. Blakemore*, 17 N. D. 67, 114 N. W. 730, holding order directing clerk of court to retain proceeds of judgment in condemnation pending the adjudication of tax liens on the condemned property, appealable; *Hone-rine Min. & Mill. Co. v. Tallerday, Steel Pipe & Tank Co.* 30 Utah, 449,

85 Pac. 626, holding order quashing a service of summons which does not have the effect of dismissing the action, not final and appealable.

Distinguished in *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701, holding that order involving merits of action and necessarily affecting judgment may be reviewed on appeal from judgment.

9 N. D. 580, RILEY v. RILEY, 84 N. W. 347.

Alteration of instruments.

Cited in note in 86 Am. St. Rep. 128, on unauthorized alteration of written instruments.

Burden upon one disputing written instrument.

Cited in *Northwestern F. & M. Ins. Co. v. Lough*, 13 N. D. 601, 102 N. W. 160, holding party asserting deed to be an equitable mortgage must bring clear, satisfactory and specific proof; *Carter v. Carter*, 14 N. D. 66, 103 N. W. 425, holding evidence to establish resulting trust in realty must be of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt.

9 N. D. 583, EMMONS COUNTY v. FIRST NAT. BANK, 84 N. W. 379.

Laws authorizing tax sales.

Followed in *Purcell v. Farm Land Co.* 13 N. D. 327, 100 N. W. 700, holding law for the collection of taxes by proceedings against the land taxed to be constitutional.

Attack upon tax sale.

Distinguished in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding that the statutory limitation upon attacks on a tax sale applies to bar attack upon judgment on which sale was based providing the sale itself was valid.

— For irregularities.

Cited in *Darling v. Purcell*, 13 N. D. 288, 100 N. W. 726, holding mere informality in certification of resolution designating official paper for publishing delinquent tax list is not fatal to tax sale; *Darling v. Purcell*, 13 N. D. 288, 100 N. W. 726, holding that error of county treasurer in computing amount of interest and penalty does not render void a tax judgment based upon such computation.

Necessity for notice in tax proceedings.

Cited in *Emmons County v. Thompson*, 9 N. D. 598, 84 N. W. 385, holding personal notice to land owner not essential in proceeding to recover judgment against land for subsequent taxes.

Directory provision as to letting contract for local improvements.

Cited in *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90, holding that a statute requiring the city council, upon letting a contract for paving, to forthwith appoint a special assessment committee, is directory only.

9 N. D. 598, EMMONS COUNTY v. THOMPSON, 84 N. W. 385.

Followed without discussion in *Emmons County v. Cranmer*, 9 N. D.

608, 84 N. W. 1117; *Emmons County v. Davidson*, 9 N. D. 608, 84 N. W. 1117; *Emmons County v. Davidson*, 9 N. D. 609, 84 N. W. 1117; *Emmons County v. Baker*, 9 N. D. 609, 84 N. W. 1117; *Emmons County v. Couch*, 9 N. D. 609, 84 N. W. 1117; *Emmons County v. Cranmer*, 9 N. D. 610, 84 N. W. 1117; *Emmons County v. Gauger*, 9 N. D. 610, 84 N. W. 1117; *Emmons County v. Kelly*, 9 N. D. 610, 84 N. W. 1117; *Emmons County v. Lilly*, 9 N. D. 611, 84 N. W. 1117; *Emmons County v. McKenzie*, 9 N. D. 611, 84 N. W. 1118 (a); *Emmons County v. McKenzie*, 9 N. D. 611, 84 N. W. 1118 (b); *Emmons County v. McKenzie*, 9 N. D. 612, 84 N. W. 1118; *Emmons County v. McLain*, 9 N. D. 612, 84 N. W. 1118; *Emmons County v. Mellon*, 9 N. D. 612, 84 N. W. 1118; *Emmons County v. Mellon*, 9 N. D. 613, 84 N. W. 1118 (a); *Emmons County v. Mellon*, 9 N. D. 613, 84 N. W. 1118 (b); *Emmons County v. Robinson*, 9 N. D. 613, 84 N. W. 1118; *Emmons County v. Thistlewaite*, 9 N. D. 614, 84 N. W. 1118 (a); *Emmons County v. Thistlewaite*, 9 N. D. 614, 84 N. W. 1118 (b); *Emmons County v. Wilson*, 9 N. D. 615, 84 N. W. 1119.

Tax sales.

Followed in *Purcell v. Farm Land Co.* 13 N. D. 327, 100 N. W. 700, upholding constitutionality of tax sale statute.

—Notice of.

Cited in *Woodrough v. Douglas County*, 71 Neb. 354, 98 N. W. 1092, holding that service by publication is sufficient notice in tax sale proceedings; *Cruser v. Williams*, 13 N. D. 284, 100 N. W. 721, holding that it is the fact of publication rather than the proof thereof that gives jurisdiction of tax sales.

- 9 N. D. 608, **EMMONS COUNTY v. CRANMER**, 84 N. W. 1117.
- 9 N. D. 608, **EMMONS COUNTY v. DAVIDSON**, 84 N. W. 1117.
- 9 N. D. 609, **EMMONS COUNTY v. DAVIDSON**, 84 N. W. 1117.
- 9 N. D. 609, **EMMONS COUNTY v. BAKER**, 84 N. W. 1117.
- 9 N. D. 609, **EMMONS COUNTY v. COUCH**, 84 N. W. 1117.
- 9 N. D. 610, **EMMONS COUNTY v. CRANMER**, 84 N. W. 1117.
- 9 N. D. 610, **EMMONS COUNTY v. GAUGER**, 84 N. W. 1117.
- 9 N. W. 610, **EMMONS COUNTY v. KELLY**, 84 N. W. 1117.
- 9 N. D. 611, **EMMONS COUNTY v. LILLY**, 84 N. W. 1117.
- 9 N. D. 611, **EMMONS COUNTY v. McKENZIE**, 84 N. W. 1118.
- 9 N. D. 612, **EMMONS COUNTY v. McKENZIE**, (a) 84 N. W. 1118.

9 N. D. 612, EMMONS COUNTY v. MCKENZIE, (b) 84 N. W. 1118.

9 N. D. 612, EMMONS COUNTY v. McLAIN, 84 N. W. 1118.

9 N. D. 612, EMMONS COUNTY v. MELLON, 84 N. W. 1118.

9 N. D. 613, EMMONS COUNTY v MELLON, (a) 84 N. W. 1118.

9 N. W. 613, EMMONS COUNTY v. MELLON, (b) 84 N. W. 1118.

9 N. D. 613, EMMONS COUNTY v. ROBINSON, 84 N. W. 1118.

9 N. D. 614, EMMONS COUNTY v. THISTLEWAITE, (a) 84 N. W. 1118.

9 N. D. 614, EMMONS COUNTY v. THISTLEWAITE, (b) 84 N. W. 1118.

9 N. D. 615, EMMONS COUNTY v. WILSON, 84 N. W. 1119.

9 N. D. 615, DOUGLAS v. GLAZIER, 84 N. W. 552.

Sufficiency of specifications of errors.

Cited in Douglas v. Richards, 10 N. D. 366, 87 N. W. 600, holding assignment, substantial compliance with statute as to specification of particular questions of fact of which a review is desired.

9 N. D. 618, STEWART v. GREGORY C. & CO. 84 N. W. 553.

9 N. D. 621, FIELDS v. MOTT, 84 N. W. 555.

Holding over as implied renewal of lease.

Cited in Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588, holding that occupancy after term of lease imports no duty to reinsure as required for the original term where the holding over was contemplated by the terms of the lease but reinsurance was not specified.

9 N. D. 623, MILER v. OAKWOOD TWP. 84 N. W. 556.

9 N. D. 627, BIDGOOD v. MONARCH ELEVATOR CO. 81 AM. ST. REP. 604, 84 N. W. 561.

Title to crops raised on leased land.

Cited in Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563, holding title to crops raised under lease providing that ownership shall remain in lessor until full performance of all conditions contingent on performance by lessee of all such conditions; Simmons v. McConville, 19 N. D. 787, 125 N. W. 304, holding that lessee cannot maintain conversion until division where contract provided that title to crops was to remain in lessor until divided.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 10 N. D.

10 N. D. 1, ANDREWS v. SCHMIDT, 84 N. W. 568.

Want of consideration as defense to note.

Cited in *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, to point that want of consideration is defense to note.

10 N. D. 5, COREY v. HUNTER, 84 N. W. 570.

Implied authority to receive payment on note.

Cited in *Hoffmaster v. Black*, 78 Ohio St. 1, 21 L.R.A.(N.S.) 52, 125 Am. St. Rep. 679, 84 N. E. 423, 14 A. & E. Ann. Cas. 877, holding that a debtor cannot make payment on note to any person at designated place who not having the note properly indorsed cannot show authority to receive payment; *Hoffmaster v. Black*, 78 Ohio St. 1, 21 L.R.A.(N.S.) 52, 125 Am. St. Rep. 679, 84 N. E. 423, 14 A. & E. Ann. Cas. 897, holding that creditor by accepting payments of interest made to an unauthorized person is not bound by a payment of a part of principal to this person.

Cited in note in 23 L.R.A.(N.S.) 418, 419, on effect of agent's nonpossession of security upon question of authority to receive payment.

10 N. D. 16, MINNESOTA THRESHER MFG. CO. v. HOLZ, 84 N. W. 581.

Time of making motion to vacate judgment.

Cited in *Freeman v. Wood*, 11 N. D. 1, 88 N. W. 721, holding that the statutory time limit of one year for making motion to vacate judgment void for lack of jurisdiction does not constitute a bar to remedy until one year after actual knowledge of judgment; *Martinson v. Marzolf*, 14 N. D. 301, 103 N. W. 937, holding that the year within which to move for

relief from default by reason of moving parties' mistake, surprise, inadvertence or excusable neglect begins to run only from date of actual notice of judgment.

Proper moving papers to vacate default judgment.

Cited in *McLaughlin v. Nettleton*, 25 Okla. 319, 105 Pac. 662, holding it not permissible to contradict allegations of merit as set up by applicant and supported by his affidavit; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, holding that motion to vacate must be based on affidavit of merits and proposed verified answer.

Distinguished in *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 130 N. W. 381, holding that a defense to the merits when embodied in an affidavit, merely, and not in a proposed answer, is not a substantial compliance with the rule requiring a defense on the merits to be shown, verified and filed with motion for vacation.

Vacation as a matter of discretion.

Cited in *Fargo v. Keeney*, 11 N. D. 484, 92 N. W. 836, holding that granting of a motion of vacation for mistake and inadvertence of counsel for moving party is entirely in the discretion of the court and cannot be had as of right; *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75, holding that order denying motion to be relieved from default judgment will be reversed where abuse of discretion is shown.

Injunction against judgment.

Cited in *Kitzman v. Minnesota Thresher Mfg. Co.* 10 N. D. 26, 84 N. W. 585, holding that an injunction will not issue to prevent the collection of a judgment, although equitable grounds therefor exist, where an adequate remedy at law is available under this section.

10 N. D. 26, KITZMAN v. MINNESOTA THRESHER MFG. CO. N. W. 585.

Injunction against enforcement of judgment.

Cited in *Freeman v. Wood*, 11 N. D. 1, 88 N. W. 721, holding that independent equitable action to vacate a fraudulent judgment is maintainable in absence of a showing that the remedy by motion in the original action was not available; *Bruegger v. Cartier*, 20 N. D. 72, 126 N. W. 491, as to when one is entitled to equitable relief from judgment.

Distinguished in *Phelps v. McCollam*, 10 N. D. 536, 88 N. W. 292, holding that equitable relief may be had against the enforcement of a judgment entered without the service of a summons upon the defendant; *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346, where plaintiffs were not parties to the fraudulent foreclosure and their motion made in the original action was defeated by untruthful and fraudulent statements of mortgagee.

Issues on motion to vacate default judgment.

Cited in *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A. (N.D.) 858, 126 N. W. 102; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228,—holding that on an application to vacate a default judgment the court cannot inquire into the merits of the defense proposed.

10 N. D. 29, BASTIEN v. BARRAS, 84 N. W. 559.

10 N. D. 34, FARWELL v. RICHARDSON, 84 N. W. 558.

Constructive rejection of claims against estate.

Cited in *Re Smith*, 13 N. D. 513, 101 N. W. 890; *Singer v. Austin*, 19 N. D. 546, 125 N. W. 560,—on constructive rejection of claims, by administrator's nonaction for period exceeding ten days.

10 N. D. 37, HAWK v. KONOUZKI, 84 N. W. 563.

Rights of landlord and tenant to grain raised on shares.

Cited in *Aronson v. Opegard*, 16 N. D. 595, 114 N. W. 377, holding that landlord being entitled to possession of grain until advances are paid him has no rights in the grain beyond the amount of advances and can recover to that extent only on a conversion; *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304, holding that the unjust refusal of land owner to deliver grain to tenant under an agreement by which the grain was to belong to former until division does not give rise to cause of action for damages before division.

10 N. D. 43, PECKHAM v. VAN BERGEN, 84 N. W. 566.

10 N. D. 48, MERCHANT v. PIELKE, 84 N. W. 574.

Advice of counsel.

Cited in *Adkin v. Pillen*, 136 Mich. 682, 100 N. W. 176, holding that advice of counsel is no defense to a malicious prosecution where to knowledge of defendant the consulted attorney was interested in the controversy.

Cited in note in 18 L.R.A.(N.S.) 55, 70, on advice of counsel as defense to action for malicious prosecution.

10 N. D. 54, ENGSTAD v. GRAND FORKS COUNTY, 84 N. W. 577.

Construction of "Institution" as pertaining to charity.

Cited in *Rine v. Wagner*, 135 Iowa, 626, 113 N. W. 471, holding that a devise in trust to an individual for charitable uses does not fall within statute prohibiting such devises to "institutions."

10 N. D. 59, KUHNERT v. ANGELL, 88 AM. ST. REP. 675, 84 N. W. 579.

Liability of agent.

Cited in note in 25 L.R.A.(N.S.) 348, on liability of agent or servant to third persons for own negligence or nonfeasance.

— For act of subagent.

Cited in *Smith v. Pawlak*, 136 Ill. App. 276, holding that one who hires for another a servant is not liable for his negligence where such servant is under control of person for whom employed.

10 N. D. 63, WISCHEK v. BECKER, 84 N. W. 590.

Statutory construction.

Cited in *Vallely v. First Nat. Bank*, 14 N. D. 580, 5 L.R.A.(N.S.) 116 Am. St. Rep. 700, 106 N. W. 127, holding that a statute must be construed in connection with all other statutory provisions relating to same subject matters.

Removal of officers.

Cited in *State ex rel. Atty. Gen. v. District Ct.* 13 N. D. 211, 100 N. W. 248, on suspension of officer pending trial for removal.

— Procedure.

Cited in *State v. Richardson*, 16 N. D. 1, 109 N. W. 1026, holding that charge against county commissioners of charging and collecting illegal fees need not be presented by grand jury to give court jurisdiction in removal case.

Who may maintain action to determine right to office.

Cited in *Jenness v. Clark*, 21 N. D. 150, 129 N. W. 357, holding that officer entitled to hold until lawful successor is elected and qualified to maintain action against one who intrudes himself into office.

10 N. D. 72, WISCHEK v. HAMMOND, 84 N. W. 587.

Waiver of right to appeal by accepting benefits.

Cited in note in 29 L.R.A.(N.S.) 29, on right to appeal from unfavorable while accepting favorable part of decree, judgment, or order.

Jurisdiction of Supreme Court on appeal for retrial.

Distinguished in *Prescott v. Brooks*, 11 N. D. 93, 90 N. W. 129, where appeal is taken from portion of judgment only and is accompanied by request for a retrial of only a portion of the case.

Accounting between members of void partnership.

Cited in note in 23 L.R.A.(N.S.) 485, on accounting between members of illegal or void partnership, or one engaged in illegal business.

Validity of contracts.

Cited in note in 5 L.R.A.(N.S.) 892, on validity of contracts influencing appointment to office.

10 N. D. 78, BOYD v. WALLACE, 84 N. W. 760.

Effect of judgment on participating persons not parties.

Cited in *Kolpack v. Kolpack*, 128 Wis. 169, 116 Am. St. Rep. 29, 106 N. W. 457, holding that a person not a party who manages an action against obstruction of highway is bound by the decision therein on subsequent litigation on same subject; *Hart v. Wyndmere*, 21 N. D. 383, 106 N. W. 231, holding that parties who voluntarily enter action and elect to litigate their case therewith are bound by result.

Distinguished in *State v. King*, 64 W. Va. 546, 63 S. E. 468, holding that a person who was not a party in any sense in the court below does not subject himself to the judgment therein by participating in an appeal therefrom taken in the name of one who was a party.

10 N. D. 81, **REYNOLDS v. STRONG**, 88 AM. ST. REP. 680, 85 N. W. 987.

10 N. D. 85, **SANDERSON v. WINCHESTER**, 85 N. W. 988.

10 N. D. 86, **COLER v. COPPIN**, 85 N. W. 988.

10 N. D. 90, **CLENDENNING v. HAWK**, 86 N. W. 114.

Voidable acts of agent.

Cited in *Bennett v. Glaspell*, 15 N. D. 239, 107 N. W. 45, on the voidability of agent's transactions where he is interested as principal on the other side.

10 N. D. 95, **PATTERSON v. PLUMMER**, 86 N. W. 111.

10 N. D. 103, **SHEETS v. PAINE**, 86 N. W. 117.

Operation of limitations against reduction of tax sale.

Cited in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335 (dissenting opinion), on the nonoperation of statute of limitations on a tax deed from a void assessment.

Rights under void tax deed.

Followed in *Paine v. Germantown Trust Co.* 69 C. C. A. 303, 136 Fed. 527, holding that purchaser at void tax sale is not entitled to recover his expenditures in acquiring deed, he being a mere volunteer.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322 (dissenting opinion), on rights of purchaser at void tax sale; *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984, holding that in an action to recover property sold for taxes, no tender of amount of back taxes is necessary where sale was on a void assessment.

Effect of void tax deed to limitation in motion.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding statute of limitations not set in motion by tax deed based on void tax.

Sufficiency of description for assessment.

Followed in *Paine v. Germantown Trust Co.* 69 C. C. A. 303, 136 Fed. 527; *Paine v. Willson*, 77 C. C. A. 44, 146 Fed. 488,—holding that an assessment description of land wherein township and range number is omitted is totally defective.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding assessment void where it is merely described as the north 200 feet of a tract extending 600 feet in a north-easterly direction; *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336, holding description as "S. E. 4," insufficient.

Explained in *Paine v. Willson*, 77 C. C. A. 44, 146 Fed. 488, holding that cited case decided, that assessment description was void for failure of inclusion of township and range number.

10 N. D. 108, **SOLY v. AASEN**, 86 N. W. 108.

10 N. D. 111, UNITED STATES SAV. & L. CO. v. McLEOD, 86 N. W. 110.

Necessity for bringing up all evidence on appeal.

Cited in *Littel v. Phinney*, 10 N. D. 351, 87 N. W. 593, denying right of appellate court to try case anew or determine whether findings of court are justified by the evidence, or whether the evidence was admitted under the issues raised by the pleadings where statement demanding *de novo* failed to incorporate all the evidence offered at the trial.

Presumption that all evidence is brought up.

Cited in *Eakin v. Campbell*, 10 N. D. 416, 87 N. W. 991, holding judgment certificate not conclusive that statement on appeal contains all the evidence offered in the trial court where it appears on its face that all evidence has not been incorporated therein; *Kipp v. Angell*, 10 N. D. 86 N. W. 706, holding that presumption established by certificate of appeal that a statement of the case embraces all the evidence offered at trial may be rebutted by the statement itself when it shows on its face that part of the evidence has been omitted.

10 N. D. 114, SECOND NAT. BANK v. SPOTTSWOOD, 86 N. W. 359.

10 N. D. 120, JAMES v. BEKKEDAHL, 86 N. W. 226.

Conditions precedent to recovery for breach of warranty.

Cited in note in 12 L.R.A.(N.S.) 545, on effect of provision for return of defective goods upon buyer's right to recover for breach of warranty.

10 N. D. 123, DEVER v. CORNWELL, 86 N. W. 227.

Conclusiveness of tax deed.

Cited in *Warden v. Broome*, 9 Cal. App. 172, 98 Pac. 252, holding that a tax deed is not conclusive that the delinquent list and published notice were regular and correct, they being jurisdictional prerequisites; *Beck v. Paine*, 15 N. D. 436, 109 N. W. 322, holding that the objection to a tax deed because it was based on an assessment that was not uniform was too late the deed being conclusive of uniformity.

Validity of statute validating tax judicial sales.

Cited in *Kenny v. McKenzie*, 23 S. D. 111, — L.R.A.(N.S.) —, 120 N. W. 781, holding that curative act will not validate foreclosure proceedings, where assignment of mortgage was defective and acknowledgment invalid.

— Tax sales.

Cited in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335 (dissenting opinion), on the unconstitutionality of tax deed curative statutes as applied to jurisdictional defects in assessment and proceedings for tax title; *McCord v. Sullivan*, 85 Minn. 344, 89 Am. St. Rep. 561, 83 N. W. 989, holding that a tax deed void for failure to give necessary notice of sale cannot be validated by a curative act of legislature; *State Finance v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding

that a limitation act validating irregular tax deeds is valid as to deed based on an assessment where in the roll was not verified by assessor such formalities being nonessential.

Validity of tax levy by percentages.

Cited in *Fisher v. Betta*, 12 N. D. 197, 96 N. W. 132, holding void a tax deed based on a levy by percentages where law requires levy to be made by specific amount.

Distinguished in *Paine v. Germantown Trust Co.* 69 C. C. A. 303, 136 Fed. 527, where levy was made not by county commissioners but by state board of equalization.

Burden of proving title in action to quiet title.

Cited in *Larson v. Christianson*, 14 N. D. 476, 106 N. W. 51, holding plaintiff not entitled to judgment on motion in proceedings to quiet title where answer denies title in plaintiff he being thereby compelled to show his interest; *Yonker v. Hobart*, 17 N. D. 296, 115 N. W. 839, holding that introduction of a tax deed void on its face is not a sufficient showing by plaintiff to entitle him to maintain action to determine adverse claims.

Noncompliance with statutory requirements in levy of tax.

Cited in *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188, holding that provisions in tax law intended solely for tax payers' benefit must be substantially complied with throughout to secure validity of tax proceedings.

10 N. D. 132, *STATE EX REL. SUNDERALL v. MCKENZIE*, 86 N. W. 231.

Nature of duties of county canvassing boards.

Cited in *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706, holding duties of county canvassing boards ministerial and not judicial.

10 N. D. 140, *LINDBLOM v. SONSTELIE*, 86 N. W. 357.

10 N. D. 146, *FIRST NAT. BANK v. PRIOR*, 86 N. W. 362.

Varying terms of written agreement.

Cited in *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903, holding that implied warranties cannot be read into a contract in writing where the only warranties made are expressly stipulated.

Parol agreement.

Cited in *Merchants' State Bank v. Ruettell*, 12 N. D. 519, 97 N. W. 853, holding that an oral contemporaneous agreement between lessor and lessee that \$160 instead of \$200 rent as stated in written lease be paid, is inadmissible.

—By mortgagee.

Cited in *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576, holding that a mortgage purporting to be security for a note will be held to be such though the parties contemporaneously orally agreed that it should take operation only in case note was negotiated.

10 N. D. 153, *TEINEN v. LALLY*, 86 N. W. 356.

Dak. Rep.—27.

10 N. D. 154, STATE EX REL. MORRILL v. MASSEY, 86 N. W. 225.

Appealability of order in contempt.

Cited in *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, holding under statute that only a final order adjudging accused guilty of contempt is appealable.

10 N. D. 157, STATE EX REL. MARTIN v. BRADLEY, 86 N. W. 354.

10 N. D. 160, McGUIN v. LEE, 86 N. W. 714.

Effect of stipulation for reconveyance.

Cited in *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306, on the conveyance of land with covenant to reconvey to grantor as not necessarily constituting a mortgage; *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499, holding that contract to recovery on fixed terms does not necessarily show deed to be mortgage.

Degree of proof to set aside written instrument.

Cited in *Little v. Braun*, 11 N. D. 410, 92 N. W. 800, on the degree of proof sufficient to show a deed to be a mortgage; *Forester v. Van Auken*, 12 N. D. 175, 96 N. W. 301, holding that in an action to reform a warranty deed to conform to the intention of the parties such intent must be satisfactorily, clearly and specifically shown; *Weills v. Geyer*, 12 N. D. 316, 96 N. W. 289, holding that to declare a deed and contract for reconveyance a mortgage, a clear, satisfactory and specific showing is required; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856, holding same as to land purchase contract conveyed absolutely as security; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306; *Northwestern F. & M. Ins. Co. v. Lough*, 13 N. D. 601, 102 N. W. 160—holding same as to absolute deed given as mortgage; *Carter v. Carter*, 14 N. D. 66, 103 N. W. 425, holding same as to establishment of resulting trust in real property; *Anderson v. Anderson*, 17 N. D. 275, 115 N. W. 836, holding that proof must be clear, satisfactory and specific to set aside a conveyance of real property for duress or menace.

10 N. D. 170, J. I. CASE THRESHING-MACH. CO. v. OLSON, 86 N. W. 718.

Evidence of novation.

Cited in *McAllister v. McDonald*, 40 Mont. 375, 106 Pac. 882, holding that the intent on the part of the creditor to release the debtor from his original obligation is a vital element in making out an ovation.

Execution of chattel mortgage.

Cited in *Pease v. Magill*, 17 N. D. 166, 115 N. W. 260, holding that the filing of an unwitnessed and unacknowledged chattel mortgage does not constitute notice.

10 N. D. 172, NICHOLS v. TINGSTAD, 86 N. W. 694.

Assigns of mortgagor.

Cited in *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171, holding that second mortgagee is an assignee of mortgagor under statute giving mortgagor or his "assignees" right to redeem.

10 N. D. 181, EASTON v. LOCKHART, 86 N. W. 697.

Specific performance.

Cited in *Boyd v. Woodbury County*, 122 Iowa, 455, 98 N. W. 274, holding that where on a delivery of an abstract showing defect in title the plaintiff in possession as tenant refuses to pay purchase price, there is no acceptance entitling him to specific performance later on where he offers to pay and remains in possession; *Pederson v. Dibble*, 12 N. D. 572, 98 N. W. 411, holding a contract to deliver land on one side and to pay for same in wheat at market price on date for delivery, or an equivalent amount of cash on the other side, is capable of specific performance.

Merchantable title.

Cited in *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623, holding that title based on deeds containing full Christian name of grantor in body of instrument is not rendered defective by fact that grantor signed by using initials of Christian name.

10 N. D. 194, SHEPARD v. HANSON, 86 N. W. 704.

Directing verdict.

Cited in *Pewonka v. Stewart*, 13 N. D. 117, 99 N. W. 1080, holding it error to direct verdict where there is a substantial conflict in the evidence on a material issue.

Presumption of title in holder of negotiable note.

Cited in *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614, holding that the holder of a negotiable note need not show his title until it is shown that he did not acquire it rightly and in due course.

10 N. D. 199, KIPP v. ANGELL, 86 N. W. 706.

Mode of bringing up documentary evidence.

Cited in *Eakin v. Campbell*, 10 N. D. 416, 87 N. W. 991, holding that exhibits offered in the trial court must be embodied in the statement on appeal or officially identified by the trial judge as a part thereof.

10 N. D. 203, STATE EX REL. McCLORY v. DONOVAN, 86 N. W. 709, Later appeal in 10 N. D. 610, 88 N. W. 717.

Erroneous and irregular judgment.

Cited in *Martinson v. Marzolf*, 14 N. D. 301, 103 N. W. 937, holding that a judgment which granted equitable relief which the case did not justify was erroneous and reviewable by appeal but was not void or irregular; *Olson v. Mattison*, 16 N. D. 231, 112 N. W. 994, holding that it is error to give judgment on a special verdict insufficient to support it and not an irregularity curable by motion.

Sales of liquor by pharmacist.

Cited in *State v. Erickson*, 14 N. D. 139, 103 N. W. 389, holding a place where liquor is unlawfully sold may be declared a common nuisance under statute though the seller had a permit to sell lawfully.

Liquor sales made at peril of vendor.

Cited in *Peacock v. Limburger*, 95 Tex. 258, 66 S. W. 764, holding knowledge of saloon keeper that the persons to whom he sold beer to students is not material to liability on his bond not to sell to students, the statute being silent as to lack of knowledge as a defense.

Self-incriminating evidence.

Cited in *People v. Robinson*, 135 Mich. 511, 98 N. W. 12, holding a filing of sales of liquor as required by statute amounts to a voluntary admission of the contents of the files; *State ex rel. Flaherty v. Haas*, 16 N. D. 347, 113 N. W. 371, holding that statute requiring public sale and registration of internal revenue tax receipts in order to detect carrying on of liquor business is not invalid as requiring the giving of self incriminating evidence; *State v. Davis*, 68 W. Va. 142, 32 L. (N.S.) 501, 69 S. E. 639, holding that druggists indicted for unlawfully selling spirituous liquors may be compelled to produce for use as evidence written prescriptions of physicians for which he has made payment of intoxicating liquors; *Wilson v. United States*, 221 U. S. 361, 54 S. Ct. 779, 31 Sup. Ct. Rep. 638, holding that officer cannot refuse to produce documents of corporation on ground that having written or signed them they would incriminate him, even though indictments are pending against him.

Cited in note in 25 L.R.A.(N.S.) 819, as to whether record of liquor sales which druggist is required to keep may be used as evidence against him.

Distinguished in *State ex rel. Nevada Title Guaranty & T. Co. v. Grimes*, 29 Nev. 50, 5 L.R.A.(N.S.) 545, 124 Am. St. Rep. 883, 84 Pac. 1061, where issues involved were as to right to inspect books and records of public officers.

Right to question constitutionality of statute.

Cited in *Turnquist v. Cass County Drain Comrs.* 11 N. D. 514, 98 N. W. 852, holding that constitutionality of statute authorizing bond in lieu of compensation for drain construction will not be raised in an appeal against drain commissioners wherein the statute is not in issue; *Ellis v. Rosholt*, 11 N. D. 559, 93 N. W. 864, holding that constitutional questions will not be considered and decided where raised by person not in position to raise the questions.

10 N. D. 211, GEILS v. FLUEGEL, 86 N. W. 712.**Right to trial de novo on appeal.**

Cited in *Hagen v. Gilbertson*, 10 N. D. 546, 88 N. W. 455, holding stipulation by counsel after trial to jury that jury should be waived and court make findings of fact not authority for trial de novo on appeal where statement fails to include evidence which was offered and excluded.

in trial to jury; *Littel v. Phinney*, 10 N. D. 351, 87 N. W. 593, denying right of appellate court to try case anew or determine whether findings of the court are justified by the evidence, or whether the evidence was admissible under the issues raised by the pleadings where statement demanding trial de novo failed to incorporate all the evidence offered at the trial.

Conclusiveness of judge's certificate that all evidence is brought up.

Cited in *Eakin v. Campbell*, 10 N. D. 416, 87 N. W. 991, holding judge's certificate not conclusive that statement on appeal contains all the evidence offered in the trial court where it appears on its face that all the evidence has not been incorporated therein.

10 N. D. 215, *AUSK v. GREAT NORTHERN R. CO.* 86 N. W. 719.

10 N. D. 219, *SMITH v. SMITH*, 86 N. W. 721.

Evidence of residence for purpose of divorce.

Cited in *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46, holding that the court if it sees fit may require further evidence of residence for divorce proceeding than that offered or sought to be adduced.

Admission by defendant of plaintiff's residence in divorce action.

Cited in *Bradfield v. Bradfield*, 154 Mich. 115, 129 Am. St. Rep. 468, 117 N. W. 588, holding that defendant in divorce action by admitting in answer that plaintiff has acquired bona fide residence does not preclude defendant from raising the question.

Distinguished in *Clopton v. Clopton*, 10 N. D. 569, 88 Am. St. Rep. 749, 88 N. W. 562, holding that where the trial court fails to exercise its right to inquire into the bona fides of the plaintiff's residence, the defendant is bound by the admission in his answer, and cannot question it.

10 N. D. 223, *GRANDIN v. EMMONS*, 54 L.R.A. 610, 88 AM. ST. REP. 684, 86 N. W. 723.

Power coupled with interest surviving death of donor.

Cited in notes in 92 Am. St. Rep. 596, on sales under powers in mortgages and trust deeds; 70 L.R.A. 139, on power of sale in mortgage or deed of trust as conferring an interest preventing its revocation by death of mortgagor.

Distinguished in *Brown v. Skotland*, 12 N. D. 445, 97 N. W. 543, where the grantor of the power died before power was accepted and the power failed to become coupled with the interest.

10 N. D. 230, *ROBERTS v. FARGO*, 86 N. W. 726.

Right of tax payer to enjoin misuse of public funds.

Cited in *Baker v. La Moure*, 21 N. D. 140, 129 N. W. 464, holding that

property owner may restrain levying of assessment to pay amount sewer in excess of sum justly due for such improvement.

Distinguished in *Toegrinson v. Norwich School Dist.* No. 31, 14 N. D. 10, 103 N. W. 414, where the right of a taxpayer to enjoin a tax levy is involved.

Necessity for appropriation.

Cited in *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 3, holding that city must make an appropriation for the expense of improvement before contracting therefor.

Ratification of public contract.

Cited in *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161, holding that question of ratification cannot arise where the county board had no power to make the original contract.

10 N. D. 245, SCHAFFNER v. YOUNG, 86 N. W. 733.

Injunction against collection of personal property tax.

Cited in *Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County*, 10 N. D. 107, 90 N. W. 260, holding that the levy of tax for county purposes on personal property of railroad company without first making itemized statement of probate county expenses for ensuing year is enjoynable in equity; *Torginson v. Norwich School Dist.* No. 31, 14 N. D. 10, 103 N. W. 414, holding that the right to sue to recover back personal property tax paid under protest is an adequate remedy at law precluding injunction restraining collection; *Chicago & N. W. R. Co. v. Ransom*, 23 S. D. 405, 122 N. W. 343, holding that injunction does not restrain collection of illegal personal tax where remedy at law is shown to be inadequate.

10 N. D. 254, POWER v. KITCHING, 88 AM. ST. REP. 691, N. W. 737.

Reasonableness of notice on shortening of statute of limitation.

Cited in *Lamb v. Powder River Live Stock Co.* 67 L.R.A. 558, 65 C. C. A. 570, 132 Fed. 434, holding unreasonable and void a period of three months within which to bring accrued action on a shortening of period of limitations; *Schauble v. Schulz*, 69 C. C. A. 581, 137 Fed. 389, holding that a statute validating tax title after ten years adverse holding and payment of valid taxes is retroactive in so far as it pertains to period of holding though it is valid as to a nine year holding giving the original holder one year in which to act; *Schauble v. Schulz*, 69 C. C. A. 581, 137 Fed. 389, holding that statute shortening period of adverse possession under tax deed takes effect as notice of its prospective operation from the date of its approval and not from the date when it becomes a law.

Cited in note in 111 Am. St. Rep. 459, on retrospective operation of statutes of limitation.

Distinguished in *Mulvey v. Boston*, 197 Mass. 178, 83 N. E. 402, 16 A. & E. Ann. Cas. 349, where means of obtaining news are manifold and territory of state is not extensive.

Running of limitations against persons under disability.

Cited in *Collier v. Smaltz*, 149 Iowa, 230, 128 N. W. 396, holding act relating to limitation of actions affecting real property not unconstitutional because it makes no exemption in favor of insane persons.

Title to act.

Cited in *State ex rel. Kol v. North Dakota Children's Home Soc.* 10 N. D. 493, 88 N. W. 273, holding that act having but a single purpose expressed in title may embrace all matters naturally and reasonably included therein and all measures which may facilitate accomplishment of legislative purpose; *Erickson v. Cass County*, 11 N. D. 404, 92 N. W. 841, holding that an amendment entitled an act to amend an act relating to the establishment, construction and maintenance of drains including the provisions of the original act which related entirely to duties of the court in actions to enjoin assessments or to annul drainage proceedings; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding that in an amendatory act it is not necessary to state in the title the exact point wherein the rights under the original act would be affected; *State v. Minneapolis & N. Elevator Co.* 17 N. D. 23, 114 N. W. 482, holding that an act may properly contain requirements other than those expressly mentioned in its title.

Operation of limitations on void tax deed.

Cited in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding that the statute of limitations starts to run on a tax sale made in default of tax payments for two different years where the levy and proceedings as to one was unquestioned though the other was void.

Cited in note in 27 L.R.A.(N.S.) 342, 352, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes.

Tax deed as color of title for adverse possession.

Cited in *Stiles v. Granger*, 17 N. D. 502, 117 N. W. 777, holding that the quit claim grantee from a grantor holding under invalid tax deed has good title after ten years adverse open possession on payment of all assessments and taxes legally levied thereon.

Cited in notes in 88 Am. St. Rep. 702, on color of title; 11 L.R.A.(N.S.) 788, on invalid tax deed as color of title within general statutes of limitations; 15 L.R.A.(N.S.) 1215, 1220, on necessity of color of title, not expressly made a condition by statute, in adverse possession.

Who may plead bar of limitations.

Cited in note in 104 Am. St. Rep. 765, on who may plead statute of limitations.

Effect of bar of limitations.

Cited in note in 95 Am. St. Rep. 673, on effect of bar of statute of limitations.

What constitutes adverse possession.

Cited in *Petticrew v. Greenshields*, 61 Wash. 614, 112 Pac. 749, holding occasional hauling of wood for domestic use from tract of 640 acres,

wholly unoccupied and unimproved, not such act of adverse possession as indicates claim of title.

10 N. D. 264, NOBLE TWP. v. AASEN, 86 N. W. 742.

Effect of filing affidavit of prejudice.

Distinguished in *Orcutt v. Conrad*, 10 N. D. 431, 87 N. W. 982, holding judicial authority of court immediately terminated on filing of proper affidavits of prejudice.

Right to trial de novo on appeal.

Cited in *State ex rel. Morrill v. Massey*, 10 N. D. 154, 86 N. W. 225, holding that a trial de novo cannot be had on appeal in criminal contempt proceedings.

Silence as waiver of constitutional or statutory right.

Cited in *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76, holding that mere silence or failure to object to an order of reference does not constitute a waiver of constitutional right to trial by jury.

What is a special proceeding.

Cited in *State ex rel. Bickford v. Fabrick*, 16 N. D. 94, 112 N. W. 74, holding that mandamus is a special proceeding not triable de novo in supreme court under statute providing for such trial of actions.

Proof of actual loss in recovery of damages for contempt.

Cited in *Davidson v. Munsey*, 29 Utah, 181, 80 Pac. 743, holding that an arbitrary assessment of a specified sum as damages for contempt is erroneous and unless actual damage is evidentially found nominal damages alone are recoverable.

10 N. D. 275, FIRST NAT. BANK v. FLATH, 86 N. W. 864.

10 N. D. 281, FIRST NAT. BANK v. FLATH, 86 N. W. 867.

Recovery by bona fide indorsee of negotiable note.

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding that a negotiable promissory note, though void in the hands of a payee may be enforced by bona fide indorsee but not by assignee; *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567, holding unauthorized delivery of note by payee's agent not available to makers as defense to action thereon by innocent purchaser.

Who are bona fide purchasers.

Cited in *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511; *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99,—holding that payment of value on purchase of negotiable paper before maturity constitutes prima facie a bona fide purchase.

Mortgage and secured note as separate contracts.

Cited in *Farmers' Nat. Bank v. McCall*, 25 Okla. 600, 26 L.R.A. (N.S.) 217, 106 Pac. 866, holding that a stipulation in mortgage does not render the secured note non-negotiable and the negotiability of the note secures the mortgage the same immunity from defenses.

Negotiability of note.

Cited in note in 32 L.R.A.(N.S.) 859, on recital in note as to security as affecting negotiability.

10 N. D. 287, FABER v. WAGNER, 86 N. W. 963.

10 N. D. 290, AMERICAN MORTG. CO. v. MOUSE RIVER LIVE-STOCK CO. 86 N. W. 965.

Best evidence of conveyance.

Cited in Conrad v. Adler, 13 N. D. 199, 100 N. W. 722, holding that the records of deeds cannot be considered in evidence against proper objection in the absence of a showing that the originals were not available.

Cited in note in 19 L.R.A.(N.S.) 442, on admissibility of record, or copy of record, to prove deed under which party offering it claims.

10 N. D. 300, PRONDZINSKI v. GARBUTT, 86 N. W. 969.

Effect of dismissal without prejudice.

Cited in Mahon v. Leech, 11 N. D. 181, 90 N. W. 807, holding that a dismissal without prejudice by its very terms does not constitute a bar in another suit on the same subject matter.

10 N. D. 311, ROSENBAUM v. HAYES, 86 N. W. 973.

Right to recover on invalid contract.

Cited in Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 88 N. W. 724, holding that the fact that the payee of a check indorsed it to another, in consideration of a gambling contract, does not prevent his recovering the amount of the check from the bank which, with knowledge of the illegality of the indorsement, paid it to the indorsee.

— Sunday contracts.

Followed in Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724, holding Sunday contract unenforceable so far as it is executory.

10 N. D. 331, STATE EX REL. LAIRD v. GANG, 87 N. W. 5.

Appeal from judgment and order.

Disapproved in Kinney v. Brotherhood of American Yeoman, 15 N. D. 21, 106 N. W. 44, holding it proper to include in a single notice an appeal from judgment and an appeal from an order made after judgment denying motion for new trial.

Presumption of performance of official duty.

Cited in Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499, holding that it will be presumed that board of education complied with statute in all particulars in making order annexing territory to school district.

10 N. D. 340, McMANUS v. COMMOW, 87 N. W. 8.**Foundation for secondary evidence.**

Cited in *State v. Denny*, 17 N. D. 519, 117 N. W. 869, holding that a proper showing that the original is not available as evidence is necessary to the introduction of secondary evidence.

10 N. D. 346, EATON v. BENNETT, 87 N. W. 188.**Mandatory provisions relating to assessment roll.**

Cited in *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97, holding assessment verified by assessor in January, void under statute providing that assessment cannot be begun until May 1; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322; *Warfield-Pratt-Howell Co. v. Averill Grocery Co.* 119 Iowa, 75, 93 N. W. 80,—holding that failure to take the prescribed oath to the assessment roll invalidates the roll as a basis for tax sale; *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839; *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919,—holding that omission to attach assessor's affidavit to assessment roll is not fatal in an action "in equity" to set aside tax deed for failure to so attach though it is fatal at law.

Disapproved in *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding that the failure of assessor to attach to the assessment roll the prescribed assessor's affidavit does not invalidate tax sale made under statute.

Tax deed based on jurisdictionally defective tax procedure.

Disapproved in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding that a tax sale based on a defective and a valid tax levy can be cured by lapse of time where the defects are not jurisdictional.

Running of limitations under void tax deed.

Cited in note in 27 L.R.A.(N.S.) 350, 352, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes; 8 L.R.A.(N.S.) 161, on applicability of statute limiting time for attack on tax sale, to sale under proceedings void for jurisdictional defects, under which no possession taken.

Sufficiency of description for assessment.

Cited in *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336, holding description as "S. E. 4" insufficient.

10 N. D. 351, LITTEL v. PHINNEY, 87 N. W. 593.**10 N. D. 353, VIDGER v. NOLIN, 87 N. W. 593.****Sufficiency of assignments of error.**

Cited in *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440, holding that there is not a total absence of assignment of error in brief because not made formally, no stated form being required.

Jurisdiction of district court upon appeal from justice.

Distinguished in *Johnson v. Erickson*, 14 N. D. 414, 105 N. W. 1104, where the justice had jurisdiction to certify to district court.

—New issues.

Cited in *Erickson v. Elliott*, 17 N. D. 389, 117 N. W. 361, holding that district court may allow filing of supplemental answer after trial before justice which causes a change of issues providing such issues after change would come within jurisdiction of justice.

10 N. D. 361, TAYLOR v. MILLER, 87 N. W. 597.

10 N. D. 366, DOUGLAS v. RICHARDS, 87 N. W. 600.

Retrial of particular facts.

Cited in *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320, holding insufficient a specified question of fact which fails to present for examination and determination on the evidence any particular fact but merely calls for deduction of a legal conclusion from indefinite and unknown facts.

10 N. D. 373, McCARDIA v. BILLINGS, 88 AM. ST. REP. 729, 87 N. W. 1008.

Clerical error in certificate of acknowledgment.

Cited in *Trerise v. Bottego*, 32 Mont. 244, 108 Am. St. Rep. 521, 79 Pac. 1057, holding sufficient the certificate of several acknowledgment of a mortgage by husband and wife though the blanks on either side of the printed "he" were not filled out to make "they."

Cited in notes in 108 Am. St. Rep. 530, 531, 535, as to when defects in service of acknowledgment are fatal; 11 L.R.A.(N.S.) 644, on grammatical defects in certificates of acknowledgment.

Presumption in favor of regular acknowledgment.

Cited in *Patnode v. Deschenes*, 15 N. D. 100, 106 N. W. 573, holding that an acknowledgment of a mortgage on homestead which is regular on its face cannot be overthrown by mere fact that wife in signing did not know what she was doing after what was required of her had been explained.

Sufficiency of mortgage assignment.

Cited in *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85, holding that assignee of mortgage to entitle him to a valid foreclosure in his own name must have the record title to the mortgage.

10 N. D. 383, NATIONAL BANK v. HANBERG, 87 N. W. 1006.

10 N. D. 389, GUNN v. LAUDER, 87 N. W. 999.

Calling in of disinterested judge.

Cited in *State ex rel. Bullion & Exch. Bank v. Mack*, 26 Nev. 430, 69 Pac. 862, holding that no formal application for the calling of a qualified judge was necessary when the record disclosed that the acting judge was disqualified by interest.

10 N. D. 400, WHITE v. LAUDER, 87 N. W. 1135.

10 N. D. 400, WILLARD v. MONARCH ELEVATOR CO. 87 N. W. 996.

10 N. D. 408, MINNEAPOLIS THRESHING MACH. CO. v. DONALD, 87 N. W. 993.

Damages for refusal to accept goods under contract of sale.

Cited in Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241, holding that on a refusal to accept property under a contract to buy the measure of damages is the difference between contract price and market value of property at time and place of refusal to accept.

10 N. D. 416, EAKIN v. CAMPBELL, 87 N. W. 991.

10 N. D. 419, FLATH v. CASSELMAN, 87 N. W. 988.

Sufficiency of evidence to sustain verdict.

Cited in Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 88 N. W. 724, holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; Casey v. Bank, 20 N. D. 211, 126 N. W. 1011, holding that order denying new trial because of insufficiency of evidence will not be reversed where abuse of discretion is not shown; F. A. Patrick & Co. v. Austin, 20 N. D. 261, 126 N. W. 109; Lang v. Bailes, 19 N. D. 582, 125 N. W. 891,—holding that refusal of trial court to set aside verdict will not be reversed where there is no substantial conflict in evidence; Action v. Fargo & M. Street R. Co., 20 N. D. 434, 129 N. W. 225; Lowry v. Piper, 20 N. D. 637, 127 N. W. 101, holding that order overruling motion for new trial, which is based on insufficiency of evidence will not be reversed where there is legal evidence of substantial character to support verdict.

10 N. D. 424, KIDDER COUNTY v. FOYE, 87 N. W. 984.

10 N. D. 431, ORCUTT v. CONRAD, 87 N. W. 982.

10 N. D. 436, STATE EX REL. SHEEKS v. HILLIARD, 87 N. W. 980.

10 N. D. 440, NICHOLS & S. CO. v. PAULSON, 87 N. W. 977.

Duty to return property replevied.

Cited in note in 69 L.R.A. 288, on duty to preserve and return property replevied.

10 N. D. 445, WHITE v. LAUDER, 87 N. W. 1135.

10 N. D. 446, NICHOLS & S. CO. v. CHARLEBOIS, 88 N. W. 8.

Notice to produce as foundation for secondary evidence.

Distinguished in Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 8, where pleadings did not show possession of the writing by a party.

also failed to show that it would necessarily become material evidence on trial.

Notice of breach of warranty.

Cited in *Kohl v. Bradley, C. & Co.* 130 Wis. 301, 110 N. W. 265, holding that notice by vendee that engine failed to do the work warranted was sufficient though the particular defects were not stated.

Entirety of contract.

Cited in *Hughes v. Mullins*, 36 Mont. 267, 92 Pac. 758, 13 A. & E. Ann. Cas. 209, holding that the illegality of one of several considerations in a contract for a single object will render all of the considerations unenforceable, the contract being entire; *Schlösser v. Moores*, 16 N. D. 185, 112 N. W. 78, holding that a contract of sale stating the price of each item of goods thereunder is not made entire by a statement of total purchase price.

10 N. D. 453, BROKKEN v. BAUMANN, 88 N. W. 84.

Homestead.

Cited in *Re Malloy*, 179 Fed. 942, holding that leaving of furniture on land claimed as a homestead after the claimant became head of a family, the furniture being placed there before becoming head of family does not alone show an intent to make the land the homestead of the family.

10 N. D. 461, KULBERG v. GEORGIA, 88 N. W. 87.

Specific performance of parol contract.

Cited in *Kaster v. Mason*, 13 N. D. 107, 99 N. W. 1083, holding that equity will not reform a contract by requiring persons not parties thereto to sign and then decree specific performance.

**10 N. D. 464, STATE EX REL. WEST v. COLLINS, 88 N. W. 88,
12 AM. CRIM. REP. 41.**

Right to bail.

Cited in *State v. Hartzell*, 13 N. D. 356, 100 N. W. 745, holding that under the evidence applicants for bail are not entitled thereto as a matter of legal right and that no cause is shown for granting it as a matter of discretion.

Discussion of facts and law by court on application for bail.

Followed in *State v. Hartzell*, 13 N. D. 356, 100 N. W. 745, holding that in denying application for bail neither the facts nor the law will in such cases be ordinarily discussed by the court, lest prejudice result to accused on trial.

10 N. D. 469, PICKTON v. FARGO, 88 N. W. 90.

Action by tax payer.

Cited in *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, on the propriety of an action to annul a void improvement tax when substantial injury will be presumed from the irregularity in the proceedings.

Procedure in adoption of ordinance.

Distinguished in *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 A. & E. Ann. Cas. 10, where the proof of the passage of an ordinance for a foundation for its introduction into evidence was involved.

—Aye and no vote.

Cited in *Payne v. Ryan*, 79 Neb. 414, 112 N. W. 599; *Markham v. Anamosa*, 122 Iowa, 689, 98 N. W. 493,—holding invalid an ordinance where the record does not show that it was adopted by a separate calling of the yeas and nays; *Cook v. Independence*, 133 Iowa, 582, 110 N. W. 1029, holding that statute requiring that on adoption of ordinance the yeas and nays shall be called and recorded is mandatory; *Milbank v. Western Surety Co.* 21 S. D. 261, 111 N. W. 561, holding that provisions of code requiring yea and nay vote on letting of municipal contracts and that entry be made in records of board are mandatory; *State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co.* 144 Wis. 386, 140 Am. St. Rep. 1025, 129 N. W. 623, holding ordinance containing undertaking that city shall furnish water free for street sprinkling does not require “aye” and “no” vote where city owns and operates its own waterworks.

10 N. D. 482, LEE v. CRAWFORD, 88 N. W. 97.**Validity of tax sale.**

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322 (dissenting opinion), on the invalidity of tax sale for taxes not legally due.

—For excessive amount.

Distinguished in *Nichols v. Roberts*, 12 N. D. 193, 96 N. W. 298, where question as to the excessiveness of amount of tax sale was involved.

Verification of assessor's return.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding failing to attach assessor's affidavit not fatal in equitable action, but the contrary in an action at law.

10 N. D. 493, STATE EX REL. KOL v. NORTH DAKOTA CHILDREN'S HOME SOC. 88 N. W. 273.**Constitutional rights and status of child.**

Cited in *Re Sharp*, 15 Idaho, 128, 18 L.R.A.(N.S.) 886, 96 Pac. 563, holding that the summary placing a delinquent child in custody of a guardian is not denial of constitutional right to trial by jury, such proceeding not being a trial; *Mill v. Brown*, 31 Utah, 473, 120 Am. St. Rep. 935, 88 Pac. 609, holding that a provision establishing a juvenile court for custody and care of delinquent children in a summary manner is not in violation of any of child's constitutional rights; *Hunt v. Wayne Circuit Judges*, 142 Mich. 93, 3 L.R.A.(N.S.) 564, 105 N. W. 531, 7 A. & E. Ann. Cas. 821, holding that state legislature has power to declare the status of a child and make provision for its welfare.

Cited in notes in 120 Am. St. Rep. 965, on constitutionality of statutes

concerning reformatories and juvenile courts; 18 L.R.A.(N.S.) 887, 894, on restraint on freedom as impairment of child's constitutional rights.

Title and subject of act.

Cited with approval in *Ex parte Loving*, 178 Mo. 194, 77 S. W. 508, holding that an act respecting "neglected and delinquent children" pertains to only one subject properly expressed in title of the act to regulate and control them.

Cited in *Eaton v. Guarantee Co.* 11 N. D. 79, 88 N. W. 1029, upholding liberal construction of the constitutional provision relating to subject and title of acts as to the inclusion and expression thereunder; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 587, 113 N. W. 705; *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703,—holding constitutional section relating to subject and title of acts to be mandatory in courts and legislature; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841, holding that the provision as to the title and subject of an act is mandatory and that an amendment is valid though its subject matter differs from that of amended act, if it relates to same subject of legislation and comes within the title of the amended act; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding that an amendment stating in title that it amended act relating to rights of purchasers at tax sale need not state in its title the precise point in which such purchasers would be affected; *State v. Minneapolis & N. Elevator Co.* 17 N. D. 23, 114 N. W. 482, holding that an act requiring elevator companies to send weight certificates to local agents and requiring the latter to post them relates to but one subject.

10 N. D. 503, GROVENOR v. SIGNOR, 88 N. W. 278.

Reopening appealed justice case for trial of issues.

Cited in *Olson v. Shirley*, 12 N. D. 106, 96 N. W. 297, holding that the effect of the reversal of judgment of dismissal by district court upon appeal is to reopen case for trial on merits which is required to be had in the district court and cannot be remanded; *Hanson v. Gronlie*, 17 N. D. 191, 115 N. W. 666, holding that on affirmance of justice by district court on appeal the appellant is not entitled to a reopening of case for trial on merits in latter court.

10 N. D. 511, McDONALD v. BEATTY, 88 N. E. 281.

Redemption by junior encumbrancer.

Cited in *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 117 N. W. 453, holding holder of mortgage given after act of sale under prior mortgage and before expiration of period allowed for redemption, a redemptioner; *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281, holding that mortgagee who does not attempt to redeem from a valid unquestioned sale under a prior mortgage is not in a position to challenge the regularity of a redemption by a prior mortgagee.

Rights and liabilities under redemption.

Cited in *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466,

29 L.R.A.(N.S.) 508, 117 N. W. 453, holding that as between the parties a party who pays redemption money to purchasing mortgagee who retains it and issues certificate of redemption becomes entitled to all the rights of a statutory redemptioner though he in fact is not one; *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 117 N. W. 453, holding that one who stood as a redemptioner by estoppel bore toward junior redemptioner the duty to permit a further redemption within the statutory sixty days.

10 N. D. 520, *BERGMAN v. JONES*, 88 AM. ST. REP. 739, 88 N. W. 284.

Fraudulent conveyances.

Followed in *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872, holding that a mortgage given on stock which did not affect mortgagor's right to sell and did not require the turning over by receipts from sales and permitted sales on cash or credit was fraudulent as to general creditors.

— Of partnership property.

Cited in *Clark-Jewell-Wells Co. v. Tolsma*, 151 Mich. 561, 115 N. W. 688, holding that a transfer of copartnership property to pay individual debts of partners is a fraud on copartnership creditors.

10 N. D. 531, *ROBERTS v. ROBERTS*, 88 N. W. 289.

Followed without discussion in *Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677.

Homestead rights of wife.

Cited in *Helgebye v. Dammen*, 13 N. D. 167, 100 N. W. 245, on the rights of a wife in the homestead.

10 N. D. 536, *PHELPS v. McCOLLAM*, 88 N. W. 292.

Effect of transcription on justices' judgment.

Followed in *Strecker v. Railson*, 16 N. D. 68, 8 L.R.A.(N.S.) 1099, 111 N. W. 612, holding that the filing of a justice judgment in clerk's office does not make it a judgment of district court.

Cited in *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36, holding that transcription pursuant to statute does not change a justice judgment into a district court judgment but merely broadens its effect.

Judgment without jurisdiction.

Cited in *Skjelbred v. Shafer*, 15 N. D. 539, 125 Am. St. Rep. 614, 108 N. W. 487, holding that the statutory period of one year in which to apply for relief from judgment has no application to a case where judgment was rendered without jurisdiction.

Place where process may be served.

Cited in note in 21 L.R.A.(N.S.) 349, as to where process may be served under statutes providing for service by leaving at usual place of abode, etc.

10 N. D. 541, NORTHERN P. R. CO. v. LAKE, 88 N. W. 461.**Rights of abutter in streets.**

Cited in *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441, holding adjoining owner entitled to fee to center of street dedicated for public use by original proprietors of town site; *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441, holding that on a dedication of the streets and alleys to the public by the original owners such owners and their successors retained title and rights merely subject to easement for street use.

Cited in note in 125 Am. St. Rep. 346, on grant by city of right to use streets and sidewalks for private purpose.

10 N. D. 546, HAGEN v. GILBERTSON, 88 N. W. 455.**New trial after waiver of jury.**

Cited in *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860, holding that the supreme court cannot review a record on appeal from cases tried under statute where jury was waived, the only remedy being an appeal from the judgment; *Bank of Park River v. Norton*, 12 N. D. 497, 97 N. W. 860, holding that no action of party to indicate that he wanted trial by jury and no objections being made to a court trial of the case estop him from claiming the case was not a court case after trial and from obtaining a new trial by motion as in jury cases.

10 N. D. 551, PORTER v. HARDY, 88 N. W. 458.**Alteration of instrument.**

Cited in *Rochford v. McGee*, 16 S. D. 606, 61 L.R.A. 335, 102 Am. St. Rep. 719, 94 N. W. 695, holding that a blameless person is not liable on an instrument from which fundamental recitals have been eliminated, depriving him of good defenses and changing the nature of the contract.

10 N. D. 558, PORTER v. ANDRUS, 88 N. W. 567.**Defenses available against bona fide indorsee and payee.**

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding that a negotiable promissory note though void in the hands of the payee may be enforced by a bona fide indorsee who is not a mere assignee.

Who is bona fide holder of note.

Cited in note in 31 L.R.A.(N.S.) 292, on holder of bill or note as collateral as bona fide holder.

10 N. D. 564, THOMPSON v. THOMPSON, 88 N. W. 565.**10 N. D. 569, CLOPTON v. CLOPTON, 88 AM. ST. REP. 749, 88 N. W. 562, Later appeal in 11 N. D. 212, 91 N. W. 46.****Admission of residence of plaintiff by answer in divorce suit.**

Cited in *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46, stating that the record of cited case contains an erroneous statement of fact referring
Dak. Rep.—28.

to statement that the answer affirmatively admitted plaintiff's request for divorce purposes.

Evidence from record of former litigation.

Cited in Clopton v. Clopton, 11 N. D. 212, 91 N. W. 46, referring to evidence that parties had stipulated to avoid certain scandals of a divorce action.

Second hearing on order as being barred by first hearing.

Cited in Sim v. Rosholt, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50, holding it permissible for plaintiff to move for a rehearing on motion for judgment notwithstanding verdict and for an order setting aside the order of court for judgment for defendant on latter's motion; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529, holding that while an action is still pending a court can vacate its first findings and judgment on motion for purpose of correcting its error; Castle v. Madison, 113 Wis. 346, 89 N. W. 156, holding that an order made pendente lite as between the parties is not binding on the court except in that the court need not consider the same matter a second time but may do so if desirable; Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027, to point that second hearing of motion upon state of facts is discretionary with court.

10 N. D. 575, CALDWELL v. BROOKS ELEVATOR CO. 88 N. W. 700.

10 N. D. 580, POWERS DRY GOODS CO. v. NELSON, 58 N. W. 770, 88 N. W. 703.

Effect of discharge in bankruptcy on liens not included in bankruptcy act.

Cited with approval in McKenney v. Cheney, 118 Ga. 387, 45 S. E. 287, holding that bankruptcy discharge has no effect on a suit on a home mortgage waiver note as enforceable against exempt property.

Cited in Pepperdine v. Bank of Seymour, 100 Mo. App. 387, 73 S. W. 890, on the effect of release in bankruptcy on the enforcement of liens acquired prior to the four months preceding institution of bankruptcy proceedings; Re Merrow, 131 Fed. 993, holding that bankruptcy act does not dissolve existing valid attachments except for the benefit of the estate and such attachments are therefore valid after bankruptcy discharge; Mayer Boot & Shoe Co. v. Ferguson, 19 N. D. 496, 126 N. W. 110, holding that lien of attachment on personal property of bankrupt set aside as exempt is not discharged by his discharge in bankruptcy.

Distinguished in Brooks v. Eblen, 127 Ky. 727, 106 S. W. 308, where creditor had no lien and debtor was discharged in bankruptcy before lien had been acquired.

Rights of trustee in bankruptcy respecting exempt property.

Followed in Jewett Bros. v. Huffman, 14 N. D. 110, 103 N. W. 100, holding that the trustee in bankruptcy is not entitled to take and

exempt property until exemption claims have been allowed but such property is under jurisdiction of state courts at all times.

Delay in discharge in bankruptcy to enable creditor to obtain lien.

Cited in *Groves v. Osburn*, 46 Or. 173, 79 Pac. 500, on withholding of discharge in bankruptcy to allow creditor to acquire lien.

10 N. D. 587, NESS v. JONES, 88 AM. ST. REP. 755, 88 N. W. 706.

Review of question of fact.

Cited in *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 310, 116 N. W. 333, holding that unless motion for new trial is made the evidence cannot be reviewed on appeal to determining whether verdict is supported.

Consideration on appeal of errors at law occurring on trial.

Cited in *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353, holding that the assignment of error predicated upon action of court in denying motion for directed verdict and upon granting motion of plaintiff for verdict cannot be considered on appeal where exceptions were not waived, such errors being errors at law occurring at the trial; *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684, holding homestead exemption not presumed to be waived by failure or neglect of head of family to expressly claim it.

What property exempt.

Cited in note in 102 Am. St. Rep. 99, on exemption of wages, salaries, and earnings.

— Wife's separate property.

Distinguished in *Bremseth v. Olson*, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 A. & E. Ann. Cas. 1155, where wife's separate property was with her consent impressed with homestead character.

Abandonment of homestead.

Cited in note in 102 Am. St. Rep. 390, on abandonment of homestead.

10 N. D. 594, WILES v. McINTOSH COUNTY, 88 N. W. 710.

Recovery back of voluntary payment.

Cited in note in 94 Am. St. Rep. 424, on recovery back of voluntary payment.

10 N. D. 601, MAPES v. METCALF, 88 N. W. 713.

Retrial of causes.

Cited in *Prescott v. Brooks*, 11 N. D. 93, 90 N. W. 129, on the source of authority of supreme court to retry cases.

Contract to refrain from business.

Cited in *Siegel v. Marcus*, 18 N. D. 214, 20 L.R.A.(N.S.) 769, 119 N. W. 358, upholding contract not to enter into same business in limited locality for next two years, on sale of share of partnership to partners.

Cited in notes in 93 Am. St. Rep. 910, on contracts with newspapers

10 N. D.] NOTES ON NORTH DAKOTA REPORTS.

void as against public policy; 6 L.R.A.(N.S.) 850, on validity of stipulation not to engage in particular business, not ancillary to lawful contract; 24 L.R.A.(N.S.) 931, on validity of agreement in restraint of trade ancillary to sale of business or profession, as affected by territorial scope.

10 N. D. 610, STATE EX REL. McCLORY v. DONOVAN, 88 N. D. 717.

Authority of counsel.

Cited in *State v. Harris*, 14 N. D. 501, 105 N. W. 621, holding that permitting attorney to conduct proceedings without challenging his authority promptly the want of authority is waived.

Return of premises to owner after abatement of liquor nuisance.

Cited in *State ex rel. Heffron v. Bleth*, 21 N. D. 27, 127 N. W. 1, holding that return of building after it has been closed because of nuisance maintained by tenant, with knowledge of owner, is discretionary with court.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 11 N. D.

11 N. D. 1, FREEMAN v. WOOD, 88 N. W. 721, Later appeal in 14 N. D. 95, 103 N. W. 392.

Actions to vacate void judgments.

Cited in *Phelps v. McCollam*, 10 N. D. 536, 88 N. W. 292, holding in direct attack on a judgment for want of jurisdiction, it may be set aside on a showing that no service of process was had on the defendant; *Bruegger v. Cartier*, 20 N. D. 72, 126 N. W. 491, as to when relief in equity may be had from judgment because of fraud or accident.

— Time for application.

Cited in *Skjelbred v. Shafer*, 15 N. D. 539, 125 Am. St. Rep. 614, 108 N. W. 487, holding where judgment is entered without jurisdiction, the statutory limitation of one year to apply for relief has no application; *Williams v. Fairmount School Dist.* 21 N. D. 198, 129 N. W. 1027, holding same as to collusion and fraudulent judgments.

Attack on judicial procedure by strangers.

Distinguished in *Whitney v. Hazzard*, 18 S. D. 490, 101 N. W. 346, holding stockholders of a corporation who were not parties to a foreclosure suit and whose motion to set aside judgment therein was defeated by fraud of mortgagee, may maintain an independent suit in equity to set aside foreclosure of mortgage on corporation's property obtained through collusion of corporation's president and mortgagee.

11 N. D. 10, DRINKALL v. MOVIUS STATE BANK, 57 L.R.A. 341, 95 AM. ST. REP. 693, 88 N. W. 724.

Gambling considerations.

Cited in *Burke v. Buck*, 31 Nev. 74, 22 L.R.A.(N.S.) 627, 99 Pac. 1073, holding an indorsement and assignment of a certificate of deposit

made at a gaming table and during progress of play, the consideration is utterly void; *Burke v. Buck*, 31 Nev. 74, 22 L.R.A.(N.S.) 627, 99 Pac. 1078, holding indorsement and transfer of certificate of deposit by one playing at roulette wheel, upon operator's cashing same to put player in funds, void.

Cited in note in 22 L.R.A.(N.S.) 628, on effect of transfer of negotiable instrument to secure money for gambling.

Conclusiveness of denial of new trial asked for, for insufficiency of evidence.

Cited in *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 109; *Lang v. Bailes*, 19 N. D. 582, 125 N. W. 891,—holding that refusal of court to set aside verdict will not be reversed where there is substantial conflict in evidence; *Action v. Fargo & M. Street R. Co.* 20 N. D. 434, 129 N. W. 225, holding that order denying motion for new trial for insufficiency of evidence will not be reversed where verdict is supported by substantial evidence.

11 N. D. 22, STATE EX REL. WILES v. ALBRIGHT, 88 N. W. 729.

Right of appeal after satisfaction of judgment.

Cited in note in 29 L.R.A.(N.S.) 22, 28, on right to appeal from unfavorable while accepting favorable part of decree, judgment, or order.

Distinguished in *Signor v. Clark*, 13 N. D. 35, 99 N. W. 68, holding where after suit to cancel a deed it is declared a mortgage and there is a judgment for foreclosure, sale made thereunder, and before expiration of period of redemption judgment is paid in full and satisfaction taken, with nothing said as to appeal, there is a waiver of right to appeal.

When mandamus lies.

Cited in *Fuller v. University & School Lands*, 21 N. D. 212, 129 N. W. 1029, holding that mandamus does not lie to review decision of board of University and School Lands as to sale of lands.

To compel payment of salary.

Cited in *State ex rel. Wiles v. Heinrich*, 11 N. D. 31, 88 N. W. 734, on the issuance of mandamus to compel issuance of warrant to pay clerks' hire in office of superintendent of schools.

Cited in note in 125 Am. St. Rep. 520, on duties, performance of which may be compelled by mandamus.

Collection of claims against county.

Cited in *State ex rel. McCue v. Lewis*, 18 N. D. 125, 119 N. W. 1037, holding that legislature may require payment of claims and demands against county before they are audited by county commissioners.

11 N. D. 31, STATE EX REL. WILES v. HEINRICH, 88 N. W. 734.

Clerk hire for county superintendent.

Distinguished in *Dickey County v. Hicks*, 14 N. D. 73, 103 N. W. 423, holding where county auditor in good faith but without authority of law

puts in monthly salary warrants of superintendent of schools, amounts due to clerks in his office, which amounts are paid to and received by clerks in full satisfaction of their demands, which were reasonable, such amounts cannot be recovered back by county.

Collection of claims against county.

Cited in *State ex rel. McCue v. Lewis*, 18 N. D. 125, 119 N. W. 1037, holding that legislature may require payment of claims and demands against county without first being audited by county commissioners.

11 N. D. 38, McCLODY v. RICKS, 88 N. W. 1042.

Title acquired by mortgage.

Cited in *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792, holding mortgage is a mere lien and of itself does not transfer the title or right of possession to mortgagee before or after default.

Dispossession of mortgagee in possession.

Disapproved in *Stouffer v. Harlan*, 68 Kan. 135, 64 L.R.A. 320, 104 Am. St. Rep. 396, 74 Pac. 610, holding where mortgagee makes peaceable entry under foreclosure believed by him to be valid but in fact void he may not be dispossessed without a payment of the mortgage debt.

11 N. D. 45, FINLAYSON v. PETERSON, 89 N. W. 855.

Interest of mortgagee in possession under void foreclosure.

Cited in *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792, holding where mortgagee with consent of mortgagor enters into peaceable and exclusive possession under a void foreclosure, his holding is adverse to the mortgagor from its inception and statute of limitations begins to run.

Title under illegal foreclosure.

Cited in *Winterberg v. Van De Vorste*, 19 N. D. 417, 122 N. W. 866, holding that one who upon examining record and going to documentary evidence of foreclosure, would find nothing to apprise him of defects in proceeding, is innocent purchaser so far as legal notice is concerned.

Trustee in possession.

Cited in *Cotton v. Butterfield*, 14 N. D. 465, 105 N. W. 236, holding where vendor after an apparent abandonment of contract for sale of land enters and improves land, on a decree for specific performance in favor of vendor he must account for the value of the use and occupation or net profits obtained from occupations.

Disability of mortgagee to take tax deed as against mortgagor.

Cited in *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14, holding where the mortgagee has merely a lien on the mortgaged property, he cannot as against the mortgagor during the relation of mortgagee and mortgagor, acquire title to the mortgaged property by means of a tax sale where under mortgage he is permitted to pay taxes and add amount to his claim.

11 N. D. 55, ARNETT v. SMITH, 88 N. W. 1037.

Trial of equitable issues interposed in answer.

Cited in *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289, holding where equitable issues interposed by defendant are determined in his favor, there is no necessity of trying the legal issues, where effect of determination of the equitable issues is to terminate the litigation.

Limited in *Cotton v. Butterfield*, 14 N. D. 465, 105 N. W. 236, holding equitable issues should be first determined and holding where equitable defense by way of counterclaim is interposed in the answer to which the plaintiff replies, in action for damages for failure and refusal by defendant to perform contract for sale of farm, the counterclaim being for specific performance, an adjudication of the equitable issues necessarily determines all the disputed facts essential to plaintiff's right of recovery.

Covenants in contract to sell land.

Cited in *Cotton v. Butterfield*, 14 N. D. 465, 105 N. W. 236, on mutuality of covenants for providing good title on tender of purchase price; *Ink v. Rohrig*, 23 S. D. 548, 122 N. W. 594, holding vendee's covenant to pay defendant on, and concurrent with, vendor's covenant to convey, where vendor covenanted to convey if vendee "first" made payments and performed covenants mentioned on his part.

Contract under mutual mistake of law.

Cited in *Silander v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544, holding a release in action for accounting and cancelation of certain mortgages and liens, executed under a mutual mistake of law bound neither party as a matter of law.

Offer of performance.

Cited in *Foster County Implement Co. v. Smith*, 17 N. D. 178, 115 N. W. 663, holding on an executory contract for the sale of real estate an offer of performance by the vendee gives him right to maintain action for breach of contract.

Accord and satisfaction.

Cited in note in 100 Am. St. Rep. 451, on accord and satisfaction.

11 N. D. 65, DALRYMPLE v. SECURITY IMPROV. CO. 88 N. W. 1033.

To what lien of judgment attaches.

Cited in *Riverdale Min. Co. v. Wicka*, 14 Cal. App. 526, 112 Pac. 896, holding judgment not lien on property held by judgment debtor as trustee.

Cited in note in 117 Am. St. Rep. 782, 785, on estates and interests to which judgment liens attach.

11 N. D. 73, GAGNIER v. FARGO, 95 AM. ST. REP. 705, 88 N. W. 1030, Later appeal in 12 N. D. 219, 96 N. W. 841.

Municipal duty and liability as to defects in street.

Cited in note in 20 L.R.A.(N.S.) 756, on liability of municipality for defects or obstructions in street.

- As to bicycle riders.

Cited in *Fox v. Clarke*, 25 R. I. 515, 65 L.R.A. 234, 57 Atl. 305, 1 A. & E. Ann. Cas. 548, holding statute imposing duty on city to keep highways in repair so that they may be safe and convenient for travelers with their teams, carts and carriages does not impose duty on city to keep highways safe and convenient for bicycles.

Cited in note in 23 L.R.A. (N.S.) 544, on duty to make streets and highways safe for bicycles.

Review of evidence on appeal.

Cited in *Lund v. Upham*, 17 N. D. 210, 116 N. W. 88, holding where particulars wherein evidence is insufficient to sustain the verdict are not pointed out in the notice of intention to move for a new trial, nor in motion for new trial nor in specifications of error, assignment that evidence is insufficient to sustain the verdict will be disregarded on appeal.

11 N. D. 79, EATON v. GUARANTEE CO. 88 N. W. 1020.

11 N. D. 81, TALBOT v. BOYD, 88 N. W. 1026.

Right to substantial damages.

Cited in *Scully Steel & Iron Co. v. Hann*, 18 N. D. 528, 123 N. W. 275, as to when substantial damages may be recovered.

11 N. D. 86, GLASPELL v. JAMESTOWN, 88 N. W. 1023.

Mode of segregating territory from city.

Cited in *State ex rel. Minot v. Willis*, 18 N. D. 76, 118 N. W. 820, to point act of segregating territory from city is legislative in character and should be by ordinance.

Imposing administrative duties upon judges.

Cited in *Kermott v. Bagley*, 19 N. D. 345, 124 N. W. 397, on right to impose administrative duties upon judges of district court.

11 N. D. 92, WILSON v. KARTES, 88 N. W. 1023.

Necessity for assignment of error in brief.

Cited in *Marck v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 86, 105 N. W. 1106, holding where the brief contains no assignments of error and there appears no cause for relaxation, the judgment will be affirmed; *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667, affirming judgment appealed from because of failure to assign errors in brief.

11 N. D. 93, PRESCOTT v. BROOKS, 99 N. W. 129.

Appeal from part of judgment.

Followed in *Crane v. Odegard*, 11 N. D. 342, 91 N. W. 962, holding an appeal from part only of a judgment is abortive and confers no jurisdiction on supreme court.

Cited in *Tronsrud v. Farm Land & Finance Co.* 18 N. D. 417, 121 N. W. 68, requiring appeal from entire judgment under N. D. Code, § 7229, to authorize retrial.

11 N. D.] NOTES ON NORTH DAKOTA REPORTS.

**11 N. D. 107, MINNEAPOLIS, ST. P. & S. STE. -M. R. C.
DICKKEY COUNTY, 90 N. W. 260.**

Injunction against taxation.

Cited in *Torgrinson v. Norwich School Dist.* No. 31, 14 N. D. 10 N. W. 414, holding an injunction would not issue to enjoin the levy tax on an entire district on the ground of its illegality; *Chicago & N. W. R. Co. v. Rolfsen*, 23 S. D. 405, 122 N. W. 343, holding that collection of illegal personal property tax will not be restrained where remedy is not shown inadequate.

11 N. D. 113, DONOVAN v. WELCH, 90 N. W. 262.

Deed by attorney in fact.

Cited in *Mulford v. Rowland*, 45 Colo. 172, 100 Pac. 603, holding sufficient to pass title a deed wherein attorney in fact is named as principal but which is signed by him as attorney, it being apparent from the facts that intention was to transfer principal's title.

11 N. D. 120, RE FREERKS, 90 N. W. 265.

Jurisdiction of proceedings for revocation of attorney's license.

Cited in *State v. Mosher*, 128 Iowa, 82, 103 N. W. 105, 5 A. & E. Cas. 984, holding the district court has jurisdiction of proceedings to revoke the license of an attorney at law.

11 N. D. 136, STATE EX REL. CLYDE v. LAUDER, 90 N. W. 564.

Substitution of prosecuting attorney.

Cited in *Taylor v. State*, 49 Fla. 69, 38 So. 380, holding where an attorney though present in court refuses to appear before the grand jury and examine witnesses and advise grand jury on points of law, the court has the implied power to appoint another member of the bar to perform such duties.

11 N. D. 148, PERRY v. HACKNEY, 90 N. W. 483.

Election irregularities.

Cited in *State ex rel. Byrne v. Wilcox*, 11 N. D. 329, 91 N. W. 100, holding where county commissioners have not caused precinct lines to conform to ward lines, such fact in absence of fraud, is a mere irregularity and does not render election void; *Fitzmaurice v. Willis*, 20 N. D. 127 N. W. 95, holding registration requirements of primary election mandatory.

Cited in note in 90 Am. St. Rep. 82, on irregularities avoiding election.

11 N. D. 157, WOODHULL v. FARMERS' TRUST CO. 95 AM. ST. REP. 712, 90 N. W. 795.

11 N. D. 164, GAAR, S. & CO. v. SORUM, 90 N. W. 799.

11 N. D. 175, ADAIR v. ADAIR, 90 N. W. 804.

11 N. D. 181, MAHON v. LEECH, 90 N. W. 807.

Extinguishment of written land contracts by parol.

Cited in *Wisner v. Field*, 15 N. D. 43, 106 N. W. 38, holding contract for the sale of real estate may be abandoned by parol; *Haugen v. Skjervheim*, 13 N. D. 616, 102 N. W. 311; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856,—holding a written contract for the sale of land may be annulled or extinguished by parol; *Ottow v. Friese*, 20 N. D. 86, 126 N. W. 503, holding that land contract may be waived by abandonment of land and of contract by vendee, and rights thereunder extinguished; *Henderson v. Beaty*, 124 Iowa, 163, 99 N. W. 716, holding where there is an oral agreement by agent and purchaser of land to rescind written contract therefor, which is acquiesced in by principal, he may not thereafter maintain action for its enforcement; *Cutwright v. Union Sav. & Invest. Co.* 33 Utah, 480, 94 Pac. 984, 14 A. & E. Ann. Cas. 725, holding a written contract for the sale of land could be rescinded by parol.

Specific performance.

Cited in *Quarton v. American Law Book Co.* 143 Iowa, 517, 32 L.R.A. (N.S.) 1, 121 N. W. 1009, holding where after delivery of books on instalment contract purchaser pays for part but refuses to pay for additional volumes although requested so to do, whereupon contract is cancelled and purchaser does nothing thereon for three years, he cannot then compel a performance of the contract; *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 271, holding vendee of land not entitled to specific performance on tender of purchase made long after due, when at time of contract vendor stated he wanted money with which to pay debts, that lands were increasing in value, and where seven months after failure to pay an instalment vendor advises vendee he will sell to another if next payment due in four months was not paid, which was not so paid.

Laches coupled with increase in value.

Cited in *Spoonheim v. Spoonheim*, 14 N. D. 380, 104 N. W. 845, holding where party to a conveyance waits nearly seven years before attacking deed as being void, he cannot invoke aid of equity to be relieved from contract especially where incentive to suit is the increased value of the land.

11 N. D. 190, DEACON v. MATTISON, 91 N. W. 35.

11 N. D. 193, AMUNDSON v. WILSON, 91 N. W. 37.

Introductory evidence of judgment.

Cited in *Galvin v. Tibbs, H. & Co.* 17 N. D. 600, 119 N. W. 39, holding testimony of what another court did was not introductory where not followed by the judgment of that court to which such testimony led.

Mode of proving judgment.

Cited in *Yokell v. Elder*, 20 N. D. 142, 127 N. W. 514, holding that where proper objection is made judgment cannot be established by judg-

ment docket containing abstract of judgment nor by parol in absence showing which permits offer of secondary evidence.

Right of fraudulent grantee to attack judgment of one attacking conveyance.

Cited in note in 67 L.R.A. 593, on attack by alleged fraudulent grantee on judgment on which action to set aside conveyance is based.

11 N. D. 198, THOMPSON v. ARMSTRONG, 91 N. W. 39.

Rights of parties under unrecorded contract for conditional sale.

Cited in Re Pierce, 87 C. C. A. 537, 157 Fed. 755, holding failure to record a contract reserving title in seller until payment of price did not render reservation void as to trustee in bankruptcy of the purchaser.

11 N. D. 203, WITTE MFG. CO. v. REILLY, 91 N. W. 42.

Delivery to pass title.

Cited in Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241, holding that the question as to intention in delivery and whether a party waived compliance with the terms intended to waive the terms of an order as to payment, payment of freight and other provisions, is to be determined by what was said and done at the time delivery was claimed to have been made, together with other circumstances prior or subsequent thereto showing intention.

11 N. D. 208, THOMPSON v. THOMPSON, 91 N. W. 44.

11 N. D. 212, CLOPTON v. CLOPTON, 91 N. W. 46.

11 N. D. 221, FLEISCHER v. FLEISCHER, 91 N. W. 51.

Fraud or illegality as defense to equitable enforcement of contract.

Cited in McMillan v. Wright, 56 Wash. 114, 105 Pac. 176, holding that oral agreement by an entryman under the Carey act and another who was to receive the latter was to pay part of expenses and on issuance of patent was to receive deed to part of entry was against public policy as contemplating perjury, and would not be enforced.

11 N. D. 233, KNEELAND v. BEARE, 91 N. W. 56.

11 N. D. 238, CASS COUNTY v. AMERICAN EXCH. STATE BANK, 91 N. W. 59.

Release of surety.

Cited in Hilleboe v. Warner, 17 N. D. 594, 118 N. W. 1047, holding that erasure of a surety's name after the bond had been signed by other parties without the knowledge or consent of such sureties, constituted a material alteration releasing such sureties.

**11 N. D. 249, PENGILLY v. J. I. CASE THRESHING MACH. CO.
91 N. W. 63.**

Judicial discretion to grant new trial.

Cited in *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026; *Galvin v. Tibbs, H. & Co.* 17 N. D. 600, 119 N. W. 39; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765; *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397,—holding the granting of a new trial for insufficiency of evidence rests in sound discretion of trial court and will not be disturbed except where abused; *Wheeler v. Castor*, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 391, holding granting of motion to vacate judgment rendered on default rests in sound discretion of trial court and will not be reversed on appeal except for abuse therein; *State v. Howser*, 12 N. D. 495, 98 N. W. 352, holding the granting of a new trial by a trial court for insufficiency of evidence in a criminal action is in the sound discretion of the trial court, and will not be disturbed on appeal except for abuse of such discretion.

11 N. D. 256, McMILLAN v. CONAT, 91 N. W. 67.

Record on appeal from order granting new trial.

Cited in *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314, holding where motion for new trial is in whole or in part made on court's minutes, a statement of the case must be settled, embodying such portion of the evidence or proceeding as is essential to a review of the specifications based thereon.

Record for review of error.

Cited in *State v. Scholfield*, 13 N. D. 664, 102 N. W. 878, holding in criminal case one who would urge error must present a record of the facts upon which the trial court acted in making the ruling or order complained of, and in case of failure to do so a review cannot be had.

11 N. D. 257, WISNER v. FIELD, 91 N. W. 67.

Compensation to partner for services.

Cited in *Williams v. Pedersen*, 47 Wash. 472, 17 L.R.A. (N.S.) 384, 92 Pac. 287, holding in absence of an agreement thereto, one partner is not entitled to recover from the other by reason of inequality of services.

Cited in note in 17 L.R.A. (N.S.) 385, 388, 391, 409, 412, 414, on right of partner to compensation for services to partnership.

11 N. W. 262, INTERNATIONAL SOC. v. HILDRETH, 81 N. W. 70.

11 N. D. 265, ANGELL v. CASS COUNTY, 91 N. W. 72.

Followed without discussion in *Morton v. Cass County*, 11 N. D. 569, 91 N. W. 1126.

Class legislation.

Cited in *Beleal v. Northern P. R. Co.* 15 N. D. 318, 108 N. W. 33, holding reasonable a classification as a hazardous occupation and imposing liability on railroad for injury to employee through negligence of a co-employee

—Classification of counties and cities.

Cited in *Re Connolly*, 17 N. D. 546, 117 N. W. 946, holding void, as special legislation, a statute providing that in counties having not more than sixty-five hundred population in which no court house has been constructed proceedings for county seat removals could be initiated or certain procedure by inhabitants of county; *Longview v. Crawfordsville*, 164 Ind. 117, 68 L.R.A. 622, 73 N. E. 78, 3 A. & E. Ann. Cas. 496, holding void, as containing an arbitrary classification, a statute providing for extension of corporate boundaries of cities not operating under special charter having a population of between six and seven thousand and for annexation of a territory; *State ex rel. Mitchell v. Mayo*, 15 N. D. 327, 108 N. W. 36, holding invalid as an unreasonable classification a statute requiring a county treasurer to pay over to cities organized the general law interest and penalties on city and city school taxes collected by county treasurer; *Rushville v. Hayes*, 162 Ind. 193, 70 N. E. 134, holding void, as special legislation, act providing that board of school trustees in city of not more than 4545 nor less than 4540 population might issue bonds for erection of school house; *Smith v. State*, 54 Tex. Crim. Rep. 298, 113 S. W. 289 (dissenting opinion), on validity of statute providing for drawing of jurors in counties having city population of certain amount.

Distinguished in *Picton v. Cass County*, 13 N. D. 242, 100 N. W. 711, 3 A. & E. Ann. Cas. 345, upholding statute providing for enforcement of taxes on land sold to state or county and giving boards of commissioners of all counties discretionary authority to institute proceedings.

11 N. D. 274, THOMPSON v. TRAVELERS' INS. CO. 91 N. W. 75, Later appeal in 13 N. D. 444, 101 N. W. 900.

Waiver of defenses by insurer.

Cited in *Goorberg v. Western Assur. Co.* 150 Cal. 510, 10 L.R.A.(N.S.) 876, 119 Am. St. Rep. 246, 89 Pac. 130, 11 A. & E. Ann. Cas. 801, holding mere retention of premiums by insurer after loss has occurred and where it steadfastly denies liability, is not a waiver of the defense of breach of warranty of title; *Taylor-Baldwin Co. v. Northwestern F. & M. Ins. Co.* 18 N. D. 343, 122 N. W. 396, 20 A. & E. Ann. Cas. 432, holding that rejection of claim on ground that policy had been canceled did not estop company to set up forfeiture for violation of condition as to removal of insured goods; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A. (N.S.) 539, 127 N. W. 837, holding forfeiture of policy waived where with knowledge of facts company issues and delivers policy and receives and retains premium.

Return of premiums on void policy.

Cited in *Taylor v. Grand Lodge A. O. U. W.* 96 Minn. 441, 3 L.R.A. (N.S.) 114, 105 N. W. 408, holding where insured in a beneficiary association fraudulently stated his age in the application, his beneficiary could not on his decease recover the premiums paid, where application provides that if any statements should be false the policy should be void; *Bruley v. Royal League*, 3 Ill. C. C. 313, 323, holding a personal representative can recover premiums paid after forfeiture of policy of a deceased.

Delivery of life insurance contract.

Cited in *Stringham v. Mutual Ins. Co.* 44 Or. 447, 75 Pac. 822, holding final consummation of the contract of insurance includes both the delivery of the policy and its acceptance by the insured.

11 N. D. 280, FIRST NAT. BANK v. MINNEAPOLIS & N. ELEVATOR CO. 91 N. W. 436.**What amounts to conversion.**

Cited in *Catlett v. Stokes*, 21 S. D. 111, 110 N. W. 84, holding purchaser of mortgaged wheat from mortgagor who mingled it with his own not liable for conversion.

Demand as prerequisite to action of trover.

Cited in *McFadden v. Thorpe Elevator Co.* 18 N. D. 93, 118 N. W. 242, on sufficiency of demand to maintain trover and conversion.

Instructions as a whole.

Cited in *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 857, holding court's instructions must be considered as a whole, and an isolated sentence containing an erroneous statement of law but which when taken with rest of charge would not mislead jury, is harmless error, and would not warrant reversal.

Reading part of deposition.

Followed in *Gussner v. Hawkes*, 13 N. D. 453, 101 N. W. 898, holding a party who appears at taking of deposition and cross-examines witness cannot introduce mere excerpts from the deposition.

Right to directed verdict.

Cited in *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266, holding it error to deny motion for directed verdict where prima facie case not made by opposing party.

11 N. D. 289, DONOVAN v. ALLERT, 58 L.R.A. 775, 95 AM. ST. REP. 720, 91 N. W. 441.**Taking of property for public use.**

Cited in *Griswold v. Minneapolis, St. P. & S. Ste. M. R. Co.* 12 N. D. 435, 102 Am. St. Rep. 572, 97 N. W. 538, holding where property for a depot has not been acquired by condemnation proceedings but by conveyance by the owner upon the condition subsequent that depot be erected thereon, which is done but depot is subsequently abandoned, causing property to revert to the grantor, he may maintain ejectment for its possession; *Fraud v. Detroit & P. R. Co.* 133 Mich. 413, 95 N. W. 559, holding where a corporation operating an electric railroad, could not agree with owners of land as to value of strip of land wanted by it, it could take such property by force, without invoking power of eminent domain, and equity would enjoin the cutting down of trees and encroachment on such land.

Distinguished in *De Lucca v. North Little Rock*, 142 Fed. 597, holding although under Arkansas law fee title to street is in abutting owner, an abutting owner is not entitled to injunctive relief against the construction

thereon by a city of a viaduct for public purposes until compensation first paid such owner.

Preliminary injunction.

Cited in *Dickson v. Dows*, 11 N. D. 404, 92 N. W. 797, holding the granting or refusal of a preliminary injunction, as well as the dissolution of the same, rests in the sound discretion of the trial court, and its order will not be reversed except for an abuse of discretion.

Proper highway use.

Cited in *Northwestern Teleph. Exch. Co. v. Anderson*, 12 N. D. 58, 1 L.R.A. 771, 102 Am. St. Rep. 580, 98 N. W. 706, 1 A. & E. Ann. 110, holding the use of street for moving of a building is an extraordinary one, and one moving a house, although under license from city, is liable for damage to wires and poles of telephone company to be made for a valuable consideration prior right to use street had been given.

Cited in notes in 101 Am. St. Rep. 110, on rights, obligations and remedies of persons over whose land a highway runs; 106 Am. St. Rep. 264, on what are additional servitudes in highways.

— Telephone lines.

Cited in *Cosgriff v. Tri-State Teleph. & Teleg. Co.* 15 N. D. 2, 1 L.R.A.(N.S.) 1142, 107 N. W. 525; *Tri-State Teleph. & Teleg. Co. v. Cosgriff*, 19 N. D. 771, 26 L.R.A.(N.S.) 1171, 124 N. W. 75,—holding the maintenance of a telephone and telegraph line upon a rural highway is not a proper highway use, and constitutes an additional servitude. *McCann v. Johnson County Teleph. Co.* 69 Kan. 210, 66 L.R.A. 17, 17 Pac. 870, 2 A. & E. Ann. Cas. 156 (dissenting opinion), on erecting telephone poles as not being a proper highway use.

Disapproved in *Kirby v. Citizens' Teleph. Co.* 17 S. D. 362, 97 N. W. 100, holding the erection, maintenance and operation of a system of telephone poles and wires on city street is not an additional servitude; *Frazier v. East Tennessee Teleph. Co.* 115 Tenn. 416, 3 L.R.A.(N.S.) 323, 112 Am. St. Rep. 856, 90 S. W. 620, 5 A. & E. Ann. Cas. 838, holding the erection of telephone poles in street is not an additional servitude upon the property of an abutting owner.

Injunction against change of street grade.

Cited in *Edwards v. Thrash*, 26 Okla. 472, 138 Am. St. Rep. 975, 17 Pac. 832, holding injunction does not lie at instance of abutting owner to restrain municipality from improving street until he has been compensated for damages arising from change of grade.

11 N. D. 300, J. B. STREETER, JR. CO. v. FREDRICKSON
N. W. 692.

Adverse possession with payment of taxes.

Cited in *Schauble v. Schulz*, 69 C. C. A. 581, 137 Fed. 389, holding the running of adverse possession and payment of taxes not necessary to bar the statute of limitations but it starts from adverse possession.

11 N. D. 306, RE OLMSTEAD, 91 N. W. 943.**Grounds for disbarment.**

Cited in note in 24 L.R.A.(N.S.) 531, on disbarment in one state or its concealment as ground for disbarment in another.

11 N. D. 309, STATE EX REL. GRANVOLD v. PORTER, 91 N. W. 944.**Judicial determination of regularity of political conventions.**

Cited in State ex rel. Buttz v. Lindahl, 11 N. D. 320, 91 N. W. 950, holding where two county conventions are held under one call and a state central committee after a contest on the merits after notice and full and fair hearing decides in favor of one set of delegates, which decision is adopted by state convention, the court will not interfere therein; Walling v. Lansdon, 15 Idaho, 282, 97 Pac. 396, holding court has power and jurisdiction to inquire into the legality of conventions and authority and rights of delegates to participate therein, and if the legal rights of a contending delegate are invaded or denied by a party convention the court will extend its inquiry to the extent of determining what legal rights of the individual have been invaded or denied.

Factional division in political conventions.

Distinguished in Walling v. Lansdon, 15 Idaho, 282, 97 Pac. 396, holding where the statute prescribes the method of electing delegates to participate in a convention only those so elected are entitled to sit or participate, and the convention cannot convert a legal minority into a legal majority by permitting illegal delegates to vote with said legal minority.

—Placing names of nominees on ballot.

Cited in State ex rel. Howells v. Metcalf, 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923, holding the names of nominees certified from a convention which is not the regular convention of the party are not entitled to a place on a ballot.

Franchise questions.

Distinguished in State ex rel. Steel v. Fabrick, 17 N. D. 532, 117 N. W. 860, holding the division of a county in no way affects the sovereignty of the state and does not call for the issuance of extraordinary writ in its behalf by the supreme court.

11 N. D. 320, STATE EX REL. BUTTZ v. LIUDAHL, 91 N. W. 950.**Conclusiveness of committee decisions of party disputes.**

Cited in State ex rel. Mitchell v. Larson, 13 N. D. 420, 101 N. W. 315, holding decision by state central committee after hearing and determination of election contest after notice, on question of regularity of county convention by which they were elected, and such decision has been confirmed by the convention, such determination and decision is conclusive on the courts; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964, holding where state central committee is recognized as one officially authorized
Dak. Rep.—29.

to certify nominations, the nominees officially certified by such committee are entitled to preference in designation as nominees of a party.

— **Judicial relief.**

Cited in *Attorney-General v. Barry*, 74 N. H. 353, 68 Atl. 192, holding where state committee and a state convention of a party have determined that certain persons involved in a contest are the regularly constituted executive committee of the party for a particular district, the court will make such decrees as are necessary to enforce rights of regularly constituted committee; *Walling v. Lansdon*, 15 Idaho, 282, 97 Pac. 396, holding court has power and jurisdiction to inquire into the legality of conventions and authority and rights of delegates to participate therein to the extent of ascertaining the application of the law thereto.

Franchise questions.

Distinguished in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860, holding division of a county in no way affects the sovereignty of the state and not in itself ground for issuance of mandamus by supreme court for giving of notice of submission of question to election.

11 N. D. 329, STATE EX REL. BYRNE v. WILCOX, 91 N. W. 955.

Original jurisdiction of Supreme Court.

Cited in *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385, holding supreme court will not issue quo warranto against usurpation of corporate authority by county beyond its boundaries, where sufficient reason is not shown why relief was not sought in the district court; *State ex rel. McDonald v. Holmes*, 16 N. D. 457, 114 N. W. 367, holding supreme court will not issue mandamus at suit of a county treasurer to compel state auditor to issue warrant in payment of reward for arrest and conviction of a violator of law prohibiting unlawful sale of intoxicants; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705, holding supreme court will grant leave to file information in nature of quo warranto on application of private relator, who has suits pending of personal nature, directed to district judge improperly appointed by governor; *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860, holding supreme court will issue mandamus to compel county auditor to give notice that the question of the division of the county would be voted on at next general election, where it is probable a final decision in the matter could not be rendered by the district court until after such election; *Homesteaders v. McCombs*, 24 Okla. 201, — L.R.A.(N.S.) —, 103 Pac. 691, 20 A. & E. Ann. Cas. 181, holding that supreme court has not original jurisdiction in action instituted by foreign insurance company to compel insurance commissioner to permit company to do business within state; *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282, holding that supreme court in exercise of its original jurisdiction will enjoin alleged new county and those assuming to act as its officers, from exercising jurisdiction over territory embraced in such county until validity of organization of county involved in pending proceeding, is finally adjudicated.

11 N. D. 342, **CRANE v. ODEGARD**, 91 N. W. 962, Appeal from order affirming taxation of costs on remittitur in 12 N. D. 135, 96 N. W. 326.

Appeal from part of judgment.

Cited in *Tronsrud v. Farm Land & Finance Co.* 18 N. D. 417, 121 N. W. 68, holding that appeal to authorize retrial under N. D. Code, § 7229 must be from entire judgment.

11 N. D. 347, **WHEELER v. CASTOR**, 61 L.R.A. 746, 92 N. W. 381.

Showing to open default judgment.

Cited in *Braseth v. Bottineau County*, 13 N. D. 344, 100 N. W. 1082, holding where affidavit of merits is served with answer, the fact that answer is not verified is not a fatal defect, especially where complaint was not verified; *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75, holding party applying for relief from default judgment, has burden of proving diligence; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, holding that motion to open default must be based on affidavit of merits and proposed verified answer.

Laches in applying to set aside judgment.

Cited in *Keeney v. Fargo*, 14 N. D. 419, 105 N. W. 92, holding though court may in its discretion relieve a party from a judgment within a year after notice, for mistake, surprise, inadvertence or excusable neglect, application therefor must be made seasonably.

What is a meritorious defense.

Cited in *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102, holding a discharge of a debt sued on by a court of bankruptcy is a meritorious defense.

—Bar of limitations as.

Cited in *Lilly-Brackett Co. v. Sonnemann*, 157 Cal. 192, 106 Pac. 715, holding that statute of limitations is meritorious defense which may be set up after default has been vacated; *Tracy v. Wheeler*, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68, holding the statute of limitations is a meritorious defense and court of equity is as much bound to observe and enforce the statute as a court of law; *Tracy v. Wheeler*, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68 (dissenting opinion), as to statute of limitations being meritorious defense to mortgage.

11 N. D. 356, **STATE EX REL. WALKER v. McLEAN COUNTY**, 92 N. W. 385.

Who may bring quo warranto.

Cited in notes in 125 Am. St. Rep. 638, as to when quo warranto may be maintained by private person; 21 L.R.A.(N.S.) 689, as to who may maintain quo warranto to test validity of organization of municipal corporation or political subdivision of state.

Extraordinary remedies by original writ from Supreme Court.

Cited in *State ex rel. McDonald v. Holmes*, 16 N. D. 457, 114 N. W.

367, holding the Supreme Court will not issue mandamus at suit of city treasurer to compel state auditor to issue warrant in settlement claim for arrest and conviction of law prohibiting unlawful sale of toxicants; *Homesteaders v. McCombs*, 24 Okla. 201, — L.R.A.(N.S.) 103 Pac. 691, 20 A. & E. Ann. Cas. 181, holding that supreme court not original jurisdiction in action instituted by foreign insurance company to compel insurance commissioner to permit company to do business within state.

Distinguished in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. 860, holding supreme court will issue mandamus to place on ballot question of division of a county, where application to district court would be futile because final action could not probably be obtained until after general election.

— **Original writ of quo warranto.**

Cited in *State ex rel. Madderson v. Nohle*, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141, holding supreme court will not issue writ of quo warranto to compel county officers to desist from exercising jurisdiction authority over territory within county where there had been acquiescence for some time therein and where attorney general resisted application; *State ex rel. Madderson v. Nohle*, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141, holding the writ of quo warranto to compel county officers to desist from exercising corporate powers over added territory will not issue by the supreme court at suit of mere private relator where he shows no greater interest than that of any other resident and property owner of the county without first invoking jurisdiction of the district court; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705, holding where a private relator brings suits pending a personal nature, the supreme court will assume jurisdiction over application by him in nature of quo warranto directed to jurisdiction of district court appointed by governor under law requiring such office filled by general election; *State ex rel. Young v. Kent*, 96 Minn. 225, L.R.A.(N.S.) 826, 104 N. W. 948, 6 A. & E. Ann. Cas. 905, holding granting or withholding of leave by supreme court to file an information at the instance of a private relator, or of a private relator with the consent of the Attorney General to test the right to an office or franchise rests in the sound discretion of the court, even though there be a substantial defect in the title by which the office or franchise is held.

Exercise of corporate powers by McLean county.

Cited in *Ward v. Gradin*, 15 N. D. 649, 109 N. W. 57, holding right of McLean County to exercise its corporate powers over territory added by statute cannot be attacked collaterally.

Estoppel by laches.

Cited in *Greenfield School Dist. v. Hannaford Special School Dist.*, 13 N. D. 393, 127 N. W. 499, holding that acquiescence for two years in annexation of territory to school district estopped questioning validity of proceedings where grave consequences would follow declaring them invalid.

Cited in note in 13 L.R.A.(N.S.) 536, on laches as estopping state to attack municipal charter.

11 N. D. 369, **FARGO v. ROSS**, 92 N. W. 449.

Revisions of general laws.

Cited in *State ex rel. Mitchell v. Mayo*, 15 N. D. 327, 108 N. W. 36, holding chapter 62, Laws 1905, relating to the organization and government of cities, is a revision and amendment of general law theretofore in force on such subject, and no action was necessary on part of city to come within its operation.

11 N. D. 374, **GARLAND v. FOSTER COUNTY STATE BANK**, 92 N. W. 452.

Proof of lost deed.

Cited in *Cross v. Abe*, 55 Fla. 311, 45 So. 820, holding the proof of contents of a lost deed must be clear and satisfactory.

11 N. D. 376, **BRANDRUP v. BRITTEN**, 92 N. W. 453.

Power of real estate agent to execute contract of sale.

Cited in *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253, holding agent with whom real estate is listed for sale has no power to execute written contract of sale, but such fact would not preclude him from recovering commission where he has procured a purchaser ready, able and willing to buy on terms proposed by owner; *Larson v. O'Hara*, 98 Minn. 71, 116 Am. St. Rep. 342, 107 N. W. 821, 8 A. & E. Ann. Cas. 849, holding real estate broker employed to find a purchaser has no implied power to make written contract of sale; *Brown v. Gilpin*, 75 Kan. 773, 90 Pac. 267, holding a real estate broker with power "to sell" realty will, in absence of express authority, only be authorized to find a purchaser; *Kepner v. Ford*, 16 N. D. 50, 111 N. W. 619, on validity of contract to sell real estate by broker; *Lichty v. Daggett*, 23 S. D. 380, 121 N. W. 862, holding that letter from owner to real estate agent stating price for land and terms and requesting agent to communicate with him did not authorize agent to execute contract for sale of land; *Purkey v. Harding*, 23 S. D. 632, 123 N. W. 69; *Watters v. Dancey*, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430,—holding that agent cannot himself sell land unless authorized in writing.

Cited in note in 17 L.R.A.(N.S.) 212, on power of real-estate broker to make contract of sale.

Distinguished in *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71, holding a real estate broker with whom realty was listed for sale under an agreement: "I hereby authorize . . . exclusive right to sell for me in my name," had power to make contract for the sale of such property.

Contract to sell real estate.

Cited in *Kepner v. Ford*, 16 N. D. 50, 111 N. W. 619, holding a brokerage contract whereby broker was to receive all over a certain sum in case he found purchaser for the property, which was a homestead, is valid although owner's wife was not a party thereto.

Intention of parties in listing realty for sale.

Cited in *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71, holding reference

to terms of sale in contract listing real estate with broker for sale of persuasive force in indicating the intention of the parties.

11 N. D. 382, LITTLE v. WORNER, 92 N. W. 456.

11 N. D. 386, STATE v. THOEMKE, 92 N. W. 480.

Description of place in suit for abatement of liquor nuisance.

Cited in *State v. Poull*, 14 N. D. 557, 105 N. W. 717, holding the omission of the block in description of the place of illegal sale of intoxicants in village divided into lots and blocks, would render information too indefinite as basis for abatement proceedings; *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883, 3 A. & E. Ann. Cas. 907, holding while particular description of the place is required in an information for the abatement of a liquor nuisance, a description in a complaint in a justice court charging one with keeping and maintaining a nuisance "in a certain one-story frame building" in certain village without giving lot and block was sufficient description on which to base preliminary examination; *State v. Ildvedsen*, 20 N. D. 62, 126 N. W. 489, holding court not authorized to abate liquor nuisance where indictment or information fails to particularly describe place where it is maintained; *State v. Ball*, 19 N. D. 782, 101 N. W. 826, holding information charging keeping of place where liquor is sold, sufficient, where prosecution is only against the person.

What is a liquor nuisance.

Cited in *State ex rel. Kelly v. Nelson*, 13 N. D. 122, 99 N. W. 1077, holding, under statute it is the keeping of a place where intoxicating liquor is unlawfully sold, or where persons are permitted to resort for purpose of drinking intoxicating liquors as a beverage, or where liquor is kept for sale, that constitutes a nuisance, and it can be declared such only where owner or keeper is made a party defendant; *State ex rel. Kelly v. Nelson*, 13 N. D. 122, 99 N. W. 1077, holding where a boarder at a hotel kept intoxicating liquor in his room and sold it to his fellow boarders, the place could not be abated as a nuisance unless the particular room was identified; *State v. Kruse*, 19 N. D. 203, 124 N. W. 385, holding that it is the "keeping" of place where intoxicating liquors are sold that constitutes the nuisance.

Evidence of character.

Cited in *State v. Magill*, 19 N. D. 131, 22 L.R.A.(N.S.) 666, 122 N. W. 330, holding where proof as to the general reputation or character of a person is admissible, the evidence must be as to general reputation in the community where he lives, and person testifying must disclose knowledge of general reputation and not his own opinion.

Cited in note in 103 Am. St. Rep. 895, on evidence of good character to create doubt of guilt.

11 N. D. 391, ULMER v. McDONNELL, 92 N. W. 482.

11 N. D. 399, NOKKEN v. AVERY MFG. CO. 92 N. W. 487.**Motion to strike out evidence.**

Cited in Walker use of Patrick v. Lee, 51 Fla. 360, 40 So. 881, holding where most that party could claim in support of motion to strike out a deed was that description therein did not sufficiently locate and describe the land, the court properly denied motion where party introducing deed had not introduced all of his evidence, and court could not know what further evidence would be introduced.

11 N. D. 404, DICKSON v. DOWS, 92 N. W. 797.**Injunction changing possession of land.**

Cited in Forman v. Healey, 11 N. D. 563, 93 N. W. 866, holding possession of land will not be disturbed by means of a temporary injunction.

Preliminary injunction.

Cited in Clark v. Deadwood, 22 S. D. 233, 18 L.R.A.(N.S.) 402, 117 N. W. 131, holding the dissolution or continuance of a preliminary injunction rests largely in the sound judicial discretion of the trial court and will not be disturbed on appeal unless record shows an abuse of such discretion; Florida East Coast R. Co. v. Taylor, 56 Fla. 788, 47 So. 345, holding a mandatory injunction, compelling the performance of some act, will not be granted before final hearing, except in rare cases where right is free and clear from reasonable doubt.

11 N. D. 407, DICKSON v. DOWS, 92 N. W. 798.**Right to intervene in foreclosure.**

Cited in Hindman v. Colvin, 47 Wash. 382, 385, 92 Pac. 139, holding creditors of an insolvent corporation who have not obtained judgments, obtained liens or filed or proved their claims with a receiver, cannot intervene in suit for foreclosure of mortgage on property of corporation.

Cited in note in 123 Am. St. Rep. 298, on intervention.

Possession as notice.

Cited in note in 13 L.R.A.(N.S.) 52, on possession of land as notice of title.

Review of discretionary matter on appeal.

Cited in Clark v. Deadwood, 22 S. D. 233, 18 L.R.A.(N.S.) 402, 117 N. W. 131, holding that court's discretion in dissolving or continuing preliminary injunction will not be disturbed on appeal in absence of abuse; State ex rel. Dakota Central Teleph. Co. v. Huron, 23 S. D. 153, 120 N. W. 1008, holding order granting injunction not reversible in absence of abuse of discretion.

11 N. D. 410, LITTLE v. BRAUN, 92 N. W. 800.**Proof of deed as mortgage.**

Cited in A. J. Dwyer Pine Land Co. v. Whiteman, 92 Minn. 55, 99 N. W. 362, holding to declare a conveyance in form of an absolute deed to be a mortgage, the evidence must be clear, strong, and reasonably conclusive; Northwestern F. & M. Ins. Co. v. Lough, 13 N. D. 601, 102 N. W.

160, holding proof that conveyance in form a deed is in fact a mortgage must be clear, satisfactory and specific; *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499, holding that contract to reconvey upon fixed terms does not necessarily show deed to be mortgage.

11 N. D. 420, STANDARD SEWING MACH. CO. v. CHURCH, 92 N. W. 805.

Contract of guaranty.

Cited in note in 105 Am. St. Rep. 515, on contract of guaranty.

Necessity for notice of acceptance of guaranty.

Cited in *William Deering & Co. v. Mortell*, 21 S. D. 159, 16 L.R.A. (N.S.) 352, 110 N. W. 86, holding where guarantors signed a form of guaranty attached to an agency contract in consideration of employment of agent, without knowledge of guarantee, such instrument was a mere offer to guaranty and required notice to guarantors to be binding on them.

Cited in note in 16 L.R.A. (N.S.) 374, on necessity of notice of acceptance to bind guarantor.

Distinguished in *Singer Mfg. Co. v. Freerks*, 12 N. D. 595, 98 N. W. 705, holding where the execution of a bond was the consideration of employment, the execution of such bond by an employee with others as sureties and delivered to company, made it binding and enforceable without notice of acceptance by obligee; *Emerson Mfg. Co. v. Tvedt*, 19 N. D. 8, 120 N. W. 1094, holding notice of acceptance of absolute guaranty unnecessary.

11 N. D. 423, RED RIVER VALLEY NAT. BANK v. MONSON, 92 N. W. 807.

11 N. D. 428, STATE v. BARRY, 92 N. W. 809, Later appeals in 13 N. D. 131, 65 L.R.A. 762, 112 Am. St. Rep. 662, 99 N. W. 769, 3 A. & E. Ann. Cas. 191; 14 N. D. 316, 103 N. W. 637.

Conclusiveness of court's decision as to competency of opinion evidence.

Cited in *Auld v. Cathro*, 20 N. D. 461, 32 L.R.A. (N.S.) 71, 128 N. W. 1025, holding that discretion of court as to competency of opinion of non-expert will not be reversed except abuse be shown.

Expression of opinion by trial court as to merits of case.

Cited in *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617, recognizing the right of trial court to ask questions of witnesses to elicit fully and clearly the facts within witnesses' knowledge, but that it should be exercised with great caution, and holding it error for the court to express an opinion by undue activity in examination of witnesses and frequent interruption of cross examination with suggestive questions and remarks.

Weight of evidence.

Cited in *State v. Momberg*, 14 N. D. 291, 103 N. W. 566, holding it error to charge that evidence, even though uncontradicted, is conclusive.

Instruction fixing penalty.

Cited in *State v. Peltier*, 21 N. D. 188, 129 N. W. 451, holding instruction in criminal case which advises jury of reasons for fixing certain penalty, erroneous.

11 N. D. 453, **RICHMIRE v. ANDREWS & G. ELEVATOR CO.**
92 N. W. 819.

Judgment notwithstanding verdict.

Cited in *Welch v. Northern P. R. Co.* 14 N. D. 19, 103 N. W. 396, holding, before a judgment, notwithstanding the verdict, can be ordered, it must reasonably appear that the defect in proof cannot be remedied if a new trial be granted; *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183, holding to justify a judgment notwithstanding the verdict the record must affirmatively show not only that the verdict is not justified by the evidence, but it must also appear from the nature of the case and circumstances connected with it that there is no reasonable probability that on another trial the defects in or objections to proof necessary to support the verdict may be remedied; *Nelson v. Grondahl*, 12 N. D. 130, 96 N. W. 299, holding motion for judgment notwithstanding the verdict cannot be granted when there is an issue for the jury to pass upon; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357, holding where party tries its case upon the theory that plaintiff could not prove a cause of action rests its rights on appeal upon the proposition that facts alleged and proved by opponent were insufficient to sustain verdict, but does not unite with motion for judgment notwithstanding verdict a request for a new trial, he in effect says that he could make no better showing if new trial were ordered; *Houghton Implement Co. v. Vavrosky*, 15 N. D. 308, 109 N. W. 1024, holding a judgment notwithstanding the verdict can be rendered only in cases where it appears that a party is precluded from recovery by reason of some conclusive fact not subject to amendment or of being supplied by another trial; *Ætna Indemnity Co. v. Schroeder*, 12 N. D. 110, 95 N. W. 436, holding a motion for judgment notwithstanding the verdict will not be granted in case of conflict of evidence, although such conflict is such that the trial court will be justified, in its discretion, in granting a new trial notwithstanding it; *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614, holding judgment notwithstanding the verdict will be ordered only where there is no reasonable probability that a different showing can be made on another trial, by amendment or evidence.

Cited in note in 12 L.R.A. (N.S.) 1022, on right to judgment non obstante veredicto because of failure of proof.

Lien on farm crops.

Distinguished in *Mitchell v. Monarch Elevator Co.* 15 N. D. 495, 107 N. W. 1085, 11 A. & E. Ann. Cas. 1001, holding, construing a statute giving thresher's lien that lien could be filed at any time within thirty days after threshing and related back to day of threshing so as to bind purchasers of grain within such period.

Application of code of procedure to justice courts.

Distinguished in *Morgridge v. Stoeffer*, 14 N. D. 430, 104 N. W. 1112,

holding applicable to justice courts the provisions in the revised codes relating to the correction of mistakes in pleading, process or proceeding.

11 N. D. 458, ROSS v. PAGE, 92 N. W. 822.

Waiver of breach of contract to convey land.

Cited in Kicks v. State Bank, 12 N. D. 576, 98 N. W. 408, holding where vendee has defaulted in payment of taxes under a crop payment contract for sale of land, the vendor cannot set up such default in action by vendee for money had on vendor's failure to convey, where vendor did not act promptly on such default by the vendee; Timmins v. Russell, 13 N. D. 487, 99 N. W. 48, holding where vendor does not act promptly in declaring his intention to cancel contract for default in conditions by vendee, he is deemed to have waived defaults.

Waiver of defect of parties.

Cited in Van Gordon v. Goldamer, 16 N. D. 323, 113 N. W. 609, holding a defendant waives right to objection to defect of parties where he does not demur but answers to the merits.

11 N. D. 466, J. I. CASE THRESHING MACH. CO. v. EBBIG-HAUSEN, 92 N. W. 826.

Notice of breach of warranty.

Cited in Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 798, holding where one of the conditions of a warranty on the sale of a threshing machine was that on its failure to work as warranted the purchaser should give notice thereof to vendor, a compliance with such condition was necessary before damages could be claimed for breach of warranty, unless condition was waived; Aultman & T. Machinery Co. v. Wier, 67 Kan. 674, 74 Pac. 227, holding purchaser liable where he fails to give written notice to sell of a threshing outfit of its failure to work within the time required under written warranty in contract, although he does give attempted notice to one not a general agent, the contract providing that no agent had authority to waive any conditions of contract or notice of failure of machine to work.

Distinguished in Geiser Mfg. Co. v. Cassell, 96 C. C. A. 240, 171 Fed. 348, holding where written contract provided for performance of certain conditions by the purchaser of a threshing machine, including giving of certain notice if it failed to work, but contained the provision that failure of any separate machine or attachment, or part thereof, shall not affect the liability of the purchaser for any other separate machine that is not defective," purchaser was not liable where machine was defective and failed to give notice.

— Waiver of notice.

Cited in Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335, holding vendor of threshing machine may waive the giving of written notice of breach of warranty and will be considered to have waived such notice where it acts on other notice given under the warranty; Nichols & S. Co. v. McCall, 17 Pa. Dist. R. 957, holding there was no waiver

of condition of contract requiring notice by registered mail to company and to dealer who sold machine, although purchaser telephoned to general agent who sent man to make repair, the company not evincing a purpose thereby to waive notice, the general agent having no authority to waive conditions.

11 N. D. 473, BUCHOLZ v. LEADBETTER, 92 N. W. 830.

Waiver of breach of contract to purchase land on crop-payment plan.

Cited in *Kicks v. State Bank*, 12 N. D. 576, 98 N. W. 408, holding on suit for money had by vendee of land under crop-payment contract, on breach by vendor, the latter cannot set up in defense that vendee did not comply with provision as to payment of taxes, as such default is waived by failure to act promptly; *Timmins v. Russell*, 13 N. D. 487, 99 N. W. 48, holding vendor of land who has made contract to convey the same will be deemed to have waived default in performance of conditions by vendee where he does not promptly declare his intention to cancel contract therefor.

11 N. D. 481, TORRESON v. WALLA, 92 N. W. 834.

11 N. D. 484, FARGO v. KEENEY, 92 N. W. 836, Later phase of same case in 14 N. D. 419, 105 N. W. 92.

Abuse of discretion in denying relief from judgment.

Cited in *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75, holding that order denying motion to be relieved from default judgment should be reversed where abuse of discretion is shown; *Racine-Sattley Mfg Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, to point that granting of relief from default judgment is discretionary with court.

Condemnation proceedings.

Criticized and limited in *Lidgerwood v. Michalek*, 12 N. D. 348, 97 N. W. 541, holding it not necessary to allege in complaint in action to condemn property for street use, as a right to maintain the action, that provision has been made to pay the award by general taxation or special assessment.

11 N. D. 494, ERICKSON v. CASS COUNTY, 92 N. W. 841.

Followed without discussion in *Turnquist v. Cass County Drain Comra*, 11 N. D. 514, 92 N. W. 852.

Validity of drainage act.

Cited in *Soliah v. Cormack*, 17 N. D. 393, 117 N. W. 125, upholding constitutionality of drainage law against contention that it is an unwarranted delegation of legislative power to the board of drain commissioners in matter of levying special assessments, and that it was a taking of property without due process of law.

—Due process.

Cited in *Ross v. Wright County*, 128 Iowa, 427, 1 L.R.A.(N.S.) 431, 104 N. W. 506, holding failure by drainage commission to give landowner

notice and hearing as to the extent of a drainage district and whether land shall be included therein does not make a drainage act invalid, if provision is made for notice to landowner and full hearing of all objections at other stages of the proceeding; *Wilkinson v. Gaines*, 96 Misa. 6 So. 718, holding all requirements of due process of law met in a drainage district proceeding, even if notice of publication is insufficient, where landowner had full notice of all subsequent proceedings.

Sufficiency of title of amendatory act.

Cited in *State v. Fargo Bottling Works Co.* 19 N. D. 396, 26 (N.S.) 872, 124 N. W. 387, holding sufficient, the title of an amendatory act to amend certain chapter of designated laws "defining intoxicating liquors" where subject matter is germane to subject of general law to which it is an amendment; *State Finance Co. v. Mather*, 15 N. D. 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding sufficient, the title of an act being an amendment of an act relating to rights of purchasers at tax sales, it not being necessary to state the precise point in which purchasers would be protected; *School Dist. No. 94 v. King*, 20 N. D. 61 N. W. 515, holding title of amendatory act sufficient if number of sections is given and subject matter of amendment is germane to subject of original act and within its title.

Drainage bonds.

Cited in *May v. Cass County*, 12 N. D. 137, 96 N. W. 292, sustaining drainage law as construed by court in cited case, and holding bonds thereunder valid and unaffected by amendment to statute passed after execution of bonds but after contract for their execution and delivery had been made changing length of time bonds could run.

Exemption of public lands from taxation.

Cited in note in 132 Am. St. Rep. 317, on exemption from taxation of assessment of lands owned by governmental bodies, or in which they have an interest.

Proceedings of drainage board.

Cited in *State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 107 N. W. 100, holding findings of board of drainage commissioners on review of assessments is final and conclusive on collateral attack, but holding a proceeding by injunction to restrain further proceeding before board has finally decided on the whole matter is a direct attack.

Jurisdiction of drainage board.

Cited in *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66, holding board of drainage commissioners acquired jurisdiction upon the filing of a petition of requisite number of landowners for the drain; *Sim v. Rosholt*, 15 N. D. 77, 11 L.R.A. (N.S.) 372, 112 N. W. 50, holding where board of drainage commissioners passed on the sufficiency of a petition and ordered the same received and filed, and proceeded to act thereunder, its jurisdiction to take all subsequent steps necessary to the establishment of a drain thereby attached, and it could not thereafter be ousted of jurisdiction by the withdrawal of petitioners of their names from the petition.

Injunctive relief against collection of drainage assessment.

Cited in *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66, holding collection of assessments for extension drains will not be enjoined for failure to comply with statute by requiring surveyor to make plans, specifications, profiles and estimate of cost, where maps and estimates were filed with original drains.

Review of action of drainage board.

Cited in *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66, holding action of drainage commissioners is not subject to review on question as to what lands are benefited except in case of fraud; *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66, holding omissions as to surveys by drainage board cannot be attacked collaterally, nor can failure to secure right of way over land through which extension ran before its establishment.

11 N. D. 514, TURNQUIST v. CASS COUNTY DRAIN COMRS. 92 N. W. 852.

Followed without discussion in *Anderson v. Cass County Drain Comrs.* 11 N. D. 519, 92 N. W. 1133; *Anderson v. Cass County Drain Comrs.* 11 N. D. 520, 92 N. W. 1133; *Hagman v. Cass County Drain Comrs.* 11 N. D. 520, 92 N. W. 1133; *Monson v. Cass County Drain Comrs.* 11 N. D. 521, 92 N. W. 1133; *Monson v. Cass County Drain Comrs.* 11 N. D. 521; *Percy v. Cass County Drain Comrs.* 11 N. D. 522, 92 N. W. 1133; *Percy v. Cass County Drain Comrs.* 11 N. D. 522, 92 N. W. 1133; *Peterson v. Cass County Drain Comrs.* 11 N. D. 523, 92 N. W. 1134; *Peterson v. Cass County Drain Comrs.* 11 N. D. 524, 92 N. W. 1134; *Potter v. Cass County Drain Comrs.* 11 N. D. 524, 92 N. W. 1134; *Safe v. Cass County Drain Comrs.* 11 N. D. 525, 92 N. W. 1134; *Thompson v. Cass County Drain Comrs.* 11 N. D. 525, 92 N. W. 1134.

Validity of Drainage Act.

Cited in *Soliah v. Cormack*, 17 N. D. 393, 117 N. W. 125, upholding validity of drainage law against contention that it was an unwarranted delegation of legislative power to the board of drain commissioners in matter of levy of special assessments and as against contention that it is a taking of property without due process of law.

Validity of acts of drain commissioners.

Cited in *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66, holding irregularities in letting of work by drain commissioners are not grounds for permanent injunction against the collection of assessments of benefits on account of the drain when not sought until completion of the drain.

Right to question validity of statute.

Cited in *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864, holding the supreme court will not consider the constitutionality of a statute or complaint by one whose rights are unaffected by it.

11 N. D. 519, ANDERSON v. CASS COUNTY, 92 N. W. 1133.

11 N. D. 520, ANDERSON v. CASS COUNTY DRAIN COMRS. 92 N. W. 1133.

11 N. D.] NOTES ON NORTH DAKOTA REPORTS.

**11 N. D. 520, HAGMAN v. CASS COUNTY DRAIN COMR
N. W. 1133.**

**11 N. D. 521, MONSON v. CASS COUNTY DRAIN COMRS. (1)
N. W. 1133.**

**11 N. D. 521, MONSON v. CASS COUNTY DRAIN COMRS. (1)
N. W. 1133.**

**11 N. D. 522, PERCY v. CASS COUNTY DRAIN COMRS. (1)
N. W. 1133.**

**11 N. D. 522, PERCY v. CASS COUNTY DRAIN COMRS. (1)
N. W. 1133.**

**11 N. D. 523, PETERSON v. CASS COUNTY DRAIN COMR
N. W. 1134.**

**11 N. D. 524, PETERSON v. CASS COUNTY DRAIN COMR
N. W. 1134.**

**11 N. D. 524, POTTER v. CASS COUNTY DRAIN COMR
N. W. 1134.**

**11 N. D. 525, SAFE v. CASS COUNTY DRAIN COMR
N. W. 1134.**

**11 N. D. 525, THOMPSON v. CASS COUNTY DRAIN COMR
N. W. 1134.**

11 N. D. 526, RE SIMPSON, 93 N. W. 918.

11 N. D. 529, UELAND v. DEALY, 89 N. W. 325.

Time to ask for suppression of deposition.

Cited in *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511, holding
motion to suppress deposition must be made before jury is called.

Burden of rebutting presumption of regularity of deposition

Cited in *F. A. Patrick & Co. v. Nurnberg*, 21 N. D. 377, 131 N. W.
holding burden upon party seeking to suppress deposition to rebu
sumption of regularity in taking same.

11 N. D. 534, DULUTH ELEVATOR CO. v. WHITE, 90 N. W. 12.

Original jurisdiction of Supreme Court in extraordinary rem

Cited in *State ex rel. McDonald v. Holmes*, 16 N. D. 457, 114 N. W.
holding the supreme court will not issue writ of mandamus at s
county treasurer to compel state auditor to issue and deliver a w
for the payment of the reward provided by the statute for the conv

of violator of statute prohibiting the unlawful sale of intoxicating liquor; *State ex rel. Bryne v. Wilcox*, 11 N. D. 329, 91 N. W. 955, holding supreme court will not issue writ of injunction against county election inspectors and county auditor, on application of private citizen not approved by the attorney general, restraining them from acting as inspectors within precincts claimed to be illegally established, and the auditor from recognizing such precincts and from preparing ballots for such precincts; *State ex rel. Walker v. McLean County*, 11 N. D. 356, 92 N. W. 385, holding supreme court will not issue writ of quo warranto against county, on suit of private citizen, for the alleged usurpation of its franchise by extending its corporate authority beyond its lawful boundaries; *State ex rel. Steel v. Fabrick*, 17 S. D. 532, 117 N. W. 860, holding supreme court will issue mandamus to county officers compelling them to submit the question of division of a county where there is not time to secure action by the district court before the next general election; *People ex rel. Graves v. District Ct.* 37 Colo. 443, 13 L.R.A.(N.S.) 768, 86 Pac. 87, holding the supreme court would issue prohibition to a district court against the unlawful interference with ballot boxes in a city election, the compulsory production of books and attendance of witnesses for examination concerning an election; *Homesteaders v. McCombs*, 24 Okla. 201, — L.R.A.(N.S.) —, 103 Pac. 691, 20 A. & E. Ann. Cas. 181, holding that supreme court has not original jurisdiction in action instituted by foreign insurance company to compel insurance commissioner to permit company to do business within state.

Cited in note in 13 L.R.A.(N.S.) 772, on exclusiveness of jurisdiction of highest court to issue remedial writs for prerogative purposes.

11 N. D. 540, RE VOSS, 90 N. W. 15.

Misconduct by state's attorney.

Cited in *State ex rel. Clyde v. Lauder*, 11 N. D. 136, 90 N. W. 564, holding a wilful refusal by a state's attorney to file an information and prosecute a criminal action where defendant was held by justice of the peace to answer in district court for a public offense, would constitute a misdemeanor and render him liable to prosecution for professional misconduct.

11 N. D. 552, ELDRIDGE v. KNIGHT, 93 N. W. 860.

Waiver of prerequisite to appeal from justice court.

Cited in *Aneta Mercantile Co. v. Groseth*, 20 N. D. 137, 127 N. W. 718, holding prerequisites to transfer of jurisdiction from justice of peace to district court not waived by stipulation to continue case over term.

Filing of notice of appeal.

Cited in *Deardoff v. Thorstensen*, 16 N. D. 355, 113 N. W. 616, holding failure to file notice and undertaking on appeal from justice court within thirty days after rendition of judgment deprived the district court of jurisdiction; *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding notice of appeal from justice court must be served before it is filed, and

filing of the notice, with proof of service, within ten days after of notice is sufficient compliance with the statute, providing the takes place within time limited for perfecting the appeal.

Undertaking on appeal from justice court.

Cited in Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616, the filing of a bond on appeal from justice court is jurisdiction to the subject matter of the appeal.

Approval of undertaking on appeal from justice court.

Cited in Wilson v. Atlantic Elevator Co. 12 N. D. 402, 97 N. W. 104, holding in appeal from a justice court to the district court, it is necessary that the undertaking be approved and filed in the office of the clerk of the district court before it is served, and the fact that approval was indorsed after it was marked "filed" was immaterial where such action was practically simultaneous.

Explained in Thompson v. Fargo Heating & Plumbing Co. 14 N. D. 104, 104 N. W. 525, holding the approval of indorsement thereof on undertaking on appeal from justice court by clerk of district court before filing of the notice of appeal and undertaking, did not invalidate the appeal.

11 N. D. 556, CLAPP v. TOWER, 93 N. W. 862.

Interest of parties in contract for sale of real estate.

Cited in Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623, holding on the execution of a contract for sale of land the purchaser becomes a beneficial owner in equity, and he must stand loss of building thereon if accidentally destroyed by fire; Martinson v. Regan, 18 N. D. 467, 123 N. W. 285, holding it not necessary that vendor be actually in possession of the land when land contract was entered into, provided he can do so at the time.

11 N. D. 559, ELY v. ROSHOLT, 93 N. W. 864.

Roaming live stock.

Cited in Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 96, 96 N. W. 324, holding it unlawful for stock to run at large between October first and November first, and where owner between such dates turned out with knowledge of a habit by them to go on railroad right of way and took precautions to keep them off, he could recover for their being run into by railroad train.

Trespassing by live stock.

Cited in Johnson v. Rickford, 18 N. D. 289, 122 N. W. 386, holding the owner of animals not liable for trespass by them committed between September 1st and April 1st; Martin v. Platte Valley Sheep Co. 12 N. D. 432, 76 Pac. 571, holding cattle owner will be enjoined from wilfully or knowingly holding or actively holding his cattle or driving them across the uninclosed land of another, except driving them without permission along public highway across said premises; Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054, holding that railroad company is liable for trespass by its cattle on land of another.

and its servants are required to use ordinary care not to injure trespassing animals after discovering them upon track or right of way.

11 N. D. 563, FORMAN v. HEALEY, 93 N. W. 866.

Complaint for injunction.

Cited in *Burton v. Walker*, 13 N. D. 149, 100 N. W. 257, holding a party is not entitled to a temporary injunction where complaint merely alleges a threatened conversion of personalty without setting out exceptional circumstances to show inadequate legal remedy; *McClure v. Hunnewell*, 13 N. D. 84, 99 N. W. 48, holding under statute requiring complaint to show that plaintiff is entitled to injunctive relief defects in complaint cannot be made good through affidavits to support the motion for temporary injunction.

Disobedience of order as contempt.

Cited in note in 16 L.R.A.(N.S.) 1064, 1068, on disobedience of void order as contempt.

11 N. D. 569, MORTON v. CASS COUNTY, 91 N. W. 1126.

Dak. Rep.—30.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 12 N. D.

12 N. D. 1, SARGENT v. COOLEY, 94 N. W. 576.

Proof necessary to defeat deed absolute on its face.

Cited in *Little v. Braun*, 11 N. D. 410, 92 N. W. 800; *Carter v. Carter*, 14 N. D. 66, 103 N. W. 425,—holding that to establish resulting trust in real property by parol testimony, the proof must be clear, satisfactory and convincing; *Wadge v. Kittleson*, 12 N. D. 452, 97 N. W. 856, holding same as to showing that deed absolute on its face was intended as security merely.

12 N. D. 17, DE ROCHE v. DE ROCHE, 94 N. W. 767, 1 A. & E. ANN. CAS. 221.

Charge of adultery as ground for divorce.

Cited in note in 18 L.R.A. (N.S.) 307, on making charges of adultery as ground for divorce.

12 N. D. 27, ROSS v. ROBERTSON, 94 N. W. 765.

Right of trial court to reduce verdict.

Cited in *Lohr v. Honsinger*, 20 N. D. 500, 128 N. W. 1035, holding that trial court has authority to order reduction of excessive verdict and require its acceptance or new trial.

Discretion as to granting new trial.

Cited in *Casey v. First Bank*, 20 N. D. 211, 126 N. W. 1011; *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397,—holding denial of motion for new trial for insufficiency of evidence discretionary and will not be reversed except for abuse.

12 N. D. 29, IRELAND v. ADAIR, 102 AM. ST. REP. 561, 94 N. W. 766.

12 N. D. 33, STATE v. CLIMIE, 94 N. W. 574, 13 AM. CRIM. REP. 211.

Offenses included in indictment.

Cited in *State v. Tough*, 12 N. D. 425, 96 N. W. 1025, sustaining conviction for "entering railway car with intent to steal" under indictment for "breaking and entering railway car with intent to steal."

12 N. D. 38, FIRST NAT. BANK v. HOLMES, 94 N. W. 764.

Personal service of process.

Cited in *Holiness Church v. Metropolitan Church Asso.* 12 Cal. App. 445, 107 Pac. 633, holding service upon secretary of state not sufficient as "personal service" upon foreign corporation; *Dalton v. St. Louis, M. & S. R. Co.* 113 Mo. App. 71, 87 S. W. 610, holding mailing notice insufficient under statute requiring "personal service" though there was also evidence that it had been received; *McKenzie v. Boynton*, 19 N. D. 531, 125 N. W. 1059, holding service of notice of expiration of time of redemption insufficient where attempted to be made by registered mail and by leaving copy thereof with employee of hotel where party having right to redeem resided.

13 N. D. 42, BRYNJOLFSON v. OSTHUS, 96 N. W. 261.

Equitable assignment.

Cited in *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792, holding that sale under void foreclosure for full amount of the debt operates as an equitable assignment of the mortgage.

12 N. D. 51, CLENDENING v. RED RIVER VALLEY NAT. BANK, 94 N. W. 901.

Conclusiveness of order in bankruptcy proceeding.

Cited in *Freeman v. Wood*, 14 N. D. 95, 103 N. W. 392, holding order discharging assignee in bankruptcy subject to attack by creditors only to the same extent as other judgments.

12 N. D. 61, BROWN v. CHICAGO, M. & ST. P. R. CO. 102 AM. ST. REP. 564, 95 N. W. 153.

Agent for service of process upon foreign corporation

Cited in *Ord Hardware Co. v. Case Threshing Mach. Co.* 77 Neb. 847, 8 L.R.A. (N.S.) 770, 110 N. W. 551, holding that agent in charge of business within certain territory, which requires exercise of his judgment in his principal's business matters is a "managing agent" upon whom service may be made.

Power of court to order physical examination.

Cited in *Johnson v. Southern P. Co.* 150 Cal. 535, 89 Pac. 348, 11 A. &

E. Ann. Cas. 841, holding that court has power to order physical examination of plaintiff in action for personal injury; *Western Glass Mfg. Co. v. Schoeninger*, 42 Colo. 357, 15 L.R.A.(N.S.) 663, 94 Pac. 342; *Atchison, T. & S. F. R. Co. v. Palmore*, 68 Kan. 545, 64 L.R.A. 90, 75 Pac. 509,—holding that court may order physical examination of plaintiff in personal injury action, provided such examination may be made without serious injury; *Best v. Columbia Street, R. Light & P. Co.* 85 S. C. 422, 67 S. E. 1 (dissenting opinion), on power of circuit court to order physical examination of plaintiff in personal injury action; *Murphy v. Southern P. Co.* 31 Nev. 120, 101 Pac. 322, holding refusal of court to order third examination of plaintiff's entire body not abuse of discretion.

Cited in notes in 23 L.R.A.(N.S.) 464, on power to compel physical examination; 15 L.R.A.(N.S.) 667, on refusal of order for physical examination as abuse of discretion.

Disapproved in *May v. Northern P. R. Co.* 32 Mont. 522, 70 L.R.A. 111, 81 Pac. 328, 4 A. & E. Ann. Cas. 605; *Austin & N. W. R. Co. v. Cluck*, 97 Tex. 172, 64 L.R.A. 494, 104 Am. St. Rep. 863, 77 S. W. 403, 1 A. & E. Ann. Cas. 261,—holding that court cannot compel plaintiff in action for personal injury to submit to physical examination by experts appointed by the court.

— To order exhumation of body.

Cited in *Mutual L. Ins. Co. v. Griesa*, 156 Fed. 398, holding that court may order body exhumed for purpose of expert examination to ascertain cause of death; *Gray v. State*, 55 Tex. Crim. Rep. 90, 22 L.R.A.(N.S.) 513, 114 S. W. 635, holding that where necessary, court may order a body exhumed and examined by experts, for purpose of evidence in trial for homicide.

12 N. D. 71, MOHER v. RASMUSSEN, 95 N. W. 152.

12 N. D. 74, JOHNS v. RUFF, 95 N. W. 440.

Requisites for granting of motion for judgment notwithstanding verdict.

Cited in *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254, holding motion for judgment notwithstanding the verdict properly denied in absence of prior motion for directed verdict; *Satterlee v. Modern Brotherhood of America*, 15 N. D. 92, 106 N. W. 561, on motion for directed verdict as prerequisite to motion for judgment notwithstanding the verdict.

12 N. D. 81, PREBLE v. WICKLUND, 95 N. W. 442.

12 N. D. 82, FRIESE v. FRIESE, 95 N. W. 446.

Who may maintain action.

Cited in *Harshman v. Northern P. R. Co.* 14 N. D. 69, 103 N. W. 412, holding that statutory right of recovery for death by wrongful act cannot be enforced in action by one not named in statute though he is sole beneficiary of one given the right by statute.

12 N. D. 88, LYMAN-ELIEL DRUG CO. v. COOKE, 94 N. W. 1041.

Power of justice of peace to grant continuance.

Held obiter in *State v. Pope*, 79 S. C. 97, 60 S. E. 234, holding that case in magistrate's court may be continued, though no statute confers upon this court power to continue cases.

12 N. D. 95, WEGNER v. LUBENOW, 95 N. W. 442.

Validity of long lease of agricultural lands.

Distinguished in *Waldo v. Jacobs*, 152 Mich. 425, 116 N. W. 371, 15 A. & E. Ann. Cas. 343, holding void lease of agricultural lands for 20 years from its date but placed in escrow to be delivered upon death of lessor, where lessor died more than 12 years before expiration of the 20 years.

Conveyance of homestead by one spouse only.

Cited in note in 95 Am. St. Rep. 927, on effect of conveyance or encumbrance of homestead by one spouse only.

Payment of rent.

Cited in *Martin v. Royer*, 19 N. D. 504, 125 N. W. 1027, to point that "rent" may be paid in money or services.

12 N. D. 106, OLSON v. SHIRLEY, 96 N. W. 297.

12 N. D. 110, ÆTNA INDEMNITY CO. v. SCHROEDER, 95 N. W. 436.

Right to judgment notwithstanding verdict.

Cited in *Welch v. Northern P. R. Co.* 14 N. D. 19, 103 N. W. 396, holding judgment notwithstanding verdict on ground of variance between pleading and proof, erroneous in absence of showing that defect cannot be remedied; *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. 183; *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614,—holding that judgment notwithstanding verdict will not be granted on appeal though directed verdict is held to have been erroneously denied, where a different showing may possibly be made at another trial; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357, holding that new trial will not be granted where motion therefor is not joined with that for judgment notwithstanding verdict.

Cited in note in 12 L.R.A.(N.S.) 1022, on right to judgment notwithstanding verdict because of failure of proof.

12 N. D. 122, SATTERLUND v. BEAL, 95 N. W. 518.

Effect of statute of limitations.

Cited in *Culbertson v. Salinger*, 131 Iowa, 307, 108 N. W. 454, on statute of limitations as not being a bar in all cases though time may have elapsed.

Cited in note in 95 Am. St. Rep. 664, on effect of bar of statute of limitations.

—As to mortgages.

Cited in *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N.

D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160, holding that statute of limitations runs against a mortgage, though the mortgagor is absent from the state; *Tracy v. Wheeler*, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68, holding that court will not cancel mortgage securing unpaid debt on sole ground that statute of limitations has run against it.

Amending pleadings.

Cited in *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243, on rule for incorporating amendment in amended complaint.

12 N. D. 130, NELSON v. GRONDAHL, 96 N. W. 299.

Action for fraudulent representations.

Cited in *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026, holding that false statement in inducing contract is not actionable unless it results in injury.

Judgment notwithstanding verdict.

Cited in *Welch v. Northern P. R. Co.* 14 N. D. 19, 103 N. W. 396, holding that variance between pleading and proof will not justify judgment notwithstanding verdict unless it also reasonably appear that defect cannot be remedied.

12 N. D. 135, CRANE v. ODEGARD, 96 N. W. 326.

12 N. D. 137, MAY v. CASS COUNTY, 96 N. W. 292.

12 N. D. 144, STATE v. ROONEY, 95 N. W. 513, Affirmed in 196 U. S. 319, 49 L. ed. 494, 25 Sup. Ct. Rep. 264, 3 A. & E. Ann. Cas. 76.

12 N. D. 159, WRIGHT v. MINNEAPOLIS, ST. P. & S. M. R. CO. 96 N. W. 324.

Presumption of negligence from killing of animal.

Distinguished in *Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 462, 123 N. W. 281, holding that statutory presumption of negligence on finding of injured animal near track remains un rebutted, if jury disbelieve defendant's witnesses.

Liability for injury to animals on railroad track.

Cited in *Cumming v. Great Northern R. Co.* 15 N. D. 611, 108 N. W. 798; *Corbett v. Great Northern R. Co.* 19 N. D. 450, 125 N. W. 1054,—holding railroad not liable for injury to animals negligently permitted to stray upon its track, unless it failed to exercise reasonable care after discovering them on the track; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972; *McDonell v. Minneapolis, St. P. & S. Ste. M. R. Co.* 17 N. D. 606, 118 N. W. 819,—on degree of care required of railroad to avoid injury to animals trespassing on track.

Distinguished in *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, holding question of negligence of owner of

cattle to be for jury, where evidence was conflicting, and railroad duced no evidence of precautions taken after animals were discovered the track.

— **Contributory negligence.**

Cited in *Richards v. Waltz*, 153 Mich. 416, 117 N. W. 193, on permit cattle to stray at large as contributory negligence.

12 N. D. 164, GALBRAITH v. PAINE, 96 N. W. 258.

Validity of deed of land held adversely by another.

Cited in *Schneller v. Plankinton*, 12 N. D. 561, 98 N. W. 77; *v. Scharf*, 19 N. D. 228, 124 N. W. 79; *Hanitch v. Beiseker*, 21 N. D. 130 N. W. 833,—holding deed of land held adversely by another void against such adverse holder; *Powers v. Van Dyke*, 27 Okla. 27, — (N.S.) —, 111 Pac. 939, holding grant of land void as to person holding adversely; *Conrad v. Adler*, 13 N. D. 199, 100 N. W. 722, holding deed of land in possession of another under claim of title; *Brynjolf Dagner*, 15 N. D. 332, 125 Am. St. Rep. 595, 109 N. W. 320, holding deed given while land was in actual possession of one claiming title a void foreclosure sale; *State Finance Co. v. Halstenonson*, 17 N. D. 14 N. W. 724, holding that mortgage may be given upon land held adversely by another; *Murray v. Lamson*, 21 N. D. 125, 128 N. W. 1039, holding session under valid tax deed vests complete title.

Distinguished in *State Finance Co. v. Bowdle*, 16 N. D. 193, 112 N. W. 76, holding conveyance of land valid where no one was occupying time of conveyance, though another party had a void tax deed the *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding though holder of the tax deed had cut the grass on the land which not cultivated; *Wade v. Crouch*, 14 Okla. 593, 78 Pac. 91, holding possession without color or claim of title is not adverse so as to conveyance by owner; *Purcell v. Farm Land Co.* 13 N. D. 327, 100 N. W. 700, holding involuntary sales under statute are not within rule; *W. v. Comonow*, 17 N. D. 84, 114 N. W. 728, where it did not appear the land was held adversely by another.

12 N. D. 175, FORESTER v. VAN AUKEN, 96 N. W. 301.

Relief from mistake of law.

Cited in note in 28 L.R.A.(N.S.) 788, 809, 850, 877, 878, 920, on from mistake of law as to effect of instrument.

When deed will be held a mortgage.

Cited in *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499, holding that will not be declared mortgage, unless evidence is clear, specific and convincing.

12 N. D. 187, HERTZLER v. FREEMAN, 96 N. W. 294.

Validity of tax assessment in wrong name.

Cited in *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, holding assessment valid though not assessed in true owner's name.

—Description of land.

Cited in *State Finance Co. v. Bowdle*, 16 N. D. 193, 112 N. W. 76, holding tax invalid where assessment failed to describe land attempted to be assessed.

12 N. D. 193, NICHOLS v. ROBERTS, 96 N. W. 298.

Matters considered on appeal.

Cited in *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132, holding that matters presented by affidavits outside the record of the case will not be considered in disposing thereof on appeal.

12 N. D. 197, FISHER v. BETTS, 96 N. W. 132.

Vested statutory rights.

Cited in *May v. Cass County*, 12 N. D. 137, 96 N. W. 292, holding drainage bonds authorized by statute not affected by amendment passed after they were authorized but before actually issued.

—Tax sales.

Cited in *Blakemore v. Cooper*, 15 N. D. 5, 4 L.R.A.(N.S.) 1076, 125 Am. St. Rep. 574, 106 N. W. 566, holding provision that tax deed should be prima facie evidence of regularity of proceedings, and conclusive evidence of facts recited, not repealable so as to affect sales already made; *Blakemore v. Cooper*, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding that rights of purchaser at tax sale are governed by law in force at time of sale, and cannot be affected by subsequent legislation.

Validity of levy of taxes on percentage basis.

Cited in *Paine v. Germantown Trust Co.* 69 C. C. A. 303, 136 Fed. 527; *Scott & B. Mercantile Co. v. Nelson County*, 14 N. D. 407, 104 N. W. 528,—holding valid levy of state taxes on percentage basis; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding levy by percentage valid where based on assessment roll of previous year.

12 N. D. 219, GAGNIER v. FARGO, 96 N. W. 841.

Care required of traveler on street undergoing repairs.

Cited in *Wells v. Lisbon*, 21 N. D. 34, 128 N. W. 308, holding that care required of one driving on street undergoing repairs is proportionate to increased danger from darkness and other atmospheric conditions.

12 N. D. 227, SONNESYN v. AKIN, 97 N. W. 557, Former appeal in 14 N. D. 248, 104 N. W. 1026.

Meaning of "debt."

Cited in *Boston v. Turner*, 201 Mass. 190, 87 N. E. 634, on distinction between "debt" and tax.

12 N. D. 242, SYKES v. BECK, 96 N. W. 844.

Followed without discussion in *Sykes v. Allen*, 12 N. D. 504, 96 N. W. 1134.

Right of purchaser pendente lite.

Cited in *Trumbull v. Jefferson County*, 60 Wash. 479, 140 Am. St. 943, 111 Pac. 569, denying motion to dismiss appeal for benefit of *pendente lite*, purchasing after judgment.

Necessity for bringing personal representative of deceased into action.

Cited in *State Finance Co. v. Halstenson*, 17 N. D. 145, 114 N. W. holding failure of court to have personal representative of deceased brought into action, not reversible error in absence of showing of *abuse of discretion*.

Sufficiency of certificate of copy of record.

Distinguished in *Darling v. Purcell*, 13 N. D. 288, 100 N. W. 726, holding auditor's certificate to resolution for publication of delinquent list sufficient though not under seal.

Evidence as to public records.

Cited in *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132, holding testimony of custodian of public records to be the best evidence as to existence or nonexistence of certain entries and records.

Disapproved in *Re Colton*, 129 Iowa, 542, 105 N. W. 1008, holding testimony of attorney who has examined records in clerk of courts inadmissible to prove that a certain judgment does not appear upon records.

12 N. D. 267, BALDING v. ANDREWS, 96 N. W. 305.

Burden of showing negligence.

Cited in *Meehan v. Great Northern R. Co.* 13 N. D. 432, 101 N. W. holding that where injury alleged may have resulted from any one of a number of causes, some of which would not be the result of negligence, the burden is upon plaintiff to establish the negligence.

Declarations as *res gestæ*.

Cited in *Puls v. Grand Lodge, A. O. U. W.* 13 N. D. 559, 102 N. W. 165, holding admissible declarations by deceased while violently ill as to supposed cause of the illness; *Johnston v. Spoonheim*, 19 N. D. 197, 101 N. W. 830, holding declarations of grantor at time deed was drawn admissible in good faith of deed to son made in absence of grantee and creditor, and admissible.

When verdict should be directed.

Cited in *Scherer v. Schlaberg*, 18 N. D. 421, 24 L.R.A. (N.S.) 520, 101 N. W. 1000, holding directed verdict proper where any other verdict could only be arrived at by speculation, guess work or conjecture.

12 N. D. 280, STATE EX REL. UNIVERSITY & SCHOOL LANDS v. McMILLAN, 96 N. W. 310.

Purposes for which school land may be taken.

Cited in *State ex rel. Galen v. District Ct.* 42 Mont. 105, 112 Pac. holding that public school lands granted to state by congress cannot be condemned for electric power.

Use of proceeds of Federal school land grants.

Cited in *Roach v. Gooding*, 11 Idaho, 244, 81 Pac. 642, holding that income from lands granted the state for university purposes cannot be used for buildings; *State ex rel. Haire v. Rice*, 33 Mont. 365, 83 Pac. 874, holding invalid act providing for use of moneys derived from Normal School Land Grant to pay bonds issued for erection of Normal school building; *State ex rel. University of Utah v. Candland*, 36 Utah, 406, 24 L.R.A. (N.S.) 1260, 140 Am. St. Rep. 834, 104 Pac. 285, holding unconstitutional, act directing land commissioners to pay over to university part of principal of school fund as loan.

What is a state debt.

Cited in *State ex rel. University of Utah v. Candland*, 36 Utah, 406, 24 L.R.A. (N.S.) 1260, 104 Pac. 285, holding that a debt contracted by the State University under authority of the legislature is a state debt.

School as public institution.

Cited in *State ex rel. Wyoming Agri. College v. Irvine*, 14 Wyo. 318, 84 Pac. 90, holding that the Wyoming State Agricultural college is a public institution though control is placed in hands of trustees.

12 N. D. 316, WELLS v. GEYER, 96 N. W. 289.**Deed as mortgage.**

Cited in *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499, holding that deed will not be declared mortgage, unless evidence is clear, specific and convincing.

Evidence to show equitable mortgage.

Cited in *Northwestern F. & M. Ins. Co. v. Lough*, 13 N. D. 601, 102 N. W. 160; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306,—holding that to show deed absolute on its face to be in fact a mortgage the evidence must be clear, strong and convincing.

Once a mortgage always such.

Cited in note in 131 Am. St. Rep. 926, on maxim "once a mortgage always a mortgage."

12 N. D. 325, DAHL v. STAKKE, 96 N. W. 353.**Exception to save question for review.**

Cited in *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353, holding action of court upon motion for directed verdict not reviewable on appeal from judgment, unless exception is taken.

Not followed in *Sucker State Drill Co. v. Brock*, 18 N. D. 534, 123 N. W. 667, holding that denial of motion to direct verdict, to which no exception is taken, will not be reviewed on appeal.

Rights of vendee where vendor fails to convey good title.

Cited in *Dunn v. Mills*, 70 Kan. 656, 79 Pac. 146, holding that vendee in undisturbed possession cannot set up lack of title in vendor as defense to action for purchase money, without restoring the property; *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51, holding that vendee may rescind

contract and recover amount paid for failure of vendor to convey full performance or offer to perform by vendor.

Distinguished in *Brown v. McCrie*, 77 Kan. 230, 94 Pac. 144, holding that vendee in possession may set up defect in title as defense to action for purchase price where action of ejectment has been brought against him by one claiming adverse title.

Covenants of seisin.

Cited in note in 125 Am. St. Rep. 448, on covenants of seisin.

12 N. D. 336, JOHNSON v. KINDRED STATE BANK, 96 N. D. 588.

Effect of exhibit attached to complaint.

Distinguished in *Clark v. Cross*, 51 Wash. 231, 98 Pac. 607, 16 A. & E. Ann. Cas. 489, holding complaint not controlled by facts recited in evidence which does not coincide with allegations in complaint, where no defense was offered, nor any motion for judgment on the pleadings.

Parol evidence to add to written instrument.

Cited in *Alsterberg v. Bennett*, 14 N. D. 601, 106 N. W. 49, holding that grantee in quitclaim deed cannot set up, and recover for breach of, an alleged oral warranty, in action at law.

12 N. D. 343, JONES v. GREAT NORTHERN R. CO. 97 N. W. 541.

12 N. D. 348, LIDGERWOOD v. MICHALEK, 97 N. W. 541.

Complaint in eminent domain proceeding.

Followed in *Grafton v. St. Paul, M. & M. R. Co.* 16 N. D. 313, 22 N. W. 1045, 113 N. W. 598, 15 A. & E. Ann. Cas. 10, holding that complaint need not allege the public necessity for the taking.

12 N. D. 354, PAULSON v. LYSON, 97 N. W. 533, 1 A. & E. Ann. Cas. 245.

Client's power to settle case.

Cited in *Olson v. Sargent County*, 15 N. D. 146, 107 N. W. 43, holding that plaintiff may settle case and stipulate for dismissal without consent of his attorney; *Van Gordon v. Goldamer*, 16 N. D. 323, 113 N. W. 609, on same point; *Tyler v. Superior Ct.* 30 R. I. 107, 23 L.R.A. 1045, 73 Atl. 467, holding valid settlement by plaintiff after verdict before judgment, in action for assault and battery though plaintiff previously assigned to his attorney any judgment he might secure by verdict, and given notice to the defendant.

Distinguished in *Bacon v. Mitchell*, 14 N. D. 454, 4 L.R.A. (N.S.) 106, 106 N. W. 129, holding that attorney has power to dismiss action without prejudice.

12 N. D. 360, PINE TREE LUMBER CO. v. FARGO, 96 N. W. 357,
Later case involving same contract in 14 N. D. 88, 103 N. W.
390.

Liability of city for street improvements payable out of special fund.

Cited in *Rogers v. Omaha*, 82 Neb. 118, 117 N. W. 119, holding city warrant for existing obligation payable out of general funds, valid though it recites that it is payable out of a special fund which the city has neglected to raise; *Ward v. Lincoln*, 87 Neb. 661, 32 L.R.A.(N.S.) 163, 128 N. W. 24, holding city liable for contract price of sidewalk improvement, where it failed to collect special assessment levied therefor.

Liability for misapplication of special fund.

Cited in *Red River Valley Nat. Bank v. Fargo*, 14 N. D. 88, 103 N. W. 390, holding that city is liable if it misappropriates funds derived from special assessments for a specific purpose.

Presumption of performance of official duty.

Cited in *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393, 127 N. W. 499, holding that presumption is that board of education did as law required in annexing territory to school district.

Effect of failure to request new trial.

Cited in *Kirk v. Salt Lake City*, 32 Utah, 143, 12 L.R.A.(N.S.) 1021, 89 Pac. 458, refusing to set aside judgment where new trial was not asked for, and ground of appeal was court's refusal to grant judgment notwithstanding verdict which trial court had no power to grant.

Municipal power to construct improvement on credit.

Cited in note in 4 L.R.A.(N.S.) 747, on implied power of municipality to construct improvements on credit.

12 N. D. 385, MONTGOMERY v. WHITBECK, 96 N. W. 327.

Liability to assessment for unauthorized mutual insurance.

Cited in *Walker v. Rein*, 14 N. D. 608, 106 N. W. 405, holding that foreign insurance company can not enforce assessment under contract of mutual insurance which is in violation of statute.

Charter and by-laws as part of insurance contract.

Cited in *J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co.* 18 N. D. 253, 119 N. W. 1048, holding incorporation statute, charter and by-laws of domestic mutual fire insurance company, a contract binding on member.

12 N. D. 394, BLAKEMORE v. ROBERTS, 96 N. W. 1029.

Powers of executors as to land.

Cited in *Blakemore v. Cooper*, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566, holding that executors are assigns within meaning of statute authorizing tax deed to be issued to "purchaser his heirs or assigns."

Effect of unnecessary allegations.

Cited in *Tracy v. Wheeler*, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 1 N. W. 68 (dissenting opinion), on unnecessary allegations in complaint not changing nature of the action.

12 N. D. 402, WILSON v. ATLANTIC ELEVATOR CO. 97 N. W. 535.

Time of service and filing of appeal papers.

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding that notice of appeal may be filed at any time within 10 days after it is served upon the adverse party.

12 N. D. 403, PERSONS v. SMITH, 97 N. W. 551.

12 N. D. 420, JOHNSON v. GREAT NORTHERN R. CO. 97 N. W. 546.

Followed without discussion in *Newville v. Great Northern R. Co.*, 13 N. D. 518, 97 N. W. 1119.

Right to bill of particulars.

Cited in *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798, on motion for bill of particulars may properly be demanded.

12 N. D. 425, STATE v. TOUGH, 96 N. W. 1025.

Exclusiveness of statutory grounds for decision.

Cited in *State v. Foster*, 14 N. D. 561, 105 N. W. 938, holding that motion to file information at term next after commitment is not ground for motion to set aside information where not enumerated in statute. Cited in *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936, holding that where statute provides for what causes demurrer or motion in arrest will lie, objection on those grounds can not be made in any other manner.

Assistance to state's attorney.

Cited in note in 24 L.R.A.(N.S.) 565, on right to complain by state where prosecution is conducted or assisted by unofficial member of bar.

Evidence of intent.

Cited in *State v. Johnson*, 17 N. D. 554, 118 N. W. 230, holding that where intent is an ingredient of the crime charged, defendant may be convicted by his intent in doing certain acts.

Cited in note in 23 L.R.A.(N.S.) 373, 387, 390, on right of state to call and testify as to his intent.

Right to instructions.

Cited in *State v. Messner*, 43 Wash. 206, 86 Pac. 636, holding that where there is evidence to sustain a certain theory, it must be presented to the jury upon request properly made.

Quashing of information or indictment.

Cited in *State v. Longstreth*, 19 N. D. 268, 121 N. W. 1114, on motion for quash upon which motion to quash information or indictment may be made.

12 N. D. 435, GRISWOLD v. MINNEAPOLIS, ST. P. S. STE. M. R. CO. 102 AM. ST. REP. 572, 97 N. W. 538.

Validity of agreement as to location of road or depot.

Cited in *Enid Right of Way & Townsite Co. v. Lile*, 15 Okla. 328, 82 Pac. 813 (dissenting opinion), on validity of agreement by railroad to build and maintain depot at a certain place; *Southard v. Arkansas Valley & W. R. Co.* 24 Okla. 408, 103 Pac. 750, holding condition of railroad bonus note that its line be constructed through certain point, not void as against public policy.

Extent of recovery in ejectment.

Cited in note in 6 L.R.A.(N.S.) 713, on extent of recovery in ejectment by tenants in common against stranger.

12 N. D. 445, BROWN v. SKOTLAND, 97 N. W. 543.

Revocation of power of attorney.

Cited in note in 110 Am. St. Rep. 858, on revocation of power of attorney.

Allowance of costs.

Cited in *Whitney v. Akin*, 19 N. D. 638, 125 N. W. 470, holding that costs allowed under section 7179 Rev. Codes 1905, are in discretion of court.

12 N. D. 452, WADGE v. KITTLESAN, 97 N. W. 856.

Waiver or estoppel as to asserting ownership to land.

Cited in *Spoonheim v. Spoonheim*, 14 N. D. 380, 104 N. W. 845, holding grantor estopped to set aside voidable deed by seven years unexplained delay, especially where land has increased greatly in value; *Ottow v. Friese*, 20 N. D. 86, 126 N. W. 503, holding land contract waived by abandonment and rights of vendee extinguished.

Title of parties under contract for sale of land.

Cited in *Salzer Lumber Co. v. Clafin*, 16 N. D. 601, 113 N. W. 1036, holding that where land is purchased under contract, vendee becomes equitable owner, while legal title remains in vendor in trust for purchase.

Rescission of land contract by parol.

Cited in *Haugen v. Skjervheim*, 13 N. D. 616, 102 N. W. 311; *Wisner v. Field*, 15 N. D. 43, 106 N. W. 38; *Cutwright v. Union Sav. & Invest. Co.* 33 Utah, 486, 94 Pac. 984, 14 A. & E. Ann. Cas. 725,—holding that written contract for purchase of land may be abandoned or rescinded by parol; *Free v. Little*, 31 Utah, 449, 88 Pac. 407, holding that contract for purchase of land may be abandoned by implication arising from conduct.

12 N. D. 463, STEVENSON v. CONTINENTAL CASUALTY CO. 97 N. W. 862.

Cause of death — Presumptions and burden of proof.

Cited in *Clemens v. Royal Neighbors*, 14 N. D. 116, 103 N. W. 402, 8

A. & E. Ann. Cas. 1111, holding death from gunshot wound presumed accidental in absence of evidence to the contrary; *Kephart v. Continental Casualty Co.* 17 N. D. 380, 116 N. W. 349, holding that in action for death from injury, it will be presumed accidental in absence of evidence to the contrary; *Paulsen v. Modern Woodman*, 21 N. D. 235, 130 N. W. 231, holding that death caused by strychnine will be presumed accidental rather than suicidal.

Cited in note in 4 L.R.A.(N.S.) 637, on duty of insured to neglect death or accident from excepted cause.

—Question for jury.

Cited in *Puls v. Grand Lodge*, A. O. U. W. 13 N. D. 559, 102 N. W. 165, holding physician's report of death, verdict of coroner's jury, and testimony of physician making post mortem examination, not conclusive on question of cause of death; *Kennedy v. Aetna L. Ins. Co.* 242 Ill. 90 N. E. 292, holding question of cause of death properly submitted to jury where evidence was conflicting.

12 N. D. 474, *STATE EX REL. ADAMS v. LARSON*, 97 N. W. 100.

12 N. D. 478, *CHAFFEE-MILLER LAND CO. v. BARBER*, 97 N. W. 850.

12 N. D. 486, *BRASETH v. STATE BANK*, 98 N. W. 79.

Right of recovery on substantial performance of contract.

Cited in notes in 24 L.R.A.(N.S.) 340, on recovery upon substantial performance of building contract; 134 Am. St. Rep. 686, 691, on right of building contractor to recover for substantial performance of his contract.

12 N. D. 495, *STATE v. HOWSER*, 98 N. W. 352.

Extension of time for settlement of case.

Cited in *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397, holding that court's action in granting or refusing extension of time for settlement of case will not be disturbed except in plain case of abuse of discretion.

12 N. D. 497, *BANK OF PARK RIVER v. NORTON*, 97 N. W. 100.

Later appeal in 14 N. D. 143, 104 N. W. 525.

Waiver of verdict by counter motions for direction.

Cited in *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 N. W. 952, 118 N. W. 826; *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266,—holding right to submit question to jury waived where both parties moved for directed verdict without asking for submission of any question to the jury.

Distinguished in *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 309, 122 N. W. 390, holding trial by jury not waived by defendant's motion for direction of verdict.

Appeal under special statute.

Cited in *Pratt v. Beiseker*, 17 N. D. 243, 115 N. W. 835, holding motion for new trial not properly before court where appeal is made under a special statute, not including such motion.

Power of district court to entertain motions.

Cited in *State ex rel. Berndt v. Templeton*, 21 N. D. 470, 130 N. W. 1009, holding that district court has power to entertain motion for new trial for newly discovered evidence.

12 N. D. 504, *SYKES v. ALLEN*, 96 N. W. 1134.

12 N. D. 504, *MONTGOMERY v. TUCKER*, 96 N. W. 1134.

12 N. D. 505, *HUNTER v. COE*, 97 N. W. 869.

Conditions for specific performance.

Cited in *King v. Raab*, 123 Iowa, 632, 99 N. W. 306, holding that in granting specific performance of option of lessee to purchase, court may charge him with cost of improvement ordered by city and paid for by lessor.

Cited in note in 128 Am. St. Rep. 385, on refusal of specific performance of valid contract for other reason than that property is of a particular class.

12 N. D. 518, *NEWVILLE v. GREAT NORTHERN R. CO.* 97 N. W. 1119.

12 N. D. 519, *MERCHANTS' STATE BANK v. RUETTELL*, 97 N. W. 853.

Parol evidence to change written instrument.

Cited in *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516, 101 N. W. 903, holding that terms of written warranty cannot be changed by parol.

Tenant holding over.

Cited in *Rosenberg v. Sprecher*, 74 Neb. 176, 103 N. W. 1045, holding that landlord may treat tenant holding over as a trespasser or as tenant for new term; *Wadsworth v. Owens*, 21 N. D. 255, 130 N. W. 932, holding that rights in crops of tenant who holds over at lessor's request, and without new agreement is governed by written contract made for preceding year.

12 N. D. 527, *STATE EX REL. STYLES v. BEAVERSTAD*, 97 N. W. 548.

Matters reviewable in habeas corpus proceeding.

Cited in *Winnovich v. Emery*, 33 Utah, 345, 93 Pac. 988, holding that court may not pass upon competency of evidence in habeas corpus proceeding.

Dak. Rep.—31.

12 N. D. 535, STATE EX REL. REGISTER v. MCGAHEY, 97 N. W. 865, 1 A. & E. ANN. CAS. 650, 14 AM. CRIM. REP. 283.

What constitutes a contempt.

Cited in note in 16 L.R.A.(N.S.) 1065, 1068, on disobedience of void order as contempt.

Affidavit upon information and belief as basis for prosecution.

Cited in *Re Huff*, 136 App. Div. 297, 120 N. Y. Supp. 1070; *State ex rel. Register v. Patterson*, 13 N. D. 70, 99 N. W. 67,—holding such affidavit insufficient to justify issuance of search-warrant; *Dupree v. State*, 102 Tex. 455, 119 S. W. 301, on same point; *State ex rel. Poul v. McLain*, 13 N. D. 368, 102 N. W. 407, holding such affidavit insufficient to authorize issue of warrant in criminal case; *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, holding such affidavit insufficient as basis for criminal contempt proceeding.

Cited in note in 10 L.R.A.(N.S.) 161, on complaint or information on information and belief as basis for issuance of warrant, or for examination preliminary thereto.

Distinguished in *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035 (dissenting opinion), on such affidavit as basis for contempt proceedings.

12 N. D. 548, LUCE v. JESTRAB, 97 N. W. 848.

12 N. D. 554, ARRISON v. COMPANY D, NORTH DAKOTA NAT. GUARD, 98 N. W. 83, 1 A. & E. ANN. CAS. 368.

Mechanic's lien on public buildings.

Cited in note in 20 L.R.A.(N.S.) 262, on mechanics' lien on public buildings.

12 N. D. 561, SCHNELLER v. PLANKINTON, 98 N. W. 77.

Conveyance of land in possession of another.

Cited in *Conrad v. Adler*, 13 N. D. 199, 100 N. W. 722; *Brynjolfson v. Dagner*, 15 N. D. 332, 125 Am. St. Rep. 595, 109 N. W. 320; *Burke v. Scharf*, 19 N. D. 228, 124 N. W. 79,—holding void conveyance of land held adversely by another under claim of title.

Distinguished in *Purcell v. Farm Land Co.* 13 N. D. 327, 100 N. W. 700, holding statute against conveyance of land in possession of another not applicable to tax deeds by county.

12 N. D. 568, McNAB v. NORTHERN P. R. CO. 98 N. W. 353.

Review of questions of fact on appeal.

Cited in *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 310, 116 N. W. 333, holding that sufficiency of evidence to sustain verdict cannot be reviewed on appeal in absence of motion for new trial in court below.

13 N. D. 572, PEDERSON v. DIBBLE, 98 N. W. 411.**Mutuality as requisite to specific performance.**

Cited in *Block v. Donovan*, 13 N. D. 1, 99 N. W. 72, holding specific performance proper where contract created mutual obligations, and remedies were also mutual; *Knudtson v. Robinson*, 18 N. D. 12, 118 N. W. 1051, holding mutuality of obligation essential to specific performance.

13 N. D. 576, KICKS v. STATE BANK, 98 N. W. 408.**Rights of vendee to restitution upon rescission of land contract.**

Cited in *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51, holding vendor bound to return money paid on contract where rescinded for his failure to convey where vendee has received nothing under the contract; *Proctor v. C. E. Stevens Land Co.* 94 Minn. 181, 102 N. W. 395; *Todd v. Bettingen*, 109 Minn. 493, — L.R.A. (N.S.) — 124 N. W. 443,—holding that where vendor fails to convey title, vendee may recover value of property advanced under contract in action for money had and received.

Distinguished in *Moline Plow Co. v. Bostwick*, 15 N. D. 658, 109 N. W. 923, holding that where nothing is shown as offset, rents received by purchaser in possession must be restored or offer made to restore before rescission of the contract can be had.

Measure of damages for breach of contract.

Cited in note in 106 Am. St. Rep. 976, on measure of vendee's damages on breach of contract to convey realty.

Waiver of forfeiture.

Cited in *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088, holding default in making payments or in paying taxes, waived by failure of vendor to act promptly in declaring forfeiture.

12 N. D. 585, NORTHWESTERN TELEPH. EXCH. CO. v. ANDERSON, 65 L.R.A. 771, 102 AM. ST. REP. 580, 98 N. W. 706, 1 A. & E. ANN. CAS. 110.**Use of city streets.**

Cited in *Edison Electric Light & P. Co. v. Blomquist*, 185 Fed. 615, holding invalid, ordinance requiring telephone companies to remove their wires at their own expense to allow moving of houses along streets.

Cited in note in 125 Am. St. Rep. 351, on grant by city of right to use streets and sidewalks for private purpose.

—Right to move building in street.

Referred to as leading case in *Ft. Madison Street R. Co. v. Hughes*, 137 Iowa, 122, 14 L.R.A. (N.S.) 448, 114 N. W. 10, holding that house movers may not move building along street occupied by street railway so as to interfere with its wires, and interrupting its service for a considerable time.

Cited in *Kibbie Teleph. Co. v. Landphere*, 151 Mich. 309, 16 L.R.A. (N.S.) 689, 115 N. W. 244, holding that one moving building along public street cannot do so in disregard of rights of telephone company having

its wires along the street; *Edison Electric Light & P. Co. v. Blomquist*, 110 Minn. 163, 124 N. W. 969, granting injunction to restrain interference with electric wires in city street by housemover, without notice and bond to pay cost of removing and replacing wires.

Cited in note in 14 L.R.A.(N.S.) 448, on interference with wires of public-service corporation in moving house along street.

12 N. D. 595, SINGER MFG. CO. v. FREERKS, 98 N. W. 705.

12 N. D. 600, CLAPP v. HOUG, 65 L.R.A. 757, 102 AM. ST. REP. 589, 98 N. W. 710.

Validity of statute for administration of estates of absentees.

Cited in note in 4 L.R.A.(N.S.) 944, on constitutionality of statutes providing for administration of absentee's estate.

Disapproved in *Cunnius v. Reading School Dist.* 198 U. S. 475, 49 L. ed. 1132, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121, holding valid statute providing for the administration of estates of persons absent and unheard of for more than seven years; *Nelson v. Blinn*, 197 Mass. 279, 15 L.R.A.(N.S.) 651, 125 Am. St. Rep. 364, 83 N. E. 889, 14 A. & E. Ann. Cas. 147, holding valid statute providing for receiver of estate of absentee and for its distribution if absentee does not appear and claim it within fourteen years.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 13 N. D.

13 N. D. 1, BLOCK v. DONOVAN, 99 N. W. 72, Later phase of same case in 17 N. D. 406, 117 N. W. 527.

13 N. D. 12, F. A. PATRICK & CO. v. GRAND FORKS MERCANTILE CO. 99 N. W. 55.

13 N. D. 20, FIFER v. FIFER, 99 N. W. 763.

13 N. D. 35, SIGNOR v. CLARK, 99 N. W. 68.

Waiver of right to appeal by accepting benefit.

Cited in note in 29 L.R.A.(N.S.) 12, on right to appeal from unfavorable while accepting favorable part of decree, judgment or order.

13 N. D. 47, MANNING v. DEVILS LAKE, 65 L.R.A. 187, 112 AM. ST. REP. 652, 99 N. W. 51.

For what purpose public funds may be used.

Cited in Opinion of Justices, 204 Mass. 607, 27 L.R.A.(N.S.) 483, 91 N. E. 405, defining public purpose and holding city could not be empowered to acquire land in Boston to consolidate tracts and lease same in order to lay out new streets; Buyck v. Buyck, 112 Minn. 94, 140 Am. St. Rep. 464, 127 N. W. 452, holding expenditures by town officers for constructing road over private property, unlawful, where town received no benefit therefrom.

Rights of city outside of city limits.

Cited in note in 113 Am. St. Rep. 1060, on city's right to do business outside its boundaries.

13 N. D. 58, STATE EX REL. KELLY v. McMASTER, 99 N. W. 58.
Finding of liquor as evidence of nuisance.

Distinguished in *State ex rel. Kelly v. Nelson*, 13 N. D. 122, 99 N. W. 1077, where liquor not found by virtue of a warrant under a warrant in an injunction case was held not prima facie evidence of a liquor nuisance.

13 N. D. 70, STATE EX REL. REGISTER v. PATTERSON, 99 N. W. 67.

Affidavit on information and belief in liquor nuisance proceeding.

Cited in *Dupree v. State*, 102 Tex. 455, 119 S. W. 301, holding affidavit on belief alone not sufficient in a search and seizure proceeding to satisfy constitution unless facts are stated to support belief.

Distinguished in *Re Huff*, 136 App. Div. 297, 120 N. Y. Supp. 1070, holding under statute an affidavit for search and seizure of liquors on information and belief not supported by statement of grounds of belief or of any personal knowledge, is bad.

13 N. D. 74, NATIONAL BANK v. PICK, 99 N. W. 63.

Forfeiture for usury.

Cited in *Grove v. Great Northern Loan Co.* 17 N. D. 352, 116 N. W. 345, holding foreclosure not voidable for usury in the mortgage loan where the statute on usury did not make that one of the penalties.

Liabilities of officers and stockholders of foreign corporation.

Distinguished in *Chesley v. Soo Lignite Coal Co.* 19 N. D. 18, 121 N. W. 73, holding that officers and stockholders of foreign corporation are liable on implied contracts or obligation of such corporation to return benefits received under express contract with it by party who has rescinded express contract.

13 N. D. 84, McCLURE v. HUNNEWELL, 99 N. W. 48.

Sufficiency of complaint for injunction pendente lite.

Cited in *Burton v. Walker*, 13 N. D. 149, 100 N. W. 257, holding complaint must plead grounds for equitable relief.

13 N. D. 85, KING v. HANSON, 99 N. W. 1085.

Wife's action for alienation of affections.

Cited in *Nolin v. Pearson*, 191 Mass. 283, 4 L.R.A. (N.S.) 643, 114 Am. St. Rep. 605, 77 N. E. 890, 6 A. & E. Ann. Cas. 658, sustaining wife's right to sue for alienation of husband's affections.

Necessity of statement of case on appeal.

Cited in *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314, holding statement of case essential where motion for new trial on minutes is to be reviewed.

13 N. D. 107, KASTER v. MASON, 99 N. W. 1083.

13 N. D. 112, ROBERTSON LUMBER CO. v. JONES, 99 N. W. 1082.

13 N. D. 117, PEWONKA v. STEWART, 99 N. W. 1080.

13 N. D. 122, STATE EX REL. KELLY v. NELSON, 99 N. W. 1077.

"Place" where liquors are sold.

Cited in *State v. Poull*, 14 N. D. 557, 105 N. W. 717, holding two buildings on one lot were two places.

13 N. D. 131, BARRY v. TRAU, 65 L.R.A. 762, 112 AM. ST. REP. 662. 99 N. W. 769, 3 A. & E. ANN. CAS. 191.

Right to jury trial.

Followed in *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76, denying right to jury trial where long account was involved.

Change of venue at motion of state.

Cited in *Zinn v. District Ct.* 17 N. D. 135, 114 N. W. 472, holding law valid which gives state right to change of place of trial on same grounds as avail to defendant; *State ex rel. Hornbeck v. Durlinger*, 73 Ohio St. 154, 76 N. E. 291, upholding law for change of venue on application of state to secure fair trial; dissenting opinion in *State v. Winchester*, 18 N. D. 534, 122 N. W. 1111, (re-reported 19 N. D. 756), on change of place of trial of criminal action on application of attorney general.

13 N. D. 149, BURTON v. WALKER, 100 N. W. 257.

13 N. D. 153, WARD v. McQUEEN, 100 N. W. 253.

Waiver of motion for directed verdict.

Followed in *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872, holding motion for direction must be renewed at close of evidence.

—Judgment notwithstanding verdict.

Cited in *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254, holding motion for directed verdict at close of testimony necessary before moving for judgment non obstante.

Authority of broker.

Cited in note in 17 L.R.A.(N.S.) 214, on power of real-estate broker to make contract of sale.

13 N. D. 157, REEVES v. BRUENING, 100 N. W. 241.

Acceptance of goods to complete sale.

Cited in *St. Anthony & D. Elevator Co. v. Cass County*, 14 N. D. 601, 106 N. W. 41, holding buyer was not owner where he was not shown to have done any act of acceptance.

Cited in note in 10 L.R.A.(N.S.) 1139, on right to withdraw order given agent before acceptance.

13 N. D. 167, HELGEBYE v. DAMMEN, 100 N. W. 245.

Homestead right.

Cited in *Ferris v. Jensen*, 16 N. D. 462, 114 N. W. 372, holding right was subject to all equities superior to husband's title.

Cited in note in 15 N. D. 129, on homestead.

— Joinder of wife in alienation.

Cited in *Garr, S. & Co. v. Collin*, 15 N. D. 622, 110 N. W. 81; *Sil v. Gronna*, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544,—nonjoinder of wife in contract to sell homestead avoided it; *Just Souder*, 19 N. D. 613, 125 N. W. 1029, holding that nonjoinder of wife mortgage on homestead avoided it.

13 N. D. 176, CLEMENTS v. MILLER, 100 N. W. 239.

13 N. D. 182, SALEMONSON v. THOMPSON, 101 N. W. 320.

lated case in 16 N. D. 295, 113 N. W. 1058.

Specification of questions of fact.

Followed in *Stevens v. Meyers*, 14 N. D. 398, 104 N. W. 529, holding question whether a certain conveyance was "fraudulent as to" a was bad as specifying no facts.

Effect of fraudulent conveyance.

Cited in note in 67 L.R.A. 876, on effect on legal title of conveyance of land in fraud of creditors.

Right of fraudulent grantee to attack judgment of one attacking conveyance.

Cited in note in 67 L.R.A. 594, 602, on attack by alleged fraudulent grantee on judgment on which action to set aside conveyance is based.

Debts discharged by discharge in bankruptcy.

Cited in *F. Mayer Boot & Shoe Co. v. Ferguson*, 19 N. D. 496, 113 N. W. 110, holding that discharge in bankruptcy protects judgment of court against any unpaid balance remaining on judgment after sale of property attached under execution and set aside as exempt.

13 N. D. 199, CONRAD v. ADLER, 100 N. W. 722.

Proof necessary in ejectment.

Followed in *Brown v. Comonow*, 17 N. D. 84, 114 N. W. 728, holding evidence failed to establish superior title on which plaintiff could recover.

Cited in *Young v. Engdahl*, 18 N. D. 166, 119 N. W. 169, holding plaintiff must prove his title as alleged in action to determine ad claims.

13 N. D. 204, HAYES v. COOLEY, 100 N. W. 250.

Weather conditions as intervening cause.

Cited in note in 20 L.R.A. (N.S.) 97, on weather conditions as independent, intervening, efficient cause.

13 N. D. 211, **STATE EX REL. ATTY. GEN. v. DISTRICT COURT**, 100 N. W. 248. Later appeal in 15 N. D. 230, 106 N. W. 1135.

13 N. D. 221, **WEST v. NORTHERN P. R. CO.** 100 N. W. 254.

Contributory negligence in crossing railroad.

Distinguished in *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531, denying that as matter of law it was contributory negligence not to stop, look and listen, where view was obstructed and driver had no knowledge of train.

13 N. D. 232, **KENNEDY v. STONEHOUSE**, 100 N. W. 258, 3 A. & E. ANN. CAS. 217.

Personal liability of agent on unauthorized contract.

Cited in note in 34 L.R.A.(N.S.) 538, on personal liability to other contracting party of one contracting as agent without authority.

13 N. D. 242, **PICTON v. CASS COUNTY**, 100 N. W. 711, 3 A. & E. ANN. CAS. 245.

Delegation of legislative power to voters.

Followed in *Vallely v. Park Comrs.* 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615, upholding law which enabled city by vote to adopt law establishing park commission.

13 N. D. 257, **DOWAGIAC MFG. CO. v. HELLEKSON**, 100 N. W. 717.

Weight of findings by court on appeal.

Cited in *Ruettell v. Greenwich Ins. Co.* 16 N. D. 546, 113 N. W. 1029, stating rule for weighing findings of fact by trial court; *Roberts v. Little*, 18 N. D. 608, 120 N. W. 563 (dissenting opinion), to point that findings of trial court should not be disturbed, unless clearly against preponderance of evidence; *James River Nat. Bank v. Weber*, 19 N. D. 702, 124 N. W. 952, holding that findings will not be disturbed unless clearly against preponderance of evidence; *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479, on weight to be given findings of trial court.

13 N. D. 267, **WREGE v. JONES**, 112 AM. ST. REP. 679, 100 N. W. 705, 3 A. & E. ANN. CAS. 482.

Presumption and proof of malice in libel.

Cited in *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907, holding malice not legally presumable where occasion of libel was privileged.

Testimony of defendant that libel was without malice.

Cited in *Dorn v. Cooper*, 139 Iowa, 742, 118 N. W. 35, 16 A. & E. Ann. Cas. 744, holding defendant may testify to his lack of malice.

13 N. D. 277, VAN DUSEN v. BIGELOW, 67 L.R.A. 288, 100 N. W. 723.

Fraudulent profits by agent.

Cited in *Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861, holding it was constructive fraud for an agent to receive a part of a commission on a sale and conceal it from principal.

Cited in note in 20 L.R.A.(N.S.) 1163, on right of broker to purchase realty listed with him.

Damages in lieu of equitable relief.

Cited in *Johnson v. Carter*, 143 Iowa, 95, 120 N. W. 320, holding in action to rescind which defendant by alienation to bona fide purchaser has made impossible court may allow compensation.

13 N. D. 284, CRUSER v. WILLIAMS, 100 N. W. 721.

Prima facie evidence of tax sale certificate.

Followed in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding burden of showing want of jurisdiction to render tax judgment was on person resisting certificate of sale.

Validity of tax title.

Cited in *McKenzie v. Boynton*, 19 N. D. 531, 125 N. W. 1059, holding tax title invalid where sale was made on insufficient service of notice of expiration of time of redemption.

13 N. D. 288, DARLING v. PURCELL, 100 N. W. 726.

Tax sale certificate as evidence of title.

Cited in *Cruser v. Williams*, 13 N. D. 284, 100 N. W. 721, holding certificate did not become evidence of title till notice of time of expiration of redemption and proof of service of such notice duly filed.

Sufficiency of notice of redemption.

Cited in *Flickinger v. Cornwell*, 22 S. D. 382, 117 N. W. 1039, holding publication of notice of expiration of redemption, insufficient, where last publication is less than statutory time before designated date.

Validity of tax title.

Cited in *McKenzie v. Boynton*, 19 N. D. 531, 125 N. W. 1059, holding tax title invalid where sale was made on insufficient service of notice of expiration of time of redemption.

13 N. D. 305, SIMENSEN v. SIMENSEN, 100 N. W. 708.

Showing of diligence to support constructive service.

Distinguished in *Pillsbury v. J. B. Streeter, Jr. Co.* 15 N. D. 174, 107 N. W. 40, holding affidavit that persons said defendant resided in certain city and affiant's statement of his own knowledge that it was so showed due diligence that also being expressly averred; *Campbell v. Coulston*, 19 N. D. 645, 124 N. W. 689 (dissenting opinion), on sufficiency of affidavit for publication.

13 N. D. 312, JOSEPHSON v. SIGFUSON, 100 N. W. 703.

13 N. D. 319, HOGEN v. KLABO, 100 N. W. 847.

Necessity for specially pleading set-off.

Cited in Vallancey v. Hunt, 20 N. D. 579, 34 L.R.A.(N.S.) 473, 129 N. W. 455, holding that counterclaim or set-off must be specially pleaded.

Sufficiency of objection to evidence.

Cited in Towne v. Mathwig, 19 N. D. 4, 121 N. W. 63, holding objection to evidence as incompetent, irrelevant and immaterial, too indefinite in case where ground of objection might be remedied.

13 N. D. 327, PURCELL v. FARM LAND CO. 100 N. W. 700.

13 N. D. 337, STATE v. CRUIKSHANK, 100 N. W. 697.

Statutory assaults with weapons.

Cited in State v. Mattison, 13 N. D. 391, 100 N. W. 1091, holding verdict describing crime as "assault with a dangerous weapon with intent to do bodily harm," was bad under indictment for "shooting" with intent to kill or to do bodily harm; State v. Hunsakor, 16 N. D. 420, 114 N. W. 996, distinguishing "assault with dangerous weapon" from "wilfully and feloniously shooting" and criticising charge to jury for inaccuracy; State v. Bednar, 18 N. D. 484, 121 N. W. 614, 20 A. & E. Ann. Cas. 458, holding that assault by shooting at person with intent to injure is included within crime of shooting at person with intent to kill.

13 N. D. 344, BRASETH v. BOTTINEAU COUNTY, 100 N. W. 1082.

Procedure for relief from default judgment.

Cited in Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, holding that procedure for relief from default judgment is by motion to vacate based on affidavit of merits and proposed verified answer.

13 N. D. 351, PATTON v. CASS COUNTY, 102 N. W. 174.

Followed without discussion in Loomis v. Lewis, 13 N. D. 638, 102 N. W. 1134.

13 N. D. 356, STATE v. HARTZELL, 100 N. W. 745.

13 N. D. 357, REGAN v. SORENSON, 100 N. W. 1095.

13 N. D. 359, BARNUM v. GORHAM LAND CO. 100 N. W. 1079.

Actions not triable de novo on appeal.

Cited in Couch v. State, 14 N. D. 361, 103 N. W. 942, holding that an action at law for recovery of money only is not reviewable on appeal under statute; Laffy v. Gordon, 15 N. D. 282, 107 N. W. 969, holding that where parties see fit to try legal and equitable issues together the case is not one "properly triable by jury" and hence not triable de novo on appeal.

13 N. D. 361, HANSON v. CARLBLOM, 100 N. W. 1084.

Waiver of jury trial.

Cited in *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76, holding mere silence or failure to object does not waive constitutional right to trial by jury.

13 N. D. 363, NELSON v. GRONDAHL, 100 N. W. 1093.

13 N. D. 368, STATE EX REL. POUL v. McLAIN, 102 N. W. 1098.
Sufficiency of indictment or information.

Cited in *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 14 A. & E. Ann. Cas. 1035 (dissenting opinion), on appearance and participation in the proceedings as a waiver of formal defects in indictment or information; *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460, holding information verified on information and belief sufficient on motion to quash.

Cited in note in 10 L.R.A.(N.S.) 161, 162, on complaint or information on information and belief as basis for issuance of warrant, or for extension preliminary thereto.

Waiver of objection to jurisdiction.

Cited in *State v. Russell*, 18 N. D. 357, 121 N. W. 918, holding objection to jurisdiction waived by appeal and participation in trial in another court.

Right of accused to meet witnesses.

Cited in note in 129 Am. St. Rep. 28, on constitutional right of accused to be confronted by witnesses.

13 N. D. 373, CUGHAN v. LARSON, 100 N. W. 1088.

Grounds for forfeiture of contract.

Cited in *Bennett v. Glaspell*, 15 N. D. 239, 107 N. W. 45, holding grounds of contract will not be extended to include grounds for forfeiture specified therein.

Parol modification of contract.

Cited in *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549, sustaining exclusion of testimony to show the parol modification of a written contract.

Waiver of condition making time of essence of contract.

Cited in *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 121 Pac. 947, holding acceptance of payments of instalments of price by long after they were due, waiver of condition that time was of essence of contract.

13 N. D. 383, STATE v. CARROLL, 101 N. W. 317.

Affidavit for continuance on information and belief.

Cited in *Eytinge v. Territory*, 12 Ariz. 131, 100 Pac. 443, holding affidavit for continuance upon information and belief, without stating source of information, insufficient.

13 N. D. 387, LOUGH v. WHITE, 100 N. W. 1084.

Nonappealable orders.

Cited in *Dibble v. Hanson*, 17 N. D. 21, 114 N. W. 371, 16 A. & E. Ann. Cas. 1210, refusing to consider appeal from an order dismissing an action.

13 N. D. 387, CAIRNCROSS v. OMLIE, 101 N. W. 897.

13 N. D. 391, STATE v. MATTISON, 100 N. W. 1091.

Assault with intent to kill.

Cited in *State v. Bednar*, 18 N. D. 484, 121 N. W. 614, 20 A. & E. Ann. Cas. 458, holding that assault by shooting at person with intent to injure is included within crime of shooting at person with intent to kill.

13 N. D. 396, MARSHALL-WELLS HARDWARE CO. v. NEW ERA COAL CO. 100 N. W. 1084.

13 N. D. 406, STATE EX REL. FISK v. PORTER, 67 L.R.A. 473, 100 N. W. 1080, 3 A. & E. ANN. CAS. 794.

Validity of provision that candidates appear only once on ballot.

Cited in *State ex rel. Shepard v. Superior Ct.* 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233, upholding act providing that no candidate's name shall appear more than once upon ballot.

13 N. D. 411, HALLORAN v. HOLMES, 101 N. W. 310.

Nature of rights acquired by mortgage.

Cited in *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160, holding that an action to foreclose a mortgage is under the Code an action in personam and limitations are tolled during absence of parties.

Immaterial variance.

Cited in *Schwoebel v. Fugina*, 14 N. D. 375, 104 N. W. 848, holding that immaterial variance not prejudicial to defendant required no amendment to pleadings; *Robertson v. Moses*, 15 N. D. 351, 108 N. W. 788, holding an alleged variance in a finding was not prejudicial to defendant and hence harmless error if any.

Amendment of pleading to conform to proof.

Cited in *Wolfinger v. Thomas*, 22 S. D. 57, 133 Am. St. Rep. 900, 115 N. W. 100, allowing amendment of complaint for rescission of contract for fraud, to conform to evidence of mutual mistake.

13 N. D. 420, STATE EX REL. MITCHELL v. LARSON, 101 N. W. 315.

Judicial interference with political party tribunals.

Distinguished in *Walling v. Lansdon*, 15 Idaho, 282, 97 Pac. 396, holding that the court may follow the law and go as far as the law goes in deter-

mining the legality of conventions and the rights of delegates to participate therein.

Original jurisdiction of Supreme Court.

Distinguished in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860, holding that the division of a county in no way affects the sovereignty of the state so as to invoke the original jurisdiction of the supreme court; *State ex rel. Shaw v. Thompson*, 21 N. D. 426, 131 N. W. 231, holding that under peculiar facts of case supreme court has jurisdiction to issue original writ to compel city auditor to prepare and cause to be furnished, ballots and supplies necessary to conduct election on question of adoption of commission form of government.

13 N. D. 426, JOHNSON v. TWICHELL, 101 N. W. 318.

13 N. D. 430, DAVIS v. JACOBSON, 101 N. W. 314.

Necessity for settled statement.

Cited in *State v. Scholfield*, 13 N. D. 664, 102 N. W. 878, holding that facts essential to review of errors must be brought into the record by statement of the case if not otherwise a part of the record proper.

13 N. D. 432, MEEHAN v. GREAT NORTHERN R. CO. 101 N. W. 183.

Conjectural verdict.

Cited in *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, holding that where it is impossible to arrive at a verdict save by surmise and conjecture the case should be taken from the jury.

Judgment non obstante.

Cited in *Kerr v. Anderson*, 16 N. D. 36, 111 N. W. 614; *Turner v. Crumpton*, 21 N. D. 294, 130 N. W. 937,—holding that it is only where there is no reasonable probability that a different showing can be made on another trial by amendment or evidence, that judgment notwithstanding the verdict may be ordered; *Houghton Implement Co. v. Vaveosky*, 15 N. D. 308, 109 N. W. 1024, holding that judgment non obstante can be rendered only where it appears that the party is precluded from recovery by reason of some conclusive fact not subject to amendment or of being supplied on another trial; *Welch v. Northern P. R. Co.* 14 N. D. 19, 103 N. W. 396, holding that before judgment can be properly ordered non obstante on the ground of variance it must appear that the defect of proof cannot be remedied upon new trial; *Kirk v. Salt Lake City*, 32 Utah, 143, 12 L.R.A.(N.S.) 1021, 89 Pac. 458, holding in the absence of an exception to court's refusal to direct a verdict or a motion for new trial based upon insufficiency of evidence the judgment must stand, the trial court having no authority to entertain motion for verdict non obstante and its refusal therein being legally correct.

Cited in note in 12 L.R.A.(N.S.) 1022, on right to judgment non obstante veredicto because of failure of proof.

Assumption of risks by employee.

Cited in note in 28 L.R.A.(N.S.) 1223, as to whether servant may assume risk of dangers created by master's negligence.

13 N. D. 444, THOMPSON v. TRAVELERS' INS. CO. 101 N. W. 900.**Conditions in insurance policy.**

Cited in *Metropolitan L. Ins. Co. v. Willis*, 37 Ind. App. 48, 76 N. E. 560, holding condition in a policy that insured shall be alive and in sound health upon delivery thereof in order to create liability, valid and enforceable.

Cited in note in 17 L.R.A.(N.S.) 1145, 1152, 1154, 1155, on effect of stipulation that policy shall not become binding unless delivered to assured while in good health.

Estoppel of insurance company.

Cited in *Taylor-Baldwin Co. v. Northwestern F. & M. Ins. Co.* 18 N. D. 343, 122 N. W. 396, 20 A. & E. Ann. Cas. 432, holding knowledge of facts necessary to estop insurance company from denying waiver of conditions of policy; *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, holding insurance company estopped to urge invalidity of policy delivered with knowledge of facts rendering it void at inception.

Warranties as conditions precedent.

Distinguished in *Salts v. Prudential Ins. Co.* 140 Mo. App. 142, 120 S. W. 714, as not specifically holding a warranty in insurance policy to be identical with a condition precedent.

Duty to notify insurer of facts developing before delivery of policy.

Cited in note in 8 L.R.A.(N.S.) 985, on duty to notify insurer of facts developing after application, but before delivery of policy or certificate.

13 N. D. 453, GUSSNER v. HAWKS, 101 N. W. 898.**13 N. D. 458, CARROLL v. RYE TWP. 101 N. W. 894.****Damnum absque injuria.**

Cited in *Hart v. Hanson*, 14 N. D. 570, 3 L.R.A.(N.S.) 438, 105 N. W. 942, holding that creditors of a corporation are strangers to the obligations of directors to the corporation and have no right of action against directors for mismanagement causing insolvency though creditors sustain loss thereby; *Marshall-McCartney Co. v. Halloran*, 15 N. D. 71, 106 N. W. 293, holding that in deceit, as in other torts, plaintiff must show a legal injury resulting proximately in certain loss or damage; *Langer v. Goode*, 21 N. D. 462, 131 N. W. 258, holding owner of land not liable for damages for failure to destroy noxious weeds, until after county commissioners have prescribed time and manner of destruction.

Cited in note in 67 L.R.A. 264, on municipal liability for defective plan of street construction.

13 N. D. 467, DOUGLAS v. FARGO, 101 N. W. 919.**Failure to verify assessment roll.**

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding that defect in verification of assessment roll does not furnish ground for canceling the tax itself; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding that verification of assessment roll is not an inherently necessary part of the assessment but merely a legislative requirement; *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding want of verification was fatal in tax enforcement proceeding where under statute legal defenses were admissible.

Payment of proper tax as prerequisite to equitable relief from unjust taxation.

Followed in *Powers v. First Nat. Bank*, 15 N. D. 466, 109 N. W. 361, holding equity will not interfere with the collection of unjust taxes unless there has first been payment on tender of tax justly due.

Cited in *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, on same point; *State Finance Co. v. Bowdle*, 16 N. D. 193, 112 N. W. 76, holding tender needless where because of assessment in gross of several tracts there was no legal tax.

— Adverse tax title claims between individuals.

Explained in *Powers v. First Nat. Bank*, 15 N. D. 466, 109 N. W. 361, holding that there exists no reason why the equitable prerequisite of payment of taxes concededly due should not apply to actions to determine adverse tax title claims between individuals as well as to proceedings for relief from tax and specifically overruling cases holding to the contrary.

Overruled in *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding tax justly due must be tendered in suit to quiet title against tax deed as well as against suit to cancel against county.

Cited as overruled in *Larson v. Peppard*, 38 Mont. 128, 129 Am. St. Rep. 630, 99 Pac. 136, 16 A. & E. Ann. Cas. 800, holding legal interest must be added to the amount justly due for taxes where it is sought to cancel a sale under void tax.

— Amount to be tendered.

Cited in *Sound Invest. Co. v. Bellingham Bay Land Co.* 45 Wash. 636, 88 Pac. 1117, holding court should by evidence of relative value pro rata the tax assigned in gross on numerous lots and required tender of such amount.

13 N. D. 487, TIMMINS v. RUSSELL, 99 N. W. 48.**Failure to assert breach of condition in contract for sale.**

Cited in *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947, holding forfeiture waived by vendor's acquiescence in continuance of contract after default in payments; *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088, holding that one seeking to forfeit contract for sale for breach of condition thereof must act promptly; *Kicks v. State Bank*, 12 N. D. 576, 98 N. W. 408, holding that failure to exercise right to cancel

contract for sale promptly upon breach of condition for payment of taxes operates as a waiver.

13 N. D. 494, STATE v. FORDHAM, 101 N. W. 888.

Intent as an essential of robbery.

Cited in *State v. O'Malley*, 14 N. D. 200, 103 N. W. 421, holding it error to instruct that intent to steal must be conclusively presumed from unlawful and forcible taking unless defendant was too drunk to form an intent.

—Pleading.

Cited in *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936, on an allegation of "felonious" taking importing sufficiently an intent to steal.

Information for preliminary examination.

Cited in *State v. Wisniewski*, 13 N. D. 649, 102 N. W. 883, 3 A. & E. Ann. Cas. 907, holding information upon which to base preliminary examination need not be technically accurate in all respects; *State v. Hefferman*, 24 S. D. 1, 25 L.R.A. (N.S.) 876, 140 Am. St. Rep. 764, 123 N. W. 87, holding that variance between the information before the committing magistrate and the information for trial immaterial where the same identical offense was charged.

13 N. D. 502, TEIGEN v. DRAKE, 101 N. W. 893.

Conclusiveness of judgment in action to quiet title.

Cited in *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416, holding judgment in action to quiet title, not res adjudicata in foreclosure action on question of statute of limitations pleaded, but not considered, in former action.

Conclusiveness of statute as to right to plead limitations to mortgage foreclosure.

Cited in *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160, holding that the statute having specifically enumerated the exceptions to limitations of mortgage foreclosure the court is not at liberty to read in other exceptions upon equitable grounds.

What will stop running of limitations.

Cited in note in 23 L.R.A. (N.S.) 674, on effect of injunction against suing on running of limitations.

13 N. D. 508, THURSTON v. OSBORNE-McMILLAN ELEVATOR CO. 101 N. W. 892.

Effect of payment by surety.

Cited in note in 68 L.R.A. 529, 533, 579, on extinction of judgment against principals by sureties' payment.

Dak. Rep.—32.

13 N. D. 513, RE SMITH, 101 N. W. 890.

Constructive rejection of claims presented to personal representative.

Cited in *Singer v. Austin*, 19 N. D. 546, 125 N. W. 560, holding constructively rejected by non-action thereon for ten days.

13 N. D. 516, DOWAGIAC MFG. CO. v. MAHON, 101 N. W. 900.

Exclusive written warranties.

Cited in notes in 15 L.R.A.(N.S.) 863, on implied warranty to particular article purchased from manufacturer or producer for particular use; 19 L.R.A.(N.S.) 1199, on right to show parol warranty connection with contract of sale of personalty; 33 L.R.A.(N.S.) 560, to whether express warranty excludes implied warranty as to quality.

Distinguished in *Hooven & A. Co. v. Writz*, 15 N. D. 477, 107 N. W. 1078, holding that where there were no exclusive written warranties merely a stipulation against oral express warranties it was error to exclude evidence of breach of implied warranties.

Parol modification of written contract.

Cited in *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549, sustaining the exclusion of evidence to show the parol modification of a written contract.

Waiver by bringing action for purchase price.

Cited in *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558, holding that conditional vendor may elect to waive his title and sue for purchase price.

Cited in note in 23 L.R.A.(N.S.) 145, on action for price as waiver of right of conditional vendor to recover property.

Fraudulent representations as to value justifying rescission.

Cited in *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032, holding that representation as to value of land, knowingly made by one with full knowledge of character and condition of property, and relied upon by one with slight knowledge and no means of obtaining full knowledge, justified rescission of contract.

13 N. D. 525, LAUDER v. JONES, 101 N. W. 907.

Privileged communications.

Cited in *Myers v. Hodges*, 53 Fla. 197, 44 So. 357, holding that, in order to be privileged communication, words spoken in the course of judicial proceedings must be relevant or pertinent to the subject of inquiry; *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1066, 7 A. & E. Ann. 528, holding it to be the well settled common law of this country that words spoken in the course of judicial proceedings are not actionably pertinent to the subject of inquiry; *Vial v. Larson*, 132 Iowa, 206 N. W. 1007, holding that when words slanderous per se are spoken in the course of a privileged communication the burden of proving malice is on the person predicated cause of action thereon.

Cited in notes in 116 Am. St. Rep. 805, on what words are libelous.

per se; 104 Am. St. Rep. 119, 124, 125, on what libelous statements are privileged; 123 Am. St. Rep. 641, on liability for libel and slander in course of judicial proceedings; 3 L.R.A.(N.S.) 697, on privileged occasion; burden of showing good faith and probable cause.

Truth as defense in libel or slander.

Cited in note in 31 L.R.A.(N.S.) 134, 138, on truth as defense to civil action for defamation.

13 N. D. 559, PULS v. GRAND LODGE, A. O. U. W. 102 N. W. 165.

Proof of death.

Cited in note in 137 Am. St. Rep. 723, on proof of death in cases of accident and life insurance.

Admissibility of proceedings and findings of coroner.

Cited in *Kinney v. Brotherhood of American Yeoman*, 15 N. D. 21, sustaining the exclusion of coroner's written finding as to cause of death, no formal inquest having been held and the coroner being a witness in the case; *State v. Squires*, 15 Idaho, 545, 98 Pac. 413, holding deposition taken at coroner's inquest inadmissible in homicide prosecution the inquest being an ex parte proceeding.

Statements of decedent as to nature of last illness.

Cited in *State v. Blydenburg*, 135 Iowa, 264, 112 N. W. 634, 14 A. & E. Ann. Cas. 443, holding it error to exclude statements of decedent made to physician as to nature of malady and as a basis for forming diagnosis.

— Res gestae.

Distinguished in *Regnier v. Territory*, 15 Okla. 652, 82 Pac. 509, where the declaration sought to be introduced was not necessarily of facts within the knowledge of deceased.

Negative evidence to establish temperate habits.

Cited in *Schon v. Modern Woodmen*, 51 Wash. 482, 99 Pac. 25, holding that negative evidence was competent and sufficient to establish the habits of defendant as one not addicted to immoderate use of intoxicants.

13 N. D. 574, MOORE v. WESTON, 102 N. W. 163.

Revocation of power of attorney by death.

Cited in note in 6 L.R.A.(N.S.) 856, on effect of provision in power of attorney declaring it shall not be revoked by death.

13 N. D. 577, TRACY v. SCOTT, 101 N. W. 905, Injunction vacated on certiorari in 15 N. D. 259, 107 N. W. 61.

13 N. D. 580, BROWN v. SMITH, 102 N. W. 171.

"Immediately."

Cited in *Peterson v. Hansen*, 15 N. D. 198, 107 N. W. 528, holding that fact that judgment was not entered by justice on the same day verdict was returned is not necessarily a failure to enter same "immediately" within meaning of statute.

13 N. D. 587, BOSARD v. GRAND FORKS, 102 N. W. 164.

Municipal liability on implied contract.

Cited in note in 27 L.R.A.(N.S.) 1129, on liability of municipality upon implied contract for labor or services.

13 N. D. 591, MORRISON v. LEE, 102 N. W. 223, Decision on the merits in 16 N. D. 377, 13 L.R.A.(N.S.) 650, 113 N. W. 1025.

Absence of intent as an essential of negligence

Cited in Hart v. Hanson, 14 N. D. 570, 3 L.R.A.(N.S.) 438, 105 N. W. 942, holding that "negligence" consists of a want of care and implies an absence of intentional wrong hence an attempt to draw an implication of wilful fraud from facts showing gross negligence involves an absurdity.

Requisites of special verdict.

Cited in Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026, holding it necessary that jury assess damages in special verdict.

Cited in note in 24 L.R.A.(N.S.) 2, 63, 70, on what special verdict must contain.

13 N. D. 601, NORTHWESTERN F. & M. INS. CO. v. LOUGH, 102 N. W. 160.

Deed as mortgage.

Cited in Miller v. Smith, 20 N. D. 96, 126 N. W. 499, holding that deed will not be declared mortgage, unless evidence is clear, specific and convincing.

Bank officer dealing with himself.

Cited in First Nat. Bank v. Gunhus, 133 Iowa, 409, 9 L.R.A.(N.S.) 471, 110 N. W. 611, holding cashier's substitution of another note for his own did not change his relations with the bank in regard thereto in the absence of authority from the directors or other authorized officials.

13 N. D. 604, WALDNER v. BOWDEN STATE BANK, 102 N. W. 169, 3 A. & E. ANN. CAS. 847.

Objection to pleading after trial begun.

Cited in Schmidt v. Beiseker, 14 N. D. 587, 5 L.R.A.(N.S.) 123, 116 Am. St. Rep. 706, 105 N. W. 1102, holding that upon objection to introduction of evidence on the ground that complaint is defective the complaint must be more liberally construed than upon demurrer; Walters v. Rock, 18 N. D. 45, 115 N. W. 511, holding that answer will be more liberally construed when attacked on trial for insufficiency than when attacked on demurrer.

Irrelevant evidence as harmless error.

Cited in State v. Harris, 14 N. D. 501, 105 N. W. 621, holding that where conviction is amply sustained by competent evidence the admission of doubtful or irrelevant testimony may be disregarded.

13 N. D. 610, FOX v. WALLEY, 102 N. W. 161.

13 N. D. 616, HAUGEN v. SKJERVHEIM, 102 N. W. 311.

Parol rescission of contract of sale.

Cited in *Cutwright v. Union Sav. & Invest. Co.* 33 Utah, 486, 94 Pac. 984, 14 A. & E. Ann. Cas. 725, holding that complete rescission of written contract of sale may be effected by the conduct of the parties.

13 N. D. 622, CANFIELD v. ORANGE, 102 N. W. 313.

13 N. D. 629, LEONARD v. FLEMING, 102 N. W. 308.

Presumption of delivery arising from possession of written instrument.

Cited in *Kauffman v. Baillie*, 46 Wash. 248, 89 Pac. 548, holding that possession of a written instrument by the person for whose benefit it was drawn is prima facie evidence of delivery thereof in the absence of circumstances tending to impeach the good faith of the holder.

13 N. D. 638, LOOMIS v. LEWIS, 102 N. W. 1134.

13 N. D. 639, BEIDLER & R. LUMBER CO. v. COE COMMISSION CO. 102 N. W. 880.

Gambling transactions.

Cited in *Semler Mill Co. v. Fyffe*, 127 Ill. App. 514, holding that whether a transaction in grain constitutes a gambling contract depends upon the intent of the parties as determined by the circumstances and their general manner of doing business.

13 N. D. 649, STATE v. WISNEWSKI, 102 N. W. 883, 3 A. & E. ANN. CAS. 907.

Instruction on failure of accused to testify.

Cited in *State v. Currie*, 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875, holding that reading to the jury the section of the code relating to the effect of accused not testifying is not error.

Sufficiency of information for maintaining liquor nuisance.

Cited in *State v. Kruse*, 19 N. D. 203, 124 N. W. 385, holding particular description of premises unnecessary where prosecution for maintaining liquor nuisance is against person only.

Modifying excessive sentence on appeal.

Cited in *State v. Stevens*, 19 N. D. 249, 123 N. W. 888, holding that supreme court may modify excessive sentence.

13 N. D. 655, STATE v. CURRIE, 69 L.R.A. 405, 112 AM. ST. REP. 687, 102 N. W. 875.

Consent to crime as defense.

Cited in note in 30 L.R.A.(N.S.) 951, on instigation or consent to crime for purpose of detecting criminal as defence.

13 N. D.] NOTES ON NORTH DAKOTA REPORTS.

13 N. D. 663, STATE v. GERHART, 102 N. W. 880.

13 N. D. 664, STATE v. SCHOLFIELD, 102 N. W. 878.

Sufficiency of statement on appeal.

Followed without discussion in State v. Gerhart, 13 N. D. 663, 102 N. W. 880; State v. Erickson, 14 N. D. 139, 103 N. W. 389.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 14 N. D.

14 N. D. 1, BERRY v. EVENDON, 103 N. W. 748.

Liability for use of land by trustee.

Cited in *Cotton v. Butterfield*, 14 N. D. 465, 105 N. W. 236, holding that trustee is liable for value of use and occupation of lands held in trust or for the net profit derived from such occupation and cestui may elect which measure of compensation he will pursue.

14 N. D. 10, TORGRINSON v. NORWICH SCHOOL DIST. NO. 31, 103 N. W. 414.

Aid to taxpayer against illegal acts.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322 (dissenting opinion), on refusal of courts to aid taxpayer as against illegal acts of taxing authorities until his property rights are invaded or immediately threatened.

14 N. D. 19, WELCH v. NORTHERN P. R. CO. 103 N. W. 396.

"Place of destination."

Cited in *Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 490, 107 N. W. 1087, holding that a stipulation to notify carrier of damage before shipment is removed from "place of destination" refers to the town rather than the railway station as such "place."

Necessity for notice to carrier of loss or injury.

Cited in note in 17 L.R.A.(N.S.) 645, on notice of loss or injury to goods, required by carrier's contract as condition precedent.

Judgment non obstante.

Cited in *Rieck v. Daigle*, 17 N. D. 365, 117 N. W. 346, holding failure of proof would not warrant judgment non obstante where defect may be sup-

plied in another trial; *Kirk v. Salt Lake City*, 32 Utah, 143, 12 L. (N.S.) 1021, 89 Pac. 458, holding that court is without authority to grant judgment non obstante.

Cited in note in 12 L.R.A.(N.S.) 1022, on right to judgment non obstante veredicto because of failure of proof.

14 N. D. 26, BEARE v. WRIGHT, 69 L.R.A. 409, 103 N. W. 8 A. & E. Ann. Cas. 1057.

Deceit.

Cited in *Marshall-McCartney Co. v. Halloran*, 15 N. D. 71, 106 N. 293, holding that complaint must show damage resulting proximately from misrepresentation in order to show a cause of action for deceit.

— Measure of damages.

Cited in *Walker v. Pike County Land Co.* 71 C. C. A. 593, 139 Fed. 841, holding one who by representing himself to be a joint purchaser procures others to share in the purchase at a higher price than that for which the property was bought is liable for the profit made thereby.

Fraud avoiding a contract.

Cited in *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194, holding that actual damage is not a prerequisite to avoidance of contract where fraud is shown.

Requisites of special verdict.

Cited in note in 24 L.R.A.(N.S.) 77, on what special verdict must be returned.

14 N. D. 39, BENESH v. TRAVELERS' INS. CO. 103 N. W. 40.

14 N. D. 46, GREEN v. TENOLD, 116 AM. ST. REP. 638, 103 N. W. 398.

Liability of public land for debt contracted before patent issued.

Cited in note in 34 L.R.A.(N.S.) 409, on liability of claim or interest in public lands for debts contracted before patent issued.

14 N. D. 57, AVERY MFG. CO. v. CRUMB, 103 N. W. 410.

14 N. D. 66, CARTER v. CARTER, 103 N. W. 425.

Creation of express trust

Cited in *Cardiff v. Marquis*, 17 N. D. 110, 114 N. W. 1088, holding that an express trust cannot be created by parole.

14 N. D. 69, HARSHMAN v. NORTHERN P. R. CO. 103 N. W. 412.

Who may sue for wrongful death.

Cited in *Hammond v. Lewiston, A. & W. Street R. Co.* 106 Me. 30, 30 L.R.A.(N.S.) 78, 76 Atl. 672, holding that sister, sole heir of deceased leaving widow who died before action, cannot sue for his wrongful death. Also cited in *Satterberg v. Minneapolis, St. P. & S. Ste. M. R. Co.* 19 N. D. 38, 12

W. 70, holding that brothers and sisters may sue when no parent, wife or child survives person killed.

14 N. D. 73, DICKEY COUNTY v. HICKS, 103 N. W. 423.

14 N. D. 77, DICKEY COUNTY v. DENNING, 103 N. W. 422.

14 N. D. 81, BECKER v. LOUGH, 103 N. W. 417.

14 N. D. 88, RED RIVER VALLEY NAT. BANK v. FARGO, 103 N. W. 390.

14 N. D. 95, FREEMAN v. WOOD, 103 N. W. 392.

Laches preventing relief from judgment.

Cited in *Weed v. Hunt*, 81 Vt. 302, 70 Atl. 564, holding that equity will not relieve against default judgment, where judgment debtor was negligent in pursuing legal remedy provided therefor.

14 N. D. 110, JEWETT BROS. v. HUFFMAN, 103 N. W. 408.

Lien on exempt property of bankrupt.

Distinguished in *Bowen v. Keller*, 130 Ga. 31, 124 Am. St. Rep. 164, 60 S. E. 174, holding discharge in bankruptcy barred claim of creditor who failed to perfect his lien upon exempt property prior thereto.

Time for objections to allegations of complaint.

Cited in *F. Mayer Boot & Shoe Co. v. Ferguson*, 19 N. D. 496, 126 N. W. 110, holding that objection to allegations of complaint which are only irregularities or surplusage, cannot be made for first time on appeal.

14 N. D. 116, CLEMENS v. ROYAL NEIGHBORS, 103 N. W. 402, 8 A. & E. ANN. CAS. 1111.

Construction of suicide clause in policy.

Cited in note in 17 L.R.A.(N.S.) 261, 269, on effect of words "sane" or "insane," etc., in suicide clause in life policy.

Presumption of suicide.

Cited in *Paulsen v. Modern Woodman*, 21 N. D. 235, 130 N. W. 231, holding that law will presume that death from use of strychnine was accidental and not suicidal.

14 N. D. 127, LOGAN v. FREERKS, 103 N. W. 426.

Time for questioning theory of case.

Cited in *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026 (dissenting opinion), on estoppel of party to for the first time on appeal challenge the theory upon which the case was tried.

14 N. D. 139, STATE v. ERICKSON, 103 N. W. 389.

14 N. D. 143, **BANK OF PARK RIVER v. NORTON**, 104 N. W. 525.

14 N. D. 147, **COLONIAL & U. S. MORTG. CO. v. NORTHWEST THRESHER CO.** 70 L.R.A. 814, 116 AM. ST. REP. 642, 103 N. W. 915, 8 A. & E. ANN. CAS. 1160.

Operation of statute of limitations.

Cited in *Bacon v. Mitchell*, 14 N. D. 454, 4 L.R.A.(N.S.) 244, 106 N. W. 129, holding that statute of limitations destroys remedy but does not destroy cause of action; *Boucofski v. Jacobsen*, 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117, holding that statute of limitations begins to run in favor of subsequent grantee or junior lien claimant when right of action of senior claimant accrues.

— Tolling the statute.

Cited in *Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677, holding that interruptions of the running of limitations as to the debt also toll limitations as to the security; *Volivar v. Richmond Cedar Works*, 152 N. C. 656, 68 S. E. 200, on tolling of limitations by absence of defendant.

Cited in note in 26 L.R.A.(N.S.) 899, 901, on effect of mortgagor's absence from state to toll limitations as against foreclosure against his grantee.

— Right to foreclosure on realty.

Followed in *Colonial & U. S. Mortg. Co. v. Flemington*, 14 N. D. 181, 116 Am. St. Rep. 670, 103 N. W. 929; *Paine v. Dodds*, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931,—holding an action to foreclose a real estate mortgage is a proceeding in personam and limitations are tolled during absence of defendant from state.

Cited in *Adams & Co. v. Kenoyer*, 17 N. D. 302, 16 L.R.A.(N.S.) 631, 116 N. W. 98, as announcing rule prior to statute excepting real estate mortgages from provision tolling limitations; *Boucofski v. Jacobsen*, 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117, on the effect of absence of debtor from state to toll limitations on mortgage foreclosure.

Distinguished in *Kaiser v. Idelman*, 57 Or. 224, 28 L.R.A.(N.S.) 169, 108 Pac. 193, as inapplicable to a case where statute was tolled by partial payments.

Independence of debt and mortgage.

Cited in *Colonial & U. S. Mortg. Co. v. Flemington*, 14 N. D. 181, 116 Am. St. Rep. 670, 103 N. W. 929, holding that although right to foreclose mortgage may be barred the debt may remain actionable.

Meaning of "cause of action."

Cited in *Bruner v. Martin*, 76 Kan. 862, 14 L.R.A.(N.S.) 775, 123 Am. St. Rep. 172, 93 Pac. 165, 14 A. & E. Ann. Cas. 39 (dissenting opinion), as collating definitions of "cause of action."

14 N. D. 181, **COLONIAL & U. S. MORTG. CO. v. FLEMINGTON**, 116 AM. ST. REP. 670, 103 N. W. 929.

Tolling limitations on real estate mortgage.

Followed in *Paine v. Dodds*, 14 N. D. 189, 116 Am. St. Rep. 674, 103

N. W. 931, holding action to foreclose a real estate mortgage is in personam and limitations are tolled during absence of defendant from state.

Cited in *Adams & F. Co. v. Kenoyer*, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98, as announcing the rule prior to statute excepting real estate mortgages from provisions tolling limitations.

14 N. D. 189, *PAINE v. DODDS*, 116 AM. ST. REP. 674, 103 N. W. 931.

Running of limitations.

Cited in *Boucowski v. Jacobsen*, 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117, holding that statute of limitations begins to run in favor of subsequent grantee or junior lien claimant when right of action of senior claimant accrues.

-Tolling limitations.

Cited in *Boucowski v. Jacobsen*, 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117, on tolling of limitations by absence of debtor.

-Limitations on real estate mortgages.

Cited in *Adams & F. Co. v. Kenoyer*, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98, as announcing the rule prior to the statute excepting mortgages from the provision tolling limitations for absence of party.

Cited in note in 26 L.R.A.(N.S.) 900, on effect of mortgagor's absence from state to toll limitations as against foreclosure against his grantee.

Effect of conveyance upon running of limitations against mortgage.

Cited in *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792, holding transfer of adverse possession did not give rise to new cause of action but the cause which originally arose in favor of the mortgagor of the property remained; *Colonial & U. S. Mortg. Co. v. Northwest Thresher Co.* 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 A. & E. Ann. Cas. 1160 (dissenting opinion), on necessity for record of deed of mortgagor to commence running of limitations against mortgagee.

New trial for mutual mistake as to law.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, ordering new trial where both parties and trial court were under misapprehension as to the legal effect of certain issues.

14 N. D. 200, *STATE v. O'MALLEY*, 103 N. W. 421.

14 N. D. 203, *STATE v. SANDERS*, 103 N. W. 419, Later case involving same robbery in 14 N. D. 200, 103 N. W. 421.

Sufficiency of description in indictment.

Cited in note in 34 L.R.A.(N.S.) 303, on sufficiency of description of property in indictment for robbery or larceny from person.

14 N. D. 209, HULET v. NORTHERN P. R. CO. 103 N. W. 628.
Gifts.

Cited in *Fowler v. Fowler*, 141 Mo. App. 610, 125 S. W. 1171, holding the evidence sufficient to show a gift inter vivos.

14 N. D. 212, PARSONS v. McCUMBER, 103 N. W. 626.

14 N. D. 218, HAGLER v. KELLY, 103 N. W. 629.

Acceptance of partial payment by municipality.

Cited in note in 19 L.R.A.(N.S.) 321, on right of town, county, or municipality to surrender valid claim upon partial payment.

Rights accrued prior to adoption of code.

Questioned in *Blakemore v. Cooper*, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566, as to whether a lien of tax judgment in favor of the state is a "right accrued" prior to adoption of Code and so preserved by the terms thereof.

Effect of repeal of law under which lien is acquired.

Cited in *Hanson v. Franklin*, 19 N. D. 259, 123 N. W. 386, holding that lien continues though law under which tax judgment was obtained is repealed.

14 N. D. 228, ROBBINS v. MAHER, 103 N. W. 755.

Counterclaim by factor against amount due principal.

Cited in *Turner v. Crumpton*, 21 N. D. 294, 130 N. W. 937, holding that factor may counterclaim against amount due principal, damages based on latter's refusal to accept grain purchased for him in factor's name.

14 N. D. 232, JONES v. HOEFS, 103 N. W. 751.

14 N. D. 236, DE FOE v. ZENITH COAL CO. 103 N. W. 747.

Dismissal of appeal from justice court.

Distinguished in *Haessly v. Thate*, 16 N. D. 403, 114 N. W. 311, where dismissal of appeal from justice court for failure of justice to transmit transcript was held error.

14 N. D. 238, MERCHANTS' STATE BANK v. TUFTS, 116 AM. ST. REP. 682n, 103 N. W. 760.

Mortgage to secure future advances.

Followed in *McCormick Harvester Mach. Co. v. Caldwell*, 15 N. D. 132, 106 N. W. 122, holding that a deed which is an equitable mortgage to secure present debt and future indebtedness is not as a matter of law fraud upon other creditors.

Cited in note in 116 Am. St. Rep. 696, on mortgages to secure future advances.

Payments requisite to recovery of equitable mortgaged property.

Cited in *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306, holding that

tender of amount secured by equitable mortgage is prerequisite to decree for reconveyance.

Parties in interest to payments by junior lienor.

Cited in *Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677, holding that payment of taxes and interest on prior mortgage to protect lien of equitable mortgage, in form a deed, are transactions with third parties which second mortgagee may testify to in order to establish the nature of his rights although mortgagor is dead.

14 N. D. 248, SONNESYN v. AKIN, 104 N. W. 1026.

Rescission of contract for fraud.

Cited in *McNeny v. Campbell*, 81 Neb. 754, 116 N. W. 671, holding that a misrepresentation of matters not material to the contract or calculated to injure the contractor is not such fraud as will warrant rescission; *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194, on the notice requisite in order to rescind a contract and the necessity that rescission for fraud be made upon discovery thereof; *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549, holding that one desiring to rescind for fraud must act promptly upon discovery thereof.

What constitutes fraud.

Cited in note in 28 L.R.A.(N.S.) 212, as to whether fraud may be predicated of misstatement as to title to realty.

Right to jury's determination of facts.

Cited in *Ward v. Gradin*, 15 N. D. 649, 109 N. W. 57, holding that court cannot assume certain facts and submit the rest to the jury in the absence of an express waiver.

14 N. D. 278, WEICKER v. STAVELY, 103 N. W. 753.

14 N. D. 282, MILBURN-STODDARD CO. v. STICKNEY, 103 N. W. 752.

14 N. D. 287, CLARK v. BECK, 103 N. W. 755.

Statute limiting prior rights.

Cited in *Adams & F. Co. v. Kenoyer*, 17 N. D. 302, 16 L.R.A.(N.S.) 681, 116 N. W. 98, holding that a statute limiting the exercise of previously acquired rights is unconstitutional in so far as it fails to give reasonable time for the protection of such rights.

Distinguished in *Scott v. District Ct.* 15 N. D. 259, 107 N. W. 61, holding that the legislature has power to limit the time for foreclosure of mortgage rights acquired prior to enactment of the limiting statute.

14 N. D. 288, STATE v. JOHNSON, 103 N. W. 565.

Instruction as to corroboration of witness.

Cited in *State v. Winney*, 21 N. D. 72, 128 N. W. 680, holding instruction which states that if any witness has "wilfully testified falsely" suf-

ficient, without stating that such testimony must be wilfully
tentionally false.

14 N. D. 291, STATE v. MOMBERG, 103 N. W. 566.

Possession of liquor as evidence of attempt to violate law.

Cited in note in 1 L.R.A.(N.S.) 628, on power of legislature
possession prima facie evidence of attempt to violate liquor law.

14 N. D. 293, STATE v. VIRGO, 103 N. W. 610.

Variance between proof and information.

Cited in State v. O'Neal, 19 N. D. 425, 124 N. W. 68, holding it
admit evidence of maintenance of liquor nuisance in other place t
specifically described in information.

14 N. D. 297, STATE v. NELSON, 103 N. W. 609.

14 N. D. 301, MARTINSON v. MARZOLF, 103 N. W. 937.

Reopening judgment.

Cited in Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A.(N.
116 N. W. 529, holding that the court has power to amend, vacate
stitute new judgment in any action before jurisdiction has be
Gilbreath v. Teufel, 15 N. D. 152, 107 N. W. 49, holding that in a
to determine adverse claims to realty failure to disclose all adver
ants who might readily have been ascertained is in effect a fra
the court warranting a reopening of the case upon motion of such
claimants; Williams v. Fairmount School Dist. 21 N. D. 198, 12
1027, holding that application judgment obtained by collusion an
upon voters and taxpayers, made by party affected on proper show
not be accompanied by affidavit of merits; Racine-Sattley Mfg.
Pavlicek, 21 N. D. 222, 130 N. W. 228, holding that motion to
fault must be based on affidavit of merits and proposed verified an

Terms of court.

Cited in Dedrick v. Charrier, 15 N. D. 515, 125 Am. St. Rep.
N. W. 38, holding that since there are no terms of court in this
the common law sense the right to apply for amendment on reop
judgment exists after term time.

Jurisdiction of contests of public land claims.

Cited in Zimmerman v. McCurdy, 15 N. D. 79, 106 N. W. 125,
E. Ann. Cas. 29, holding that the conflicting claims of homestead
within the exclusive jurisdiction of the land department while t
remains in the United States.

14 N. D. 311, ROBERTS v. BOPE, 103 N. W. 935.

14 N. D. 316, STATE v. BARRY, 103 N. W. 637.

"May" construed as "must."

Cited in Walker v. Maronda, 15 N. D. 63, 106 N. W. 296, holdi

vision that justice of peace "may" grant change of venue upon affidavit of prejudice prescribes a mandatory duty.

14 N. D. 331, HOUGHTON IMPLEMENT CO. v. DOUGHTY, 104 N. W. 516.

Oral and written agreements.

Cited in *Sullivan Machinery Co. v. Breeden*, 40 Ind. App. 631, 82 N. E. 107, holding that oral warranties upon sale of machinery are merged in a written warranty which cannot then be extended by parole; *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549, sustaining the exclusion of testimony of parole alteration of written contract.

14 N. D. 335, STATE v. FORRESTER, 103 N. W. 625.

14 N. D. 340, KNIGHT v. CASS COUNTY, 103 N. W. 940.

14 N. D. 344, PETERSBURG SCHOOL DIST. v. PETERSON, 103 N. W. 756.

Measure of compensation in eminent domain.

Cited in *Portneuf-Marsh Valley Irrigating Co. v. Portneuf Irrigating Co.* 19 Idaho, 483, 114 Pac. 19, holding owner entitled to just compensation for land taken, clear of all costs of proceeding.

Cited in note in 15 L.R.A.(N.S.) 681, on compensation allowable on condemnation as affected by adaptability of property for uses other than to which it is put.

Court's discretion as to order of proof.

Cited in *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872, refusing to consider objection to the admission of evidence out of its proper order no abuse of discretion being shown.

14 N. D. 353, LOUGH v. WHITE, 104 N. W. 518.

Prerequisites to appeal from justice court.

Cited in *Aneta Mercantile Co. v. Groseth*, 20 N. D. 137, 127 N. W. 718, holding service of appellant's pleading with undertaking prerequisite to jurisdiction of district court, and not waived by stipulation putting case over term.

14 N. D. 355, O'KEEFE v. LEISTIKOW, 104 N. W. 515, 9 A. & E. ANN. CAS. 25.

Sale of uniform commodity without separation from bulk.

Followed in *St. Anthony & D. Elevator Co. v. Cass County*, 14 N. D. 601, 106 N. W. 41, holding that reparation of portion of commodity of uniform grade is not essential to a completed sale thereof.

-Sufficiency of separation.

Cited in note in 26 L.R.A.(N.S.) 7, 56, 59, on sufficiency of selection or designation of goods sold out of larger lot.

14 N. D. 361, SMALL v. STATE, 103 N. W. 942.

When reward is earned.

Cited in note in 9 L.R.A.(N.S.) 1057, on prior knowledge of, a
tion of earning, reward.

14 N. D. 368, STATE EX REL. FRICH v. STARK COUNTY, 103 N. W. 913.

Original jurisdiction to issue injunction.

Cited in State ex rel. Miller v. Miller, 21 N. D. 324, 131 N. W. 1048, holding that supreme court in exercise of its original jurisdiction may join alleged new county and those assuming to act as its officers exercising jurisdiction over territory embraced in such county with validity of organization of county involved in pending proceeding is adjudicated.

14 N. D. 375, SCHWOEBEL v. FUGINA, 104 N. W. 848.

Effect of denial of tenancy.

Cited in note in 25 L.R.A.(N.S.) 105, on denial of tenancy as well as notice to quit or demand of possession.

Scope of cross-examination.

Cited in Holtan v. Beck, 20 N. D. 5, 125 N. W. 1048, holding that evidence of adverse party may be proved by his cross-examination; Miller v. Hanson, 19 N. D. 692, 124 N. W. 1116 holding that latitude allowed in cross-examination is largely discretionary with court.

14 N. D. 380, SPOONHEIM v. SPOONHEIM, 104 N. W. 848.

Validity of contract with intoxicated person.

Cited in Power v. King, 18 N. D. 600, 138 Am. St. Rep. 784, 125 N. W. 543, holding that to avoid deed, it must be shown that grantor was intoxicated as not to understand nature and effect of deed.

Cited in note in 25 L.R.A.(N.S.) 597, 599, 601, on validity of contract with intoxicated person.

14 N. D. 390, WEISBECKER v. CAHN, 104 N. W. 513.

Limitations on judgments and executions.

Cited in Holton v. Schmarback, 15 N. D. 38, 106 N. W. 36, distinguishing between a limitation upon power to issue execution and limitation upon life of judgment; Enderlin Invest. Co. v. Nordhagen, 18 N. D. 123, 123 N. W. 390, holding that execution on transcribed judgment issued within ten years from entry of judgment in justice's court is valid.

Cited in note in 133 Am. St. Rep. 68, on effect of statute of limitations on judgments and executions and proceedings for their enforcement.

14 N. D. 393, FRIEDLANDER v. TAINTOR, 116 AM. ST. REP. 697, 104 N. W. 527, 9 A. & E. ANN. CAS. 96.

Mechanics' lien of architect.

Distinguished in Buckingham v. Flummerfelt, 15 N. D. 112, 106 N. W. 100.

403, where architect merely furnished plans and building was constructed according to other plans.

14 N. D. 398, **STEVENS v. MEYERS**, 104 N. W. 529.

14 N. D. 405, **THOMPSON v. FARGO PLUMBING & HEATING CO.** 104 N. W. 525.

14 N. D. 407, **SCOTT & B. MERCANTILE CO. v. NELSON COUNTY**, 104 N. W. 528.

Time for questioning tax proceedings.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, as applying without discussion the statutory provision barring attack upon tax proceedings after sale has been made.

14 N. D. 411, **STATE v. WILLIAMS**, 104 N. W. 546.

14 N. D. 414, **JOHNSON v. ERICKSON**, 105 N. W. 1104.

14 N. D. 417, **SIMONSON v. JENSON**, 104 N. W. 513.

Right to reject goods for breach of warranty.

Cited in note in 27 L.R.A.(N.S.) 920, 921, on right to reject goods for breach of warranty.

14 N. D. 419, **KEENEY v. FARGO**, 105 N. W. 92, Related case in 14 N. D. 423, 105 N. W. 93.

Abuse of discretion in denying relief from judgment.

Cited in *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75, reversing denial of motion to vacate default judgment for abuse of discretion; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, holding that ruling on motion to vacate judgment will not be reversed except for abuse of discretion.

Time for motion to vacate judgment.

Cited in *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75, holding that motion to vacate default judgment must be seasonably made.

14 N. D. 423, **KEENEY v. FARGO**, 105 N. W. 93.

14 N. D. 430, **MORGRIDGE v. STOEFFER**, 104 N. W. 1112.

Suit by or against partnership in firm name.

Cited in note in 29 L.R.A.(N.S.) 284, as to whether partnership may sue or be sued in firm name.

Amendments to pleadings before justice of peace.

Cited in *Rae v. Chicago, M. & St. P. R. Co.* 14 N. D. 507, 105 N. W. 721, as holding that the same general rules as to amendments prevail in justice as in district court.

Dak. Rep.—33.

Amendment to pleading incorrectly designating firm.

Cited in *Springfield F. & M. Ins. Co. v. Gish, B. & Co.* 23 Okla. 8, 108 Pac. 708, holding that defect in summons in error in designating partnership by firm name only is remediable by amendment.

14 N. D. 435, JOHN MILLER CO. v. KLOVSTAD, 105 N. W. 235.

Presumed validity of contracts for future delivery.

Cited in *Halle v. Aggergaard*, 21 S. D. 554, 14 L.R.A.(N.S.) 12, 118 N. W. 696, holding that burden is upon party asserting that contract for future delivery of commodity is a gaming contract to prove that delivery was in fact intended.

14 N. D. 445, HANSON v. SKOGMAN, 105 N. W. 90.

Conversion by chattel mortgagee.

Cited in *Simpson v. Bantley*, 142 Mo. App. 490, 126 S. W. 999, holding that refusal of mortgagee to sell personally mortgaged and his exercise of control over it amounted to conversion.

Counterclaim by mortgagor for mortgagee's conversion.

Cited in *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 3, 118 Am. St. Rep. 920, 117 N. W. 372, holding that mortgagor of chattel may counterclaim for their conversion in action on note secured by mortgage.

14 N. D. 449, HEALEY v. FORMAN, 105 N. W. 233.

14 N. D. 454, BACON v. MITCHELL, 4 L.R.A.(N.S.) 244, 105 N. W. 129.

Presumption of attorney's authority.

Cited in notes in 126 Am. St. Rep. 39, on presumption of attorney's authority to appear for party whom he assumes to represent; 126 Am. St. Rep. 162, on implied authority of attorney in conducting litigation.

Act of attorney binding upon client.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322 (dissenting opinion), on the rule that attorney's error of judgment is not ground for reversal of trial.

14 N. D. 460, MILLS v. FORTUNE, 105 N. W. 235.

14 N. D. 465, COTTON v. BUTTERFIELD, 105 N. W. 236.

Separate trial of equitable counterclaim.

Cited in *Laffy v. Gordon*, 15 N. D. 282, 107 N. W. 969, holding that the existence of an equitable counterclaim does not prevent the case from being one "properly triable by jury" within the statute prescribing method of appeal.

14 N. D. 476, LARSON v. CHRISTIANSON, 106 N. W. 5.

Sufficiency of answer to assertion of adverse title.

Cited in *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85, holding that answer to assertion of adverse title is sufficient to require proof of title.

denial of title raises issue without setting forth specifically the origin, nature and extent of title claimed by defendant.

Limitation on power to impose license tax.

Cited in note in 129 Am. St. Rep. 277, on constitutional limitations on power to impose license or occupation taxes.

14 N. D. 482, CURRIE v. LOOK, 106 N. W. 131.

14 N. D. 487, RE WHITEMORE, 105 N. W. 232.

14 N. D. 490, STATE v. HAZLETT, 105 N. W. 617.

Examination of witness by court.

Cited in *Komp v. State*, 129 Wis. 20, 108 N. W. 46, affirming right of trial court to question witness providing questions are so framed as to make clear that which is not clear.

Cross examination of witnesses in criminal cases.

Cited in *State v. Hakon*, 21 N. D. 133, 129 N. W. 234, holding it prejudicial error to refuse to permit any cross-examination as to motives and feelings of witnesses.

14 N. D. 501, STATE v. HARRIS, 105 N. W. 621.

Authority of attorney to appear.

Cited in note in 126 Am. St. Rep. 36, on right of attorney to appear for party whom he assumes to represent.

14 N. D. 507, RAE v. CHICAGO, M. & ST. P. R. CO. 105 N. W. 721.

Amendment to pleadings.

Followed in *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197, holding that an amendment which sets forth what is technically a different cause of action is not necessarily objectionable.

Cited in *More v. Burger*, 15 N. D. 345, 107 N. W. 200, holding an amendment while technically changing cause of action is not objectionable where based upon substantially the same facts.

15 N. D. 511, ROBERTSON LUMBER CO. v. STATE BANK, 105 N. W. 719.

Mechanics lien filed after statutory period.

Cited in *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085, 17 A. & E. Ann. Cas. 213, holding that mechanic's lien filed after statutory period may attach to any sums yet unpaid to contractor but the owner is protected as to all payments made in good faith.

Lien of subcontractor.

Cited in *Langworthy Lumber Co. v. Hunt*, 19 N. D. 433, 122 N. W. 865, holding subcontractor entitled to direct lien for labor or materials furnished contractor irrespective of state of accounts between contractor and owner, or amount due or unpaid on their contract; North Dakota

Lumber Co. v. Bulger, 19 N. D. 516, 125 N. W. 883, holding subcontractor not entitled to lien unless before completion of contract he notified grantor of land by registered letter that he has furnished materials, machinery or fixtures.

14 N. D. 518, JOHNSON v. ERLANDSON, 105 N. W. 722.
Notice of defect in title.

Cited in Jennings v. Lentz, 50 Or. 483, 29 L.R.A.(N.S.) 584, 327, on the extent of duty of purchaser to investigate title; Dalzutto, 59 Wash. 62, 29 L.R.A.(N.S.) 467, 109 Pac. 270, holding purchaser not charged with notice that property was community property; grantor's associates knew that he was married and inquiry might disclose fact, where grantor had lived apart from family for years.
Estoppel by laches.

Cited in Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318, holding that one seeking to avoid a voidable sale must act promptly upon discovery of the facts; Winterberg v. Van De Vorste, 19 N. D. 417, 122 N. W. 100, holding that estoppel to deny title of innocent purchasers.

Cited in note in 7 L.R.A.(N.S.) 713, on permitting undelivered property wrongfully recorded, to remain on record as estoppel of grantor and successors to deny delivery as against purchaser relying on record.

14 N. D. 523, STATE v. MALMBERG, 105 N. W. 614.
Scope of cross-examination.

Cited in State v. Hazlett, 14 N. D. 490, 105 N. W. 617, on the scope of cross-examination; Schnase v. Goetz, 18 N. D. 594, 122 N. W. 553, holding that witness cannot be contradicted as to collateral matters brought out on cross-examination; State v. Hakon, 21 N. D. 133, 122 N. W. 235, holding it prejudicial error to refuse to permit any cross-examination as to motives and feelings of witnesses in criminal cases; Longstreth, 19 N. D. 268, 121 N. W. 1114, holding that latitude of cross-examination rests largely in discretion of trial judge.

15 N. D. 529, STATE v. BROWN, 104 N. W. 1112.
Specification of place of alleged liquor nuisance.

Distinguished in State v. Poull, 14 N. D. 557, 105 N. W. 717, holding that information for keeping liquor nuisance on certain described premises required an election by the state where there were two separate places on the described property.

What constitutes a liquor nuisance.

Cited in State v. Ildvedsen, 20 N. D. 62, 126 N. W. 489, holding that hotel and small building in rear constitute one place for maintenance of liquor nuisance.

14 N. D. 532, STATE EX REL. RUSK v. BUDGE, 105 N. W. 722.
Delegation of legislative powers.

Cited in Betts v. Land Office Comrs. 27 Okla. 64, 110 Pac. 766, holding that delegation of legislative powers to a board of land commissioners is valid.

statutory provision authorizing land commissioners to make rules and fix number of employees and salaries, invalid as unwarranted delegation of legislative power; *Newell v. Franklin*, 30 R. I. 258, 74 Atl. 1009, in discussing whether a certain delegation of power was a delegation of executive, legislative or judicial authority; *Davenport v. Elrod*, 20 S. D. 567, 107 N. W. 833, holding that the legislature has power to delegate to a board the superintendence of the erection of public buildings.

Distinguished in *State v. Atlantic Coast Line R. Co.* 56 Fla. 617, 32 L.R.A.(N.S.) 639, 47 So. 969, construing a statute conferring powers upon a state railway commission as conferring only a limited discretion upon the commission; *Blais v. Franklin*, 31 R. I. 95, 77 Atl. 172, holding bridge commission law not unconstitutional as unwarranted delegation of legislative power.

14 N. D. 542, MURPHY v. DISTRICT CT. 105 N. W. 728.

Followed without discussion in *Murphy v. District Ct.* 14 N. D. 557, 105 N. W. 734.

Selection of forum upon change of venue.

Cited in *Zinn v. District Ct.* 17 N. D. 135, 114 N. W. 472, holding that upon change of venue the selection of the county to which the cause shall be sent is entirely within the discretion of the trial judge.

14 N. D. 557, MURPHY v. DISTRICT CT. 105 N. W. 734.

14 N. D. 557, STATE v. POUILL, 105 N. W. 717.

Election between counts of indictment.

Distinguished in *State v. Ildvedsen*, 20 N. D. 62, 126 N. W. 489, holding denial of motion to require prosecution to elect under indictment for maintenance of liquor nuisance in certain building, not error, though proof was given as to two connected buildings.

14 N. D. 561, STATE v. FOSTER, 105 N. W. 938.

Dismissal of prosecution for delay in filing information.

Cited in *State v. Fleming*, 20 N. D. 105, 126 N. W. 565, holding that criminal action will not be dismissed for failure to file information at term at which defendant cannot be regularly tried by jury.

Review of order refusing new trial.

Cited in *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397, holding that refusal to grant new trial for insufficiency of evidence will not be disturbed except for abuse of discretion.

Motion to quash indictment or information.

Cited in *State v. Longstreth*, 19 N. D. 268, 121 N. W. 1114, on grounds upon which motion to quash information or indictment may be made.

14 N. D. 570, HART v. EVANSON, 3 L.R.A.(N.S.) 428, 105 N. W.

14 N. D. 580, VALLEL v. FIRST NAT. BANK, 5 L.R.A. (N.S.) 116 AM. ST. REP. 700, 106 N. W. 127.

Deed absolute as mortgage.

Cited in notes in 11 L.R.A.(N.S.) 210, as to whether deed absolute in face, but intended as mortgage, conveys title; 32 L.R.A.(N.S.) 100, as to protection of purchaser from apparent vendee under instrument intended as mortgage.

14 N. D. 587, SCHMIDT v. BEISEKER, 5 L.R.A. (N.S.) 117 AM. ST. REP. 706, 105 N. W. 1102, Later appeal in 11 N. D. 35, 120 N. W. 1096.

14 N. D. 591, REGAN v. JONES, 105 N. W. 613.

Transaction with decedent.

Cited in Larson v. Newman, 19 N. D. 153, 23 L.R.A. (N.S.) 849, 105 N. W. 202, holding testimony as to oral promise of decedent inadmissible in action to enforce specific performance against his estate.

14 N. D. 596, ALSTERBERG v. BENNETT, 106 N. W. 49.

Parol evidence as to consideration.

Cited in Smith v. Gaub, 19 N. D. 337, 123 N. W. 827, holding parol evidence admissible to show that deed was made without consideration.

Cited in note in 25 L.R.A.(N.S.) 1209, on parol evidence as to consideration of deed.

14 N. D. 601, ST. ANTHONY & D. ELEVATOR CO. v. CASSIDY, 106 N. W. 41.

14 N. D. 608, WALKER v. REIN, 106 N. W. 405.

Contract of foreign corporation contrary to law of forum.

Distinguished in State use of Hart-Parr Co. v. Robb-Lawrence, 19 N. D. 55, 106 N. W. 406, holding compliance with statutory requirements for doing business in the state not necessarily prerequisite to suit against contract by foreign corporation not otherwise illegal.

14 N. D. 614, BESSIE v. NORTHERN P. R. CO. 105 N. W. 618. Later appeal in 18 N. D. 507, 121 N. W. 618.

14 N. D. 622, RE LIPSCHITZ, 95 N. W. 157.

Uniformity of taxation.

Cited in State v. Whitcom, 122 Wis. 110, 99 N. W. 468, holding exemption of certain classes from operation of peddlers' license to be in equal protection of the laws.

Cited in notes in 129 Am. St. Rep. 251, 270, on constitutional questions on power to impose license or occupation taxes; 19 L.R.A. 303, on license or occupation tax on hawkers, peddlers, and peddlers engaged in soliciting orders by sample or otherwise, as violating commerce clause.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 15 N. D.

15 N. D. 1, BROWN v. NEWMAN, 105 N. W. 941.

What are accessions.

Cited in *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 101, 128 N. W. 691, on meaning of word "accessions."

15 N. D. 5, BLAKEMORE v. COOPER, 4 L.R.A.(N.S.) 1074, 125 AM ST. REP. 574, 106 N. W. 566.

Retroactive operation of statute requiring notice of time to redeem.

Cited in note in 10 L.R.A.(N.S.) 818, on applicability to past tax sales, of statute eliminating or requiring notice of expiration of redemption period.

Description of property in notice.

Cited in *Blessett v. Turcotte*, 20 N. D. 151, 127 N. W. 505, holding tax deed void because notice describes land as part of section 2, instead of section 20.

15 N. D. 21, KINNEY v. BROTHERHOOD OF AMERICAN YEOMAN, 106 N. W. 44.

Duplicity of notice of appeal.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, holding notice of appeal from judgment and from two orders denying motions for new trial, not duplicitous; *Oldland v. Oregon Coal & Nav. Co.* 55 Or. 340, 99 Pac. 423, holding that notice of appeal from order vacating former judgment and granting new trial and from final judgment is not duplicitous.

Evidence of cause of death.

Cited in *Sullivan v. Seattle Electric Co.* 51 Wash. 71, 130 Am. St. Rep.

1082, 97 Pac. 1109, holding in action for death by wrongful act, that the word of a coroner's inquest inadmissible to prove cause of death.

Opinion evidence.

Cited in *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359, holding that a physician may, in testifying as expert, give his opinion upon facts known to him in his own knowledge or on facts testified to by others or facts agreed upon by the jury, but facts on which opinion is based must appear in the evidence.

Anticipation of matter of defense.

Cited in *Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 107, 107 N. W. 1087, holding where contract of shipment of live stock contained stipulation requiring giving notice of injuries, a compliance with need not be affirmatively shown, but failure therein is a matter of defense which must be raised by answer.

Surplusage.

Cited in *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798, holding that allegation in answer that plaintiff is a foreign corporation may be treated as surplusage where it does not allege noncompliance by such corporation with requirements of statute precedent to its doing business in state.

15 N. D. 34, ORVIK v. CASSELMAN, 105 N. W. 1105.

Judicial notice.

Cited in note in 124 Am. St. Rep. 49, on facts of which courts will take judicial notice.

What standard of time governs.

Cited in note in 6 L.R.A.(N.S.) 1046, as to whether standard of time governs legal proceedings.

15 N. D. 38, HOLTON v. SCHMARBACK, 106 N. W. 36.

Limitation on issuance of execution on transcript of justice's decision.

Cited in *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390; *Acme Harvester Co. v. Magill*, 15 N. D. 116, 106 N. W. 563,—holding that execution may issue on transcript of judgment of justice court in district court, within ten years from its entry by the justice.

Cited in note in 133 Am. St. Rep. 68, on effect of statute of limitations on judgments and executions and proceedings for their enforcement.

15 N. D. 43, WISNER v. FIELD, 106 N. W. 38.

15 N. D. 51, VIETS v. SILVER, 106 N. W. 35.

15 N. D. 55, STATE USE OF HART-PARR CO. v. ROBB-IRVING RENO Co. 106 N. W. 406.

Regulation of foreign corporation.

Cited in *Sucker State Drill Co. v. Wirtz*, 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844, holding statute requiring compliance with certificate of incorporation of foreign corporation.

statutory prerequisites before the doing of business by a foreign corporation cannot affect contracts relating only to interstate transactions, and evidence of prior separate, independent contracts or violations in violation of law is inadmissible.

"Doing business" by foreign corporation.

Cited in *Sucker State Drill Co. v. Wirtz*, 17 N. D. 313, 18 L.R.A. (N.S.) 134, 115 N. W. 844, holding fact that foreign corporation has stored goods in state which are the subjects of interstate commerce from which point they are delivered on contracts made with such corporation does not make such corporation guilty of doing business within statute requiring precedent compliance with certain conditions; *W. L. Lutes Co. v. Wysong*, 100 Minn. 112, 110 N. W. 367, holding an isolated sale of a machine by a foreign corporation to a resident of the state is not doing business in the state within regulatory statute.

Cited in note in 10 L.R.A. (N.S.) 693, on single or isolated transaction as "doing business" within state.

Defense of noncompliance with statute by foreign corporation.

Cited in *Kelley v. R. J. Schwab & Sons Co.* 22 S. D. 406, 118 N. W. 696; *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798,—holding noncompliance with statute by foreign corporation must be alleged and shown.

15 N. D. 63, WALKER v. MARONDA, 106 N. W. 296.

15 N. D. 69, JACOBSON v. RANSOM COUNTY, 105 N. W. 1107.

15 N. D. 71, MARSHALL-McCARTNEY CO. v. HALLORAN, 106 N. W. 293.

Misleading variance.

Cited in *Maloney v. Geiser Mfg. Co.* 17 N. D. 195, 115 N. W. 669, holding a variance becomes immaterial unless actually and prejudicially misleading, and shown to the satisfaction of the court to be so and wherein misleading and prejudicial.

15 N. D. 79, ZIMMERMAN v. McCURDY, 106 N. W. 125, 12 A. & E. ANN. CAS. 29.

15 N. D. 86, MARCK v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 105 N. W. 1106.

Necessity of assignment of errors on appeal.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667, holding that judgment will be affirmed unless appellant's brief contains assignment of errors.

15 N. D. 87, SIEBOLDT v. KONATZ SADDLERY CO. 106 N. W. 564.

Extent of recovery on replevin bond.

Cited in note in 30 L.R.A. (N.S.) 367, on elements of damages recoverable on replevin bond.

15 N. D. 92, SATTERLEE v. MODERN BROTHERHOOD OF AMERICA, 103 N. W. 561.

Conclusiveness of order denying new trial.

Cited in Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276, that order denying new trial is not conclusive as to errors appearing on judgment roll, on appeal from judgment.

Material misrepresentations in application for insurance.

Cited in Soules v. Brotherhood of American Yeoman, 19 N. D. 233, 104 N. W. 760, holding that misrepresentations in application for insurance are immaterial unless made with intent to defraud, include statements which by law of insurance are called warranties.

15 N. D. 100, PATNODE v. DESCHENES, 106 N. W. 573.

Proof of deed as mortgage.

Cited in Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677, holding that instrument in the form of a deed may be proved by oral testimony as mortgage as between the parties and all others with knowledge.

Release of surety by extension of time.

Cited in Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677, holding that release of surety is on surety to show he did not consent to any extension of time.

Mortgage as bona fide purchaser.

Cited in Gray v. Harvey, 17 N. D. 1, 113 N. W. 1034, holding that mortgagee is without actual notice of rights of a vendee in contract for purchase of real estate which has been orally assigned as security to an innocent purchaser, although vendee is in possession when mortgage was given.

Protection of one purchasing from apparent vendee who is a mortgagee.

Cited in note in 32 L.R.A. (N.S.) 1047, on protection of purchaser from apparent vendee under instrument intended as mortgage.

15 N. D. 112, BUCKINGHAM v. FLUMMERFELT, 106 N. W. 573.

15 N. D. 116, ACME HARVESTER CO. v. MAGILL, 106 N. W. 573.

Running of limitations on judgments and executions.

Cited in note in 133 Am. St. Rep. 68, on effect of statute of limitations on judgments and executions and proceedings for their enforcement.

15 N. D. 120, CALMER v. CALMER, 106 N. W. 684.

15 N. D. 130, AULTMAN, MILLER CO. v. JONES, 106 N. W. 684.

Error without prejudice.

Cited in S. J. Vidger Co. v. Great Northern R. Co. 15 N. D. 5, 104 N. W. 1083, holding error without prejudice does not constitute ground for reversal.

15 N. D. 132, McCORMICK HARVESTER MACH. CO. v. CALDWELL, 106 N. W. 122.

15 N. D. 140, SPENCER v. BEISEKER, 107 N. W. 189.

15 N. D. 144, CONTINENTAL HOSE CO. NO. 1 v. MITCHELL, 105 N. W. 1108.

15 N. D. 146, OLSON v. SARGENT COUNTY, 107 N. W. 43.

Discretion in vacating default judgment.

Cited in *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, holding that ruling of court on motion to vacate default judgment will not be reversed except for manifest abuse of discretion.

15 N. D. 150, EDWARDS v. EAGLES, 107 N. W. 43.

15 N. D. 151, RAPP v. HANSEN, 107 N. W. 48.

15 N. D. 152, GILBREATH v. TEUFEL, 107 N. W. 49.

Summons in action to determine adverse claims.

Cited in *Fenton v. Minnesota Title Ins. & T. Co.* 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363, holding although plaintiff complies with statute, in addressing summons in action to quiet title, to all unknown claimants, summons is insufficient where it contains no description of the property.

15 N. D. 157, PYKE v. JAMESTOWN, 107 N. W. 359.

Waiver of error.

Cited in *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243, holding where trial court permits party to amend pleading and grants leave to file amendment at later time and trial proceeds without objection on theory that amendment had been properly and duly made, it is too late to raise objection to such irregularity for the first time on appeal there being a waiver thereof.

Presentment to city of claim for damages.

Cited in *Grand Forks v. Allman*, 83 C. C. A. 554, 153 Fed. 532, holding claim presented to and filed with city auditor within time prescribed by statute is duly presented to council.

Negligence as fact question.

Cited in *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, holding contributory negligence and negligence of a defendant are questions for the jury in a case at law, unless the conceded facts from which the inference must be drawn admit of only one conclusion; *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A. (N.S.) 1111, 127 N. W. 91, holding contributory negligence of person driving load over rough road after seeing it, question for jury; *Wells v. Lisbon*, 21 N. D. 34, 128 N.

W. 308, holding that question of contributory negligence of traveler in assuming that light placed in street marks place of excavation, is for jury.

— Contributory negligence in use of sidewalk.

Cited in *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243, holding a pedestrian not guilty of contributory negligence as a matter of law in failing to see a loop formed by a wire around a plank in sidewalk, about a foot from outer edge, where, at time of contact therewith place was dark.

15 N. D. 174, *PILLSBURY v. J. B. STREETER, JR. CO.* 107 N. W. 40.

15 N. D. 182, *MILLER v. SHELBURN*, 107 N. W. 51.

15 N. D. 188, *MICHELS v. FENNELL*, 107 N. W. 53.

15 N. D. 195, *SMITH v. GREAT NORTHERN R. CO.* 107 N. W. 56.

15 N. D. 198, *PETERSON v. HANSEN*, 107 N. W. 528.

15 N. D. 205, *STATE EX REL. RUSK v. BUDGE*, 106 N. W. 293.

15 N. D. 206, *J. I. CASE THRESHING MACH. CO. v. BALKE*, 107 N. W. 57.

Notice of failure of machine to work.

Cited in *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798, holding compliance with contract in respect to giving the notice provided for therein is necessary before damages can be claimed for failure of machine to work in accordance with warranty, unless the same is waived.

15 N. D. 210, *COSGRIFF v. TRI-STATE TELEPH. & TELEG. CO.* 5 L.R.A.(N.S.) 1142, 107 N. W. 525.

Additional servitude.

Cited in *Tri State Teleg. & Teleph. Co. v. Cosgriff*, 19 N. D. 771, 26 L.R.A.(N.S.) 1171, 124 N. W. 75, holding the placing of a telephone and telegraph line upon land dedicated to highway purposes is an additional servitude.

Injunctive relief as to fences and gates.

Cited in note in 7 L.R.A.(N.S.) 87, on injunctive relief as to fences or gates.

15 N. D. 219, *STATE EX REL. D'ORGAN v. FISK*, 107 N. W. 191.

Validity of drainage act.

Cited in *Soliah v. Cormack*, 17 N. D. 393, 117 N. W. 125, upholding the drainage act against contentions that it was an unwarranted delegation

of legislative authority, and that it was a taking of property without due process.

Review of assessment of benefits by drainage commission.

Cited in *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66, holding action of drainage commissioners on question as to what lands are benefited by a drain is not subject to review, their action thereon being conclusive except when acting fraudulently.

Injunctive relief against proceedings by drainage commission.

Distinguished in *Billsborrow v. Pierce*, 101 Minn. 271, 112 N. W. 274, holding landowners not made parties to a drainage proceeding nor served with notice, and whose land was not mentioned therein, could enjoin proceeding by drainage commission on ground that damaging quantities of water would be brought onto their land.

Writ of prohibition.

Cited in *Zinn v. District Ct.* 17 N. D. 128, 114 N. W. 475, holding writ of prohibition is not available to arrest further proceedings by a trial court or an indictment found by grand jury irregularly drawn, summoned and impaneled, such court having jurisdiction to impanel grand juries.

Injunction against official act.

Distinguished in *State ex rel. Ladd v. District Ct.* 17 N. D. 285, 15 L.R.A.(N.S.) 331, 115 N. W. 675, holding district court may enjoin a pure food commissioner from destroying business of a manufacturer where his acts are in excess of the authority conferred on him by statute.

Assessment of benefits from improvements.

Cited in note in 16 L.R.A.(N.S.) 292, on selection of interested person to assess benefits from improvements.

15 N. D. 230, STATE v. MOODY, 106 N. W. 1135.

15 N. D. 231, RAYMOND v. EDELBROCK, 107 N. W. 194.

Liquidated damages.

Cited in *Myers v. Ralston*, 57 Wash. 47, 106 Pac. 474, holding where a contract stipulates an amount of liquidated damages to be paid by a party thereto who fails to fully perform the same, upon his part, such damages are not recoverable for a partial default.

15 N. D. 239, BENNETT v. GLASPELL, 107 N. W. 45.

15 N. D. 248, TRACY v. WHEELER, 6 L.R.A.(N.S.) 516, 107 N. W. 68.

Limitations to foreclosure of mortgage.

Cited in *Scott v. District Ct.* 15 N. D. 259, 107 N. W. 61, holding that when statute of limitations has barred foreclosure by action it may be set up as ground for enjoining foreclosure by advertisement.

Doing equity on suit to quiet title.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding where,

in suit to quiet title, defendant's title, based on tax titles, fails entitled to judgment establishing and foreclosing his lien for tax by reason of the sale, although not specially prayed for; *Burke v. 19 N. D. 228, 124 N. W. 79* (dissenting opinion), on right to affirm equitable relief without offering to do equity.

Actions to set aside liens created by tax certificates.

Cited in *Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 36* ing action seeking an injunction against county officials, forbidding delivery by them of a deed on tax sale, in which the cancelation of cates and setting aside of levies and taxes is sought, is an equitable action; *Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 338*, holding mortgagor's grantee cannot maintain action to cancel sheriff's certificate and deed, as against mortgagee in possession, without paying mortgage debt, even though action on mortgage is barred.

15 N. D. 259, SCOTT v. DISTRICT CT. 107 N. W. 61.

Foreclosure of mortgage.

Cited in *Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68* (dissenting opinion), on running of statute of limitations as a remedy for injunctive relief against foreclosure of a mortgage.

— Injunction against.

Cited in *Hodgson v. State Finance Co. 19 N. D. 139, 122 N. W. 338*, holding that purchaser of land at tax sale cannot avail himself of the remedy provided by code to enjoin foreclosure of mortgage.

Cited in note in *6 L.R.A.(N.S.) 511*, on right to enjoin sale of land under power in barred mortgage.

15 N. D. 275, STATE v. LONNE, 107 N. W. 524.

15 N. D. 279, A. G. BECKER & CO. v. FIRST NAT. BANK, 107 N. W. 968.

15 N. D. 282, LAFFY v. GORDON, 107 N. W. 969.

15 N. D. 284, MARIN v. POTTER, 107 N. W. 970.

Procedure to vacate default judgment.

Cited in *Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228*, holding that procedure for relief from default judgment is by motion to vacate based on affidavit of merits and proposed verified answer.

15 N. D. 286, LIBBY v. BARRY, 107 N. W. 972.

Reversal of denial of new trial.

Cited in *Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; N. W. Horton, 19 N. D. 187, 123 N. W. 397*,—holding that order denying new trial will not be reversed, where there is substantial conflict in testimony.

New trial for newly discovered evidence.

Cited in *State v. Albertson*, 20 N. D. 512, 128 N. W. 1122, holding new impeaching evidence no ground for new trial.

15 N. D. 290, DOUGHTY v. MINNEAPOLIS, ST. P. & S. STE. R. CO. 107 N. W. 971, Affirmed in 208 U. S. 251, 52 L. ed. 474, 28 Sup. Ct. Rep. 291.

Acquisition of right of way under grant.

Cited in *Comford v. Great Northern R. Co.* 18 N. D. 570, 120 N. W. 875, holding that grant of right of way under act of 1875 becomes operative only when railroad has definitely located road.

15 N. D. 294, KERR v. GRAND FORKS, 107 N. W. 197.

Amendments changing cause of action.

Cited in *More v. Burger*, 15 N. D. 345, 107 N. W. 200, holding amendment of complaint after notice and a long time before trial was permissible where substantially different facts were not stated, although prayer in original complaint is in claim and delivery, and that of second is for damages for conversion.

Cited in note in 3 L.R.A.(N.S.) 264, on relation of new pleadings to statutes of limitations.

15 N. D. 299, FIRST NAT. BANK v. WYNDMERE BANK, 10 L.R.A.(N.S.) 49, 125 AM. ST. REP. 588, 108 N. W. 546.

Recovery of money paid on check.

Cited in note in 23 L.R.A.(N.S.) 1094, on right of bank to recover amount paid on check or other paper drawn upon or payable at it, under mistaken belief as to sufficiency of funds to meet it.

— Forged check.

Cited in *Jones v. Miners' & M. Bank*, 144 Mo. App. 428, 128 S. W. 829, holding that maker cannot recover back money paid on forged note to bona fide holder; *National Bank v. Mechanics' American Nat. Bank*, 148 Mo. App. 1, 127 S. W. 429, holding that drawee cannot recover back money paid to bona fide holder of check, to which drawer's name has been forged; *State Bank v. First Nat. Bank*, 87 Neb. 351, 29 L.R.A.(N.S.) 100, 127 N. W. 244, holding that drawee cannot recover back money paid on forged draft to holder for value, unless holder was negligent, or concealed suspicions from drawee.

Cited in notes in 25 L.R.A.(N.S.) 1308; 29 L.R.A.(N.S.) 100,—on right of drawee to recover money paid on forged check or draft; 25 L.R.A.(N.S.) 997, on forger's application of proceeds of check to indebtedness to depositor, as affecting bank's right to charge against depositor's account.

Distinguished in *United States v. National Exch. Bank*, 214 U. S. 302, 53 L. ed. 1010, holding the United States can recover back moneys paid to a bank on pension checks bearing the forged indorsements of the payees without demand or giving notice of discovery of forgery.

Criticised in *American Exp. Co. v. State Nat. Bank*, 27 Okla. L.R.A.(N.S.) 188, 113 Pac. 711, holding that drawee can recover money paid on forged check, unless it was negligent and payee negligent and would be prejudiced.

Disapproved in *National Bank v. First Nat. Bank*, 141 Mo. A. 125 S. W. 513, holding a drawee bank which pays a check to a holder holding bonds cannot on subsequent discovery that the check is forged recover the money back.

15 N. D. 308, HOUGHTON IMPLEMENT CO. v. VAVROSEK.
N. W. 1024, Later appeal in 19 N. D. 594.

Judgment notwithstanding verdict.

Cited in *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 1024, on right to judgment notwithstanding verdict.

Cited in note in 12 L.R.A.(N.S.) 1022, on right to judgment notwithstanding verdict because of failure of proof.

15 N. D. 312, RE LEMERY, 107 N. W. 365.

15 N. D. 318, BELEAL v. NORTHERN P. R. CO. 108 N. W. 1024.
Railroad hazard within fellow servant rule.

Cited in note in 18 L.R.A.(N.S.) 481, on what is a railroad hazard within statutes abolishing or restricting fellow-servant rule as to railroad employees.

Class legislation.

Cited in *Re Connolly*, 17 N. D. 546, 117 N. W. 946, declaring an ordinance unreasonable a law providing that in all counties having not more than sixty-five hundred people and in which no court house had been erected proceedings for removal of county seat could be instituted by petition; *State ex rel. Mitchell v. Mayo*, 15 N. D. 327, 108 N. W. 1024, holding invalid as containing an unreasonable classification a statute requiring a county treasurer to pay over to cities organized under the law interest and penalties on city and city school taxes collected by the county treasurer; *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 1024, upholding law giving lien to materialmen and laborers on buildings erected on government lands held under laws of the United States; *State ex rel. Holes*, 17 N. D. 154, 115 N. W. 256, holding invalid as containing an unreasonable, arbitrary and capricious classification granting a right to civil townships adjoining incorporated cities having at least five thousand inhabitants and which shall have paved, graded, curbed or macadamized its streets, to pave, grade or macadamize the high roads in such township connecting with such paved city streets; *State ex rel. Dorval v. Hamilton*, 20 N. D. 592, 129 N. W. 916, holding prima facie a classification law void, because classification lacks uniformity in different counties.

— **Employers' liability act.**

Cited in *Kiley v. Chicago, M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 1024.

309 (dissenting opinion), discussing validity of law making railroad liable for injury to servant from negligence of fellow servant.

15 N. D. 327, STATE EX REL. MITCHELL v. MAYO, 108 N. W. 36.

Class legislation.

Cited in *Morton v. Holes*, 17 N. D. 154, 115 N. W. 256, holding invalid as containing an unreasonable discrimination a statute providing that townships adjoining incorporated cities of at least six thousand inhabitants having paved or graded or macadamized streets, might pave, macadamize or grade highways connecting with such streets; *Powers Elevator Co. v. Pottner*, 16 N. D. 359, 113 N. W. 703, holding statute giving right to lien on buildings erected on government lands held under United States laws is not invalid as not having uniform operation.

15 N. D. 332, BRYNJOLFSON v. DAGNER, 125 AM. ST. REP. 595, 109 N. W. 320.

Adverse possession by mortgagee.

Cited in note in 23 L.R.A.(N.S.) 754, on possession of mortgagee entering under incomplete or defective foreclosure as adverse.

15 N. D. 339, HIGBEE v. DAELEY, 109 N. W. 318.

Foreclosure of mortgage by person not entitled.

Distinguished in *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85, holding where person in whose name a mortgage is foreclosed has no legal title to the mortgage at time of foreclosure a foreclosure was invalid, and mortgagor not estopped by laches from attacking validity of foreclosure.

Protection of title of purchaser.

Cited in *Winterberg v. Van De Vorste*, 19 N. D. 417, 122 N. W. 866, holding that one who obtains deed for nominal consideration and through misrepresentations of condition of title, acquires no title which equity will protect.

15 N. D. 345, MORE v. BURGER, 107 N. W. 200.

15 N. D. 351, ROBERTSON v. MOSES, 108 N. W. 788.

15 N. D. 360, LEU v. COMMERCIAL MUT. F. INS. CO. 107 N. W. 59.

Pleading compliance with conditions of contract.

Cited in *Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co.* 15 N. D. 490, 107 N. W. 1087, on sufficiency of general statement of compliance with conditions imposed by contract; *Gray v. Reliable Ins. Co.* 26 Okla. 592, 110 Pac. 728, holding complaint, not alleging giving of notice of loss, demurrable.

Dak. Rep.—34.

15 N. D. 365, FENTON v. MINNESOTA TITLE INS. & T. CO.
AM. ST. REP. 599, 109 N. W. 363.

Constructive service against nonresident.

Cited in note in 29 L.R.A.(N. S.) 626, as to whether jurisdiction to quiet title or remove cloud on title of land within jurisdiction may rest upon constructive service of nonresident.

Summons against unknown claimants.

Cited in Skjelbred v. Shafer, 15 N. D. 539, 125 Am. St. Rep. N. W. 487, holding summons published in action to quiet title, intended to confer jurisdiction over defendants described as "unknown" does not so confer jurisdiction and default judgment is void as to those named in the summons, and who are not personally served and do not appear.

Payment of taxes as condition precedent to quieting title.

Cited in Larson v. Peppard, 38 Mont. 128, 129 Am. St. Rep. Pac. 136, 16 A. & E. Ann. Cas. 800, holding in action to determine adverse claims, plaintiff as a condition precedent to relief will be required to pay the taxes paid on the property.

15 N. D. 374, STATE FINANCE CO. v. BECK, 109 N. W. 76.
Champertous deed.

Cited in State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76, holding the fact that grantors of land had taken no rents for more than one year prior to the giving of such deeds, but no one was occupying the land adversely to them at time, is not sufficient to constitute adverse possession so as to avoid such deed for champerty.

Description of property in assessment roll.

Cited in Hodgson v. State Finance Co. 19 N. D. 139, 122 N. W. 139, holding description as "S. E. 4" insufficient.

Assessment of separate tracts.

Cited in Griffin v. Denison Land Co. 18 N. D. 246, 119 N. W. 76, holding in State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76,—holding assessment of a tract as a single tract in which there are two separate interests is a jurisdictional defect invalidating the tax.

Payment of taxes in action to quiet title.

Followed in Fenton v. Minnesota Title Ins. & T. Co. 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363, holding where plaintiff seeks to quiet title free of a cloud from his title consisting of an illegal tax deed he will as a condition precedent to relief be required to pay the total amount of taxes paid by purchaser of such tax title.

Cited in Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 466, holding in action between private citizens in which one party claims title arising out of tax certificate, which are void the other party as a condition to relief will be required to pay the taxes justly due; Larson v. Peppard, 38 Mont. 128, 129 Am. St. Rep. 630, 99 Pac. 136, 16 A. & E. Ann. Cas. 800, holding party seeking to quiet title will as a condition precedent to relief be required to pay taxes paid on the property.

Cited in note in 31 L.R.A.(N.S.) 1142, on right of purchaser at invalid tax sale, in absence of statute, to be reimbursed for purchase price, or subsequent taxes.

Defects in tax sale or certificate.

Cited in *Goes v. Herman*, 20 N. D. 295, 127 N. W. 78; *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986,—holding tax deed void where grantor was named as county instead of state; *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984, holding fact that certificate of sale contained unerased statements not applicable to the tax sale in question and which should have been erased before delivery of the certificate not a jurisdictional defect avoiding the sale.

—Use of original judgment book.

Cited in *Nind v. Meyers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding the fact that the sheriff in making a sale used the original judgment book instead of a certified copy thereof was an irregularity not invalidating certificate issued thereon; *State Finance Co. v. Trimble*, 16 N. D. 199, 202, 112 N. W. 984, holding sale of land by sheriff under the original judgment book instead of a certified copy thereof not a jurisdictional defect avoiding sale.

Service of notice of expiration of redemption from sale for taxes.

Cited in *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, holding service of notice of expiration of redemption from tax sale made on claimants under void tax deeds ineffectual.

**15 N. D. 386, STATE FINANCE CO. v. MATHER, 109 N. W. 350,
11 A. & E. ANN. CAS. 1112.**

Description of property in assessment roll.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding insufficient a description as "N. 23x200 ft. deep; *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336, holding same as to "S. E. 4."

Jurisdictional defects in tax proceedings.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding want of a sufficient description of land in an assessment proceeding is a jurisdictional defect which cannot be cured by a remedial act.

Curable defects in tax sales.

Cited in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding a sale for taxes pursuant to a judgment apparently valid, but in fact void for want of jurisdiction of court, cannot be set aside in action commenced more than three years after the sale, where part of taxes for which sale was made were valid even though the land had never been occupied; *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding the naming of a county as grantor instead of the state insufficiency of notice of sale, and improper statement of time to redeem from tax sale

were not jurisdictional irregularities beyond the power of the legislature to cure or bar.

— **Limitations on action to cancel.**

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, upholding validity of law requiring tax certificate holders to actively assert their rights under the certificate within the given statutory time by either taking or suing for possession or by securing a deed.

15 N. D. 400, NIND v. MYERS, 8 L.R.A.(N.S.) 157, 109 N. W. 335.

Tax sale certificate with unerased form variations.

Cited in *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding a tax sale certificate is not void on its face because of failure to erase parts of the printed form which were intended for use in case of a sale on different terms, where the certificate contained a proper description of the land; *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984, holding failure to erase statements in the blank form not applicable to the sale in question, and which should have been erased before the delivery of the certificate, not a jurisdictional defect.

Jurisdictional defects in tax certificates.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding want of a sufficient description is a jurisdictional defect which cannot be cured by a limitation act; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding the failure of an assessor to attach to the assessment roll an affidavit prescribed by statute is not a jurisdictional defect, which cannot be remedied by a limitation act or declared immaterial by the same act which requires it.

— **Sale under original judgment book.**

Cited in *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984, holding sale by sheriff under the original judgment book instead of a certified copy thereof not a jurisdictional defect avoiding sale; *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding the fact that no certified copy of judgment was handed to the sheriff, but instead thereof he used the original judgment in making sale, is not a jurisdictional defect, but an irregularity barred by statutory limitation prescribed in the "Wood's law."

— **Cure of by limitation.**

Cited in *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding failure to erase part of blank form designed for use on sale on different terms, the use of an original judgment instead of certified copy by sheriff in making tax sale, erroneous statement of time for redemption were not jurisdictional defects which legislature could not cure by a three year limitation for attack thereon; *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding if jurisdiction to sell land for a road tax exists, but is erroneously exercised, the error may be remedied by a curative or limitation statute.

Cited in note in 23 L.R.A.(N.S.) 1104, on effect upon special statute of limitations, running from time of actual possession under tax deed, of invalidity or irregularity of such deed.

Validity of limitation of action to avoid tax sale.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 335, upholding validity of law prescribing a limitation within which attack can be made on tax sale; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112, holding law declaring that no tax sale should be invalidated unless party objecting to same act within prescribed period, cannot be enforced literally to the extent that it purports to declare non-essential acts inherently necessary to valid tax sale.

Description of property in assessment roll.

Followed in *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984, on irregularities affecting validity of tax certificate.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding insufficient a description of property as "N. 23x200 ft. deep;" *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, holding a description of property as in assessment roll as "S. W. $\frac{1}{4}$ E2" followed by section, township and range numbers, constitutes no description and is not a proper foundation for subsequent tax proceedings.

Service of notice of expiration of period of redemption from tax sale.

Cited in *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986, holding service of notice of expiration of redemption from tax sale made on one claiming under a void tax deed is ineffectual.

15 N. D. 436, BEGGS v. PAINE, 109 N. W. 322.

Grantor in tax deed.

Cited in *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78; *State Finance Co. v. Mulberger*, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986; *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336,—holding a tax deed void where grantor was named as county instead of state; *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding a tax deed is void on its face where it names a county as grantor and not the state.

Reimbursement for taxes paid.

Distinguished in *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding where tax deed is void on its face and holder offers no proof of a tax sale certificate or tax sale, he cannot claim reimbursement for taxes actually paid.

Description of property in assessment roll.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding insufficient a description as "N. 23x200 ft. deep;" *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding a description as "W. 2 E. 2" of a section was no description and vitiated entire tax proceeding; *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335, holding description of land in assessment roll as "N. E.

4 of N. W. 4, S. 2 of N. W. 2 and S. W. 4" constituted no description and tax and tax sale based thereon invalid.

Jurisdictional defects affecting validity of tax sale certificate

Cited in *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 3 A. & E. Ann. Cas. 1112, holding failure of assessor to attach affidavit assessment roll not a jurisdictional defect which could not be cured by limitation act or declared immaterial by the same statute which required it; *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, holding that to erase part of blank form designed for use in case of sale on deferred terms, use of original judgment instead of certified copy on which to make sale, and improper notice of redemption not jurisdictional defects which could not be cured or barred by remedial statute.

Limitation or laches as to contest of validity of tax deed.

Cited in *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 3 A. & E. Ann. Cas. 1112, holding statute placing limitation on time for attacking validity of tax proceeding and barring objections not made before tax sale, cannot be enforced literally to the extent that it purports to declare nonessential those acts which are inherently necessary to a valid sale; *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. D. 335, upholding validity of statute placing a limitation of time on the right to attack regularity of tax sales or tax proceedings.

Cited in note in 27 L.R.A.(N.S.) 348, 355, 356, as to whether voidable deed sets in motion special statutes of limitations governing action to recover lands sold for taxes.

Notice of tax proceedings.

Cited in *Nind v. Myers*, 15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. D. 335, holding regardless of possession, actual or constructive, a person affected by a tax is chargeable with knowledge of the tax proceeding if he fails to avail himself of his remedies within reasonable time, and if irregular, he is in no position to complain, because his laches are to be conclusive evidence that he has no grievance.

Necessity of deed to title of purchaser at tax sale.

Cited in *White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 101, holding that purchaser at tax sale in conformity to law after expiration of redemption period acquires title, whether deed is issued or not.

15 N. D. 466, POWERS v. FIRST NAT. BANK, 109 N. W. 386

Reimbursement for taxes paid as condition to setting aside tax deed.

Cited in *Larson v. Peppard*, 38 Mont. 128, 129 Am. St. Rep. 60, 136 Pac. 136, 16 A. & E. Ann. Cas. 800, holding in action to determine title to land, a plaintiff as condition precedent to relief will be required to pay taxes paid on the property; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 A. & E. Ann. Cas. 1112 (dissenting opinion), holding payment of taxes due as condition precedent to relief in action to determine title to land, adverse claims.

Distinguished in *Fenton v. Minnesota Title Ins. & T. Co.* 15 N. D.

125 Am. St. Rep. 599, 109 N. W. 363, holding one seeking to remove cloud on title caused by invalid tax deed must pay taxes due, but distinguishing cited case in that appeal was not dismissed because plaintiff in his complaint alleged he was ready and willing and offered to redeem by paying amount justly due.

Amount to redeem lands forfeited for tax.

Cited in *State v. Several Parcels of Land*, 84 Neb. 719, 121 N. W. 977, holding owner must pay full amount of decree interest and costs to redeem from purchaser under "Scavenger" sale.

15 N. D. 471, MARTINSON v. MARZOLF, 108 N. W. 801.

15 N. D. 477, HOOVEN & A. CO. v. WIRTZ, 107 N. W. 1078.

Express warranty as exclusion of implied warranty.

Cited in notes in 19 L.R.A.(N.S.) 1200, on right to show parol warranty in connection with contract of sale of personalty; 33 L.R.A.(N.S.) 513, as to whether express warranty excludes implied warranty as to quality.

15 N. D. 484, WALKER v. STIMMEL, 107 N. W. 1081.

15 N. D. 488, TAMLYN v. PETERSON, 107 N. W. 1081.

Burden of proof as to fraud in note.

Cited in *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511, holding burden upon indorsee to show good faith, where fraud in inception of note is proved.

15 N. D. 490, HATCH v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 107 N. W. 1087.

Stipulations for notice of injury by carrier.

Cited in *Southern R. Co. v. Tollerson*, 129 Ga. 647, 59 S. E. 799, holding reasonable and valid a stipulation in a contract for shipment of live stock that as a condition precedent to right to recover damages for loss or injury to such stock written notice of a claim therefor shall be given before the removal or intermingling of such live stock with other stock; *Libby v. St. Louis, I. M. & S. R. Co.* 137 Mo. App. 276, 117 S. W. 659, on validity of stipulation requiring notice of injury not based on independent consideration.

Cited in notes in 7 L.R.A.(N.S.) 1042, on reasonableness of time fixed in contract of shipment of live stock for presentation of claim for damages; 17 L.R.A.(N.S.) 630, on validity of stipulation requiring notice within specified time, as applied to loss due to carrier's negligence; 17 L.R.A.(N.S.) 644, on notice of loss or injury to goods, required by carrier's contract as condition precedent.

Distinguished in *Houtz v. Union P. R. Co.* 33 Utah, 175, 17 L.R.A.(N.S.) 628, 93 Pac. 439, holding stipulation in shipping contract requiring giving notice of loss or injury to live stock within ten days after arrival would

not be enforced where delay causing injury was inexcusable and resulted solely from carrier's negligence.

Disapproved in *Burgher v. Wabash R. Co.* 139 Mo. App. 62, 120 S. W. 673, holding stipulation requiring giving of notice of injury to live stock is invalid when not based on separate and independent consideration, as it is a limitation on carrier's common-law liability.

— As matters of defense.

Cited in *Libby v. St. Louis, I. M. & S. R. Co.* 137 Mo. App. 276, 117 S. W. 659, holding in action for damages for loss resulting from decline in market price of cattle from delay in transportation, plaintiff was not required to show that notice of injury or loss to cattle, as required in contract, was given or waived; *Brown v. St. Louis & S. F. R. Co.* 135 Mo. App. 624, 117 S. W. 112, holding plaintiff in action for injury to live stock need not plead compliance with stipulation in contract of shipment as to the giving of notice of injury, but noncompliance is matter of defense, to be proved by defendant.

15 N. D. 495, MITCHELL v. MONARCH ELEVATOR CO. 107 N. W. 1085, 11 A. & E. ANN. CAS. 1001.

Thresher's lien.

Distinguished in *Schlosser v. Moores*, 16 N. D. 185, 112 N. W. 78, discussing without deciding whether seed lien on furnishing of two or more kinds of seed grain under one entire contract is on each kind of grain for the seed thereof.

15 N. D. 501, S. J. VIDGER CO. v. GREAT NORTHERN R. CO. 107 N. W. 1083.

15 N. D. 506, SCHOMBERG v. LONG, 108 N. W. 332.

Statement of case on appeal.

Cited in *Murphy v. Foster*, 15 N. D. 556, 109 N. W. 216, holding in appeal from a judgment alleged error by the trial court in directing a verdict for defendant and refusing to strike out certain evidence duly objected to cannot be reviewed on appeal in absence of a settled statement of the case; *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701, holding that stipulated facts used in connection with motion to strike out, may be considered in reviewing correctness of order granting motion, though not incorporated in statement of case.

15 N. D. 508, LARSON v. WALKER, 107 N. W. 1135.

15 N. D. 509, GORTHY v. JARVIS, 108 N. W. 39.

15 N. D. 512, HUNT v. SWENSON, 108 N. W. 41.

Motion to vacate default judgment.

Cited in *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W.

228, holding that motion to vacate default must be based on affidavit of merits and proposed verified answer.

15 N. D. 515, **DEDRICK v. CHARRIE**, 125 AM. ST. REP. 608, 108 N. W. 38.

Correction of judgment.

Cited in *Plano Mfg. Co. v. Doyle*, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529, holding court has power and jurisdiction while action is still pending on motion after notice to vacate its findings and judgment and make new findings and enter a new and different judgment.

15 N. D. 518, **SHOEMAKER v. SONJU**, 108 N. W. 42, 11 A. & E. ANN. CAS. 1173.

15 N. D. 525, **JOHNSON v. FARGO**, 108 N. W. 243.

Municipal liability for defects in street.

Cited in note in 20 L.R.A.(N.S.) 583, 651, 708, 758, 759, on liability of municipality for defects or obstructions in streets.

- Effect of contributory negligence on.

Cited in note in 21 L.R.A.(N.S.) 648, on contributory negligence as affecting municipal liability for defects and obstructions in streets.

15 N. D. 533, **JACKSON v. ELLERSON**, 108 N. W. 241.

Specification of error.

Cited in *Smith v. Kunert*, 17 N. D. 120, 115 N. W. 76, holding specifications of error are insufficient where no attempt is made to point out wherein evidence was insufficient to support findings complained of; *Bertelson v. Ehr*, 17 N. D. 339, 116 N. W. 335, holding specifications of error relating to rulings on the trial in admission and rejection of testimony and in refusing to strike out testimony cannot be considered on appeal where they are not incorporated in the settled statement of the case; *F. A. Patrick & Co. v. Nurnberg*, 21 N. D. 377, 131 N. W. 254, holding that statement on appeal will be disregarded where no specification of error is incorporated therein.

15 N. D. 535, **DEAN v. COLLINS**, 9 L.R.A.(N.S.) 49, 125 AM. ST. REP. 610, 108 N. W. 242, 11 A. & E. ANN. CAS. 1027.

15 N. D. 539, **SKJELBRED v. SHAFER**, 125 AM. ST. REP. 614, 108 N. W. 487.

Vacation of judgment.

Cited in *Campbell v. Coulston*, 19 N. D. 645, 124 N. W. 689 (dissenting opinion), on lapse of time as bar to vacation of void judgment.

- Affidavit of defense as condition.

Cited in note in 18 L.R.A.(N.S.) 406, on necessity of affidavit of meritorious defense, and necessity of showing such defense, to vacate judgment rendered without jurisdiction of defendant's person.

15 N. D. 542, **RASMUSSEN v. HAGLER**, 108 N. W. 541.

15 N. D. 548, **GARLAND v. KEELER**, 108 N. W. 484.

Warranty to work satisfactorily.

Cited in *Houghton Implement Co. v. Vavrosky*, 15 N. D. 308, 109 N. W. 1024, holding a warranty to work satisfactorily means satisfactorily to the purchaser.

15 N. D. 552, **SILANDER v. GRONNA**, 125 AM. ST. REP. 616, 108 N. W. 544.

What is subject of compromise.

Cited in note in 25 L.R.A.(N.S.) 282, 294, on void, invalid, or unfounded claim as subject of valid compromise.

Conveyance of homestead.

Cited in *Garr, S. & Co. v. Collin*, 15 N. D. 622, 110 N. W. 81, *Justice v. Souder*, 19 N. D. 613, 125 N. W. 1029,—holding void a mortgage of the homestead in which wife did not join; *Lawrence v. Vinkemulder*, 157 Mich. 294, 122 N. W. 88, holding vendee in land contract not signed by vendor's wife for purchase of homestead may not maintain an action for damages against vendor for failure to convey; *Knudtson v. Robinson*, 18 N. D. 12, 118 N. W. 1051; *Mundy v. Shellabarger*, 88 C. C. A. 445, 161 Fed. 503,—holding contract for the sale of homestead signed by husband alone is void, and cannot be made basis for recovery of damages either at law or equity, nor enforced in equity.

15 N. D. 556, **MURPHY v. FOSTER**, 109 N. W. 216.

15 N. D. 557, **P. J. BOWLIN LIQUOR CO. v. BEAUDOIN**, 108 N. W. 545.

15 N. D. 560, **GESSNER v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO.** 108 N. W. 786.

15 N. D. 566, **NASH v. NORTHWEST LAND CO.** 108 N. W. 792.

Limitation of action to redeem.

Followed in *Mears v. Somers Land Co.* 18 N. D. 384, 121 N. W. 916, holding rights of fee owners barred by statute of limitations, after ten years adverse possession by mortgagees.

Cited in *Mahaffy v. Faris*, 144 Iowa, 220, 24 L.R.A.(N.S.) 840, 122 N. W. 934, holding where grantee is in possession of land conveyed to him as security for a debt and no time is fixed for redemption, the law implies a reasonable time therefor, but action to redeem should be brought within period of the statute of limitations.

Cited in note in 34 L.R.A.(N.S.) 357, as to whether limitation runs against mortgagee in possession.

Remedy of mortgagor.

Cited in *Boschker v. Van Beek*, 19 N. D. 104, 122 N. W. 338, holding

that remedy of mortgagor against holder of sheriff's certificate under invalid foreclosure, in possession with mortgagor's implied assent, is suit in equity and offer to redeem.

When possession is adverse.

Cited in *Hanson v. Sommers*, 105 Minn. 434, 117 N. W. 842, holding where a tenant attorns and pays rent to a third person claiming title adversely to landlord, which is known to landlord and without objection by him, such possession becomes adverse to landlord.

Cited in note in 23 L.R.A.(N.S.) 754, 755, on possession of mortgagee entering under incomplete or defective foreclosure as adverse.

Laches as to defective foreclosure.

Cited in *Hanson v. Sommers*, 105 Minn. 434, 117 N. W. 842, holding where one claiming title acquiesces for fifteen years in possession claimed adversely to him, under foreclosures of mortgages from which no redemptions had been made, is estopped from seeking equitable relief.

Title acquired by adverse possession.

Cited in *Justice v. Souder*, 19 N. D. 613, 125 N. W. 1029, holding that title acquired by operation of statute of limitations is perfect legal title.

15 N. D. 577, ANNIS v. BURNHAM, 108 N. W. 549.

Rescission of contract.

Cited in *Winter v. Bostwick*, 172 Fed. 285, holding where one party has an option to purchase property until a certain date, he could not rescind before such time because the title to such property was unmarketable.

Cited in note in 30 L.R.A.(N.S.) 873, 878, on waiver of purchaser's right to rescind land contract.

15 N. D. 584, HANSON v. LINDSTROM, 108 N. W. 798.

Pleading of compliance with statutes by foreign corporation.

Cited in *Friedenwald Co. v. Warren*, 195 Mass. 432, 81 N. E. 207, holding foreign corporation suing as plaintiff need not allege or prove compliance with statute relating to doing of business, but fact of noncompliance is matter of defense.

15 N. D. 589, STATE v. FISK, 108 N. W. 485.

15 N. D. 594, FIRST NAT. BANK v. STATE BANK, 109 N. W. 61.

Liability of bank for acts of officer.

Cited in *First Nat. Bank v. Bakken*, 17 N. D. 224, 116 N. W. 92, holding if cashier of a bank in collection of drafts drawn against consignments of grain acted for the bank, it would be under legal obligations to account to consignors of such grain, even though cashier exceeded his authority.

Title passing by deed intended as mortgage.

Cited in note in 11 L.R.A.(N.S.) 210, 212, as to whether deed absolute on face, but intended as mortgage, conveys title.

15 N. D. 604, CRANMER v. DINSMORE, 109 N. W. 317.

15 N. D. 606, EMERSON-NEWTON IMPLEMENT CO. v. 108 N. W. 796.

15 N. D. 611, CUMMING v. GREAT NORTHERN R. CO. W. 798.

Liability of railroad for injury to animals.

Cited in *Hansberry v. Chicago, B. & Q. R. Co.* 79 Neb. 120, 1292, holding railroad not liable for injury to cattle driven over crossing and allowed to wander on right of way, which get onto short distance ahead of an approaching train and every means is by the railroad to avoid injury.

Distinguished in *Anderson v. Minneapolis, St. P. & S. Ste. M.* 18 N. D. 462, 123 N. W. 281, holding railroad liable for injury from being struck by train.

15 N. D. 613, FRANKLIN v. JAMESON-WOHLER, 109 N. W. 56.

15 N. D. 618, BAIRD v. CHAMBERS, 6 L.R.A.(N.S.) 8 AM. ST. REP. 620, 109 N. W. 61.

Duty and liability towards adjoining owners.

Cited in note in 123 Am. St. Rep. 577, on duty and liability owners to adjoining proprietors.

15 N. D. 621, CURRIE v. GAAR, S. & CO. 110 N. W. 83.

15 N. D. 622, GAAR, S. & CO. v. COLLIN, 110 N. W. 81.

Mortgage on homestead by husband alone.

Cited in *Justice v. Souder*, 19 N. D. 613, 125 N. W. 1029, holding mortgage on homestead in which wife did not join.

15 N. D. 629, ALSTAD v. SIM, 109 N. W. 66.

Injunctive relief against drainage proceedings.

Distinguished in *Bilsborrow v. Pierce*, 101 Minn. 271, 112 N. holding injunction will lie to restrain drain proceeding on comp landowners not named as parties in the proceeding, who were not and whose land was not designated therein, where a remonstrance was futile and damage from ditch will be irreparable by discharge of water on their land.

Jurisdiction of drainage board.

Cited in *Sim v. Rosholt*, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 115 N. W. 50, holding where drainage board has acquired jurisdiction on the filing of a petition and it has acted thereunder, it could not thereafter be ousted of such jurisdiction by action of certain petitioners in attempting to draw their names from the petition.

Disapproved in *Heinz v. Buckham*, 104 Minn. 389, 116 N. W. 73, holding in drainage proceedings the first hearing is merely preliminary.

determines principally that the court is justified in proceeding further, while second hearing reviews and considers merits of entire matter and finally establishes the ditch, and it was error to exclude objections to the establishment of the ditch on such second hearing.

15 N. D. 639, GATES v. KELLEY, 110 N. W. 770.

Constructive trusts.

Cited in *Robertson v. Rawlins County*, 84 Kan. 52, — L.R.A.(N.S.) —, 113 Pac. 413, holding that one procuring deed by inducing grantor to believe that it is to cure defect in title of third party becomes trustee for third party; *Winterberg v. Van De Vorste*, 19 N. D. 417, 122 N. W. 866, on constructive trust as arising where one procures deed for nominal consideration by misrepresentations.

15 N. D. 649, WARD v. GRADIN, 109 N. W. 57.

15 N. D. 658, MOLINE PLOW CO. v. BOSTWICK, 109 N. W. 923.

Resolved, That the Board of Supervisors do hereby certify that the following is a true and correct copy of the original as the same appears in the records of the Board of Supervisors:

IN WITNESS WHEREOF, the Board of Supervisors have caused this

Resolution to be signed by their respective hands and the seal of the County of Santa Clara to be hereunto affixed, at the County of Santa Clara, California, this 17th day of March, 1882.

JOHN W. BROWN, Chairman of the Board of Supervisors.

Attest: My hand and the seal of the County of Santa Clara, California, this 17th day of March, 1882.

JOHN W. BROWN, County Clerk.

By _____, Deputy County Clerk.

By _____, Deputy County Clerk.

By _____, Deputy County Clerk.

By _____, Deputy County Clerk.

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NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 16 N. D.

16 N. D. 1, STATE v. RICHARDSON, 109 N. W. 1026.

16 N. D. 10, J. L. OWENS CO. v. DOUGHTY, 110 N. W. 78, Later appeal in 17 N. D. 368, 116 N. W. 340.

Waiver of rescission.

Cited in Mizell v. Watson, 57 Fla. 111, 49 So. 149, holding that unreasonable delay after discovery of right to rescission operates as ratification; Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558, holding that rescission may be waived by acts of acquiescence after offer of rescission.

16 N. D. 16, CONNOLLY v. LUROS, 107 N. W. 365.

16 N. D. 17, TONN v. TONN, 111 N. W. 609.

Award of temporary alimony, etc., pending appeal.

Cited in note in 27 L.R.A.(N.S.) 716, on jurisdiction to award temporary alimony, suit money, and counsel fees pending appeal.

16 N. D. 19, COOK v. LOCKERBY, 111 N. W. 628.

16 N. D. 25, VALLELLY v. PARK COMRS. 15 L.R.A.(N.S.) 61, 111 N. W. 615.

Delegation of taxing power.

Cited in Wulf v. Kansas City, 77 Kan. 358, 94 Pac. 207, on local right of self government and holding that legislature may provide for establishment of municipal park boards with power to acquire parks and levy taxes; State ex rel. Gerry v. Edwards, 42 Mont. 135, 32 L.R.A.(N.S.) 1078, 111 Pac. 734, holding that act empowering municipal boards of park

commissioners to raise money for parks by taxation is unconstitutional.

Cited in note in 32 L.R.A.(N.S.) 1078, on boards or bodies power of taxation is delegable.

Distinguished in *Solish v. Cormack*, 17 N. D. 393, 117 N. W. 614; holding legislature has power to delegate to drainage commission authority to levy special assessments.

16 N. D. 36, KERR v. ANDERSON, 111 N. W. 614.

Followed without discussion in *Kerr v. Sunstrum*, 16 N. D. 59, 111 N. W. 614; *Kerr v. Swanson*, 16 N. D. 59, 111 N. W. 615; *Kerr v. Swanson*, 16 N. D. 59, 111 N. W. 615.

Judgment non obstante.

Cited in *State ex rel. Hart-Parr Co. v. Robb-Lawrence Co.* 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846, holding that waiver of a portion of stored property by accepting the proceeds of sale does not go to diminution of owner's recovery and is not ground for judgment non obstante; *Schwartz v. Hendrickson*, 20 N. D. 639, 128 N. W. 614, holding that judgment notwithstanding verdict will be granted in case where directed verdict is erroneously denied; *American National Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99, on right to judgment non obstante.

Cited in note in 12 L.R.A.(N.S.) 1022, on right to judgment non obstante because of failure of proof.

16 N. D. 38, WOODWARD v. NORTHERN P. R. CO. 111 N. W. 627.

Pleading proper parties.

Cited in *Johnson v. American Smelting & Ref. Co.* 80 Neb. 257, 115 N. W. 517, holding that an allegation that defendant succeeded to liabilities of the tortfeasor is a mere conclusion of law which will not be regarded in testing sufficiency of complaint.

16 N. D. 42, WOODWARD v. McCOLLUM, 111 N. W. 623.
Who must bear loss where property is destroyed before sale completed.

Cited in note in 27 L.R.A.(N.S.) 233, as to who must bear loss of property by destruction or deterioration of realty before contract of sale completed by transfer of title.

Effect of failure to record assignment of mortgage.

Cited in *James v. Newman*, 147 Iowa, 574, 126 N. W. 781, holding that assignee of mortgage who fails to record assignment, takes risk of loss by honest dealing on part of mortgagee with subsequent innocent purchaser.

16 N. D. 50, KEPNER v. FORD, 111 N. W. 619.

Right of agent to commissions.

Cited in *Bell v. Stedman*, 88 Neb. 625, 130 N. W. 257, holding

fusal of wife to join in deed did not release husband from contract to pay agent for services performed.

—Necessity for written authority of broker.

Cited in note in 9 L.R.A.(N.S.) 934, on necessity that authority of agent to purchase or sell realty be written to enable him to recover compensation.

16 N. D. 56, ZINK v. LAHART, 110 N. W. 931.

Directing verdict.

Cited in Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 A. & E. Ann. Cas. 960, holding disputed question of negligence should have gone to the jury; Scherer v. Schlager, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000 (dissenting opinion), on the impropriety of directing verdict where intelligent minds might differ as to the conclusions deducible from the evidence.

16 N. D. 59, KERR v. SUNSTRUM, 111 N. W. 614.

16 N. D. 59, KERR v. SWANSON, 111 N. W. 615.

16 N. D. 59, KERR v. HERRED, 111 N. W. 615.

16 N. D. 60, HALL v. NORTHERN P. R. CO. 111 N. W. 609, 14 A. & E. ANN. CAS. 960.

Questions for jury.

Cited in First Nat. Bank v. Bakken, 17 N. D. 224, 116 N. W. 92, holding that evidence should be construed in its most favorable light toward defendant in determining the necessity for submission to jury; Scherer v. Schlager, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000 (dissenting opinion), on the impropriety of directing verdict where the evidence presents a question of fact upon which reasonable minds might differ; Messenger v. Valley City Street & Interurban R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023, holding question of negligence and contributory negligence generally for jury and when passed upon will not ordinarily be disturbed.

16 N. D. 68, STRECKER v. RAILSON, 8 L.R.A.(N.S.) 1099, 111 N. W. 612.

Proof of foreign judgment.

Cited in Galvin v. Tibbs, H. & Co. 17 N. D. 600, 119 N. W. 39, holding testimony as to the result of a proceeding in Federal court was inadmissible to prove such result.

16 N. D. 73, STANDORF v. SHOCKLEY, 11 L.R.A.(N.S.) 869, 111 N. W. 622, 14 A. & E. ANN. CAS. 1099.

Effect of mortgage on realty equitably converted.

Cited in Wood v. Pehrsson, 21 N. D. 357, 130 N. W. 1010, holding that Dak. Rep.—35.

mortgage on realty, directed by will to be sold and proceeds distributed will be treated as hypothecation by mortgagors of their interest to extent of proceeds of such realty.

16 N. D. 77, SIM v. ROSHOLT, 11 L.R.A.(N.S.) 372, 150.

Withdrawal of signature from petition.

Cited in *Fischer v. Washtenaw County*, 156 Mich. 1, 120 N. W. 675, holding signatures cannot be withdrawn from petition for local option after such petition is filed.

— Drainage petition.

Distinguished in *Re Central Drainage Dist.* 134 Wis. 130, 116 N. W. 675, holding under statute petitioner may withdraw prior to approval of drainage petition and may thereafter withdraw subject to court order.

Jurisdiction in ditch proceedings.

Cited in *Heinz v. Buckham*, 104 Minn. 389, 116 N. W. 736, on question of jurisdiction in preliminary and final proceedings to establish a public ditch.

Amendment or substitution of judgment.

Cited in *Plano Mfg. Co. v. Doyle*, 17 N. D. 386, 17 L.R.A.(N.S.) 116 N. W. 529, holding court has full power to withdraw or amend judgment while it retains jurisdiction.

16 N. D. 83, STATE v. WERNER, 112 N. W. 60.

Competency of child as witness.

Cited in note in 124 Am. St. Rep. 302, on competency of children as witnesses.

Order of proof.

Cited in *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 55 N. W. 872, refusing to consider objection to order of testimony in absence of a showing of abuse of discretion; *F. A. Patrick & Co. v. Pease*, 20 N. D. 261, 127 N. W. 109; *Pease v. Magill*, 17 N. D. 166, 116 N. W. 260,—holding it not error to permit in rebuttal the introduction of evidence which might have been given in chief.

Formation of opinion from newspaper accounts as disqualifying juror.

Cited in *State v. Fujita*, 20 N. D. 555, 129 N. W. 360, holding formation of opinion based wholly upon newspaper accounts will not disqualify juror provided it appears satisfactory to court that juror can fairly and impartially try case on testimony adduced and law as given by court.

Review of ruling on challenge of juror.

Cited in *State ex rel. Pepple v. Banik*, 21 N. D. 417, 131 N. W. 100, holding point that ruling of court on matter of challenges will not be reversed except for manifest abuse of discretion.

16 N. D. 94, STATE EX REL. BICKFORD v. FABRICK, 112 N. W. 74.

Term of office.

Cited in *Jenness v. Clark*, 21 N. D. 150, 129 N. W. 357, holding that under statute regularly elected incumbent of office of county superintendent of schools holds over, where election of successor is invalid.

Review of order on appeal from judgment.

Cited in *State ex rel. Minehan v. Meyers*, 19 N. D. 804, 124 N. W. 701, holding that order involving merits and necessarily affecting judgment may be reviewed on appeal from judgment.

16 N. D. 100, FJONE v. FJONE, 112 N. W. 70.

16 N. D. 106, STATE EX REL. HARVEY v. DAVIES, 112 N. W. 60.

16 N. D. 106, A. B. FARQUHAR CO. v. HIGHAM, 112 N. W. 557.

Persons liable as indorser under negotiable instrument law.

Cited in *Bank of Montpelier v. Montpelier Lumber Co.* 16 Idaho, 730, 102 Pac. 685, holding under negotiable instrument law one who signs his name on the back of a note before delivery without further endorsement is an indorser; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 14 L.R.A. (N.S.) 842, 83 N. E. 392; *Walker v. Dunham*, 135 Mo. App. 396, 115 S. W. 1086,—holding negotiable instrument law abrogates the rule formerly in force as to liability of one signing neither as makers or payee's.

Cited in note in 14 L.R.A. (N.S.) 843, on character under negotiable instruments law, of one placing name on back of note prior to, or at time of, delivery.

When indorser of promissory not becomes liable.

Cited in *Worley v. Johnson*, 60 Fla. 294, 33 L.R.A. (N.S.) 639, 53 So. 543, holding endorser of promissory note not liable on endorsement until presentment to maker and notice to indorser of such presentment.

16 N. D. 110, PROPPER v. WOHLWEND, 112 N. W. 967.

Location of boundaries.

Cited in note in 129 Am. St. Rep. 1002, on location of boundaries.

16 N. D. 118, GRAND FORKS COUNTY v. FREDERICK, 125 AM. ST. REP. 621, 112 N. W. 839.

16 N. D. 126, OMLIE v. O'TOOLE, 112 N. W. 677.

Complaint cured by answer.

Cited in *Scott v. Northwestern Port Huron Co.* 17 N. D. 91, 115 N. W. 192, holding that omission of material allegation in complaint is cured by answer alleging such material fact.

16 N. D. 138, **McLAIN v. NURNBERG**, 112 N. W. 245, 1 case in 16 N. D. 144, 112 N. W. 243.

16 N. D. 144, **McLAIN v. NURNBERG**, 112 N. W. 243, 1 case in 16 N. D. 138, 112 N. W. 245.

Consideration of point not raised below.

Cited in *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 386; *Hanson v. Franklin*, 19 N. D. 259, 123 N. W. 386,—holding that a court will not consider point not raised in trial court.

16 N. D. 151, **STATE EX REL. HARVEY v. NEWTON**, 112 N. W. 52, 14 A. & E. ANN. CAS. 1035.

Followed without discussion in *State ex rel. Harvey v. Davies*, 112 N. D. 106, 112 N. W. 60.

Sufficiency of affidavit.

Cited in *Campbell v. Coulston*, 19 N. D. 645, 124 N. W. 689, holding of affidavit on information and belief.

— Upon which to base contempt proceedings.

Distinguished in *State v. Heiser*, 20 N. D. 357, 127 N. W. 72, holding affidavit sufficient though in part based upon information and belief.

16 N. D. 168, **STATE EX REL. MADDERSON v. NOHLE**, 112 N. D. ST. REP. 628, 112 N. W. 141.

Invoking original jurisdiction of Supreme court.

Cited in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860; *State ex rel. McDonald v. Holmes*, 16 N. D. 457, 114 N. W. 367,—holding that before original writ will issue from supreme court there must be a case affecting the sovereignty of the state and that ordinarily the writ should be made by the attorney general; *Homesteaders v. M. C. Co.*, 24 Okla. 201, — L.R.A.(N.S.) —, 103 Pac. 691, 20 A. & E. Ann. C. 103, holding that supreme court has not original jurisdiction of suit in which by foreign insurance company to compel insurance commissioner to permit to company to do business within state.

— Extraordinary circumstances.

Cited in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860, on the assumption of original jurisdiction by the supreme court where there is emergency or under exceptional circumstances, as at the instance of a private relator.

Who may maintain quo warranto.

Cited in *Greenfield School Dist. v. Hannaford Special School*, 19 N. D. 393, 127 N. W. 499, holding that quo warranto will not issue against private persons as relator where there would be no perceivable benefit to the relator, but would result in great detriment to public.

Cited in note in 125 Am. St. Rep. 635, 638, as to when quo warranto may be maintained by private person.

16 N. D. 174, ANDERSON v. JOHNSON, 112 N. W. 139.

Broker's right to commissions.

Cited in *Fulton v. Cretian*, 17 N. D. 335, 117 N. W. 344, holding burden upon broker suing for commissions to show that he had secured a customer willing and able to buy at the price specified.

16 N. D. 177, STATE v. SEELIG, 112 N. W. 140.

Error in instructions.

Cited in *State v. Ball*, 19 N. D. 782, 123 N. W. 826, holding instruction that as matter of law beer is malt liquor and intoxicating not error.

16 N. D. 180, SHEETS v. PROSSER, 112 N. W. 72.

16 N. D. 185, SCHLOSSER v. MOORES, 112 N. W. 78.

Articles not used as basis of lien.

Cited in note in 31 L.R.A. (N.S.) 757, on materials furnished for structure, but not actually used, as basis of mechanics' lien.

16 N. D. 193, STATE FINANCE CO. v. BOWDLE, 112 N. W. 76,

Reaffirmed on later case between same parties in 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986.

Sufficiency of description in assessment roll.

Cited in *Grand Forks County v. Frederick*, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, holding description in assessment roll of part of lot as "N. 23x200 ft." said lot being 600 ft. long and extending in northeasterly direction, void for indefiniteness, though owner correctly named in assessment roll.

What constitutes champerty and maintenance.

Cited in *State Finance Co. v. Trimble*, 16 N. D. 199, 112 N. W. 984, holding fact that grantee before purchasing land, examined records and discovered defects in grantor's title does not make deed void for maintenance.

16 N. D. 199, STATE FINANCE CO. v. TRIMBLE, 112 N. W. 984,

Reaffirmed on later case between same parties in 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986.

Sufficiency of description in assessment roll.

Cited in *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336, holding description as "S. E. 4," insufficient.

16 N. D. 204, HARRIS v. ROLETTE COUNTY, 112 N. W. 971.

16 N. D. 208, SMITH v. SPAFFORD, 112 N. W. 965.

Time exemption attaches.

Cited in *Mahon v. Fansett*, 17 N. D. 104, 115 N. W. 79, holding exemption is permitted only upon property exempt at time it is attempted to charge it with lien.

16 N. D. 214, STATE FINANCE CO v. MULBERGER, 125 REP. 650, 112 N. W. 986.

Validity of tax deed with county as grantor.

Cited in Goss v. Herman, 20 N. D. 295, 127 N. W. 78, holding drawn in name of county instead of name of state, void.

Service of notice of expiration of redemption period.

Cited in Hodgson v. State Finance Co. 19 N. D. 139, 122 N. W. 1054, holding service of notice of expiration of time for redemption of void tax deed as owner, ineffectual for any purpose.

16 N. D. 217, CARR v. MINNEAPOLIS, ST. P. & S. ST. CO. 112 N. W. 972.

Negligence as question of fact.

Cited in McBride v. Wallace, 17 N. D. 495, 117 N. W. 857, question of negligence in turning strange and unbroken horses in barb wire corral was for jury; Corbett v. Great Northern R. Co. 17 N. D. 450, 125 N. W. 1054, holding that negligence in permitting horses remain loose over night in yard fifty yards from railroad with wire as fence on one side of yard, is question for jury.

Directing verdict.

Cited in Scherer v. Schlager, 18 N. D. 421, 24 L.R.A.(N.S.) 1000 (dissenting opinion), on impropriety of directing verdict where reasonable minds might differ as to the facts deducible from the evidence.

Duty to request more explicit instructions.

Cited in Landis v. Fyles, 18 N. D. 587, 120 N. W. 566, holding that where more explicit instructions are desired they should be properly presented to court in writing with request that they be given.

16 N. D. 227, COLEMAN MFG. CO. v. FECKLER, 112 N. W. 994.

Abuse of discretion in imposing terms on setting aside default.

Cited in Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 133 N. W. 228, holding that under facts in case it was abuse of discretion to set \$100 term costs as condition to setting aside default.

16 N. D. 231, OLSON v. MATTISON, 112 N. W. 994.

16 N. D. 234, KELLY v. PIERCE, 12 L.R.A.(N.S.) 1000, 112 N. W. 995.

Sale of good will of partnership by partner.

Cited in Griffing v. Dunn, 23 S. D. 141, 120 N. W. 890, 20 A. & Cas. 579, holding that one partner has no authority to sell good will of partnership.

16 N. D. 240, BESANCON v. WEGNER, 112 N. W. 965.

Liability of estate for attorney's fee.

Cited in note in 25 L.R.A.(N.S.) 72, 74, on liability of estate of decedent for attorney employed by executor or administrator.

16 N. D. 242, BREMSETH v. OLSON, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 A. & E. Ann. Cas. 1155.

Waiver of homestead exemption.

Cited in *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684, holding homestead exemption not presumed to be waived by failure or neglect of head of family to expressly claim it.

16 N. D. 248, LARSON v. CALDER, 112 N. W. 102.

Mutual motions for directed verdict.

Cited in *Segear v. Westcott*, 83 Neb. 515, 120 N. W. 170; *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266,—holding that mutual motions for directed verdict amount to a waiver of jury trial; *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826, holding that where both parties move for directed verdict there is no ground for objection to instructions for failure to present certain conflicts in the testimony in the absence of specific request.

Measure of damages.

Cited in note in 34 L.R.A.(N.S.) 700, 701, on damages for selling diseased animals.

16 N. D. 256, MORRISON MFG. CO. v. FARGO STORAGE & TRANSFER CO. 112 N. W. 605.

What constitutes conditional sale.

Cited in *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558, holding that "conditional sale" is one in which transfer of title, or retention thereof, is made to depend upon performance of some condition.

16 N. D. 269, MOSHER v. MOSHER, 12 L.R.A.(N.S.) 820, 125 AM. ST. REP. 654, 112 N. W. 99.

Charge of adultery as ground for divorce.

Cited in note in 18 L.R.A.(N.S.) 307, 314, on making charges of adultery as ground for divorce.

Temporary alimony, etc., pending appeal.

Cited in note in 27 L.R.A.(N.S.) 714, on jurisdiction to award temporary alimony, suit money, and counsel fees pending appeal.

16 N. D. 277, BARRON v. NORTHERN P. R. CO. 112 N. W. 102.

Damages for loss of time.

Cited in *Tarr v. Oregon Short Line R. Co.* 14 Idaho, 192 125 Am. St. Rep. 151, 93 Pac. 957, holding that one claiming damages for loss of time must allege and prove time lost, and value thereof.

16 N. D. 281, MADSON v. RUTTEN, 13 L.R.A.(N.S.) 554, 112 N. W. 872.

Attachment of mortgaged property as waiver of mortgage lien.

Cited in *Stein v. McAuley*, 147 Iowa, 630, 27 L.R.A.(N.S.) 692, 125

N. W. 336, 140 Am. St. Rep. 332, holding that attachment of goods does not waive the lien of chattel mortgage.

Cited in note in 24 L.R.A.(N.S.) 491, on waiver of chattel lien by attachment or execution.

Order of proof.

Cited in *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 260, holding it no discretion to permit in rebuttal the introduction of evidence which have been given in chief.

Necessity for offer of proof.

Cited in *Bristol & S. Co. v. Skapple*, 17 N. D. 271, 115 N. W. 996, holding court cannot assume that excluded evidence would have been in the absence of an offer of proof; *State v. Hunscoe*, 16 N. D. 186, 115 N. W. 996, holding in the absence of an offer of proof objection predicated upon the exclusion of evidence.

16 N. D. 290, BULL v. BEISEKER, 14 L.R.A.(N.S.) N. W. 870.

Eviction as essential to breach of warranty.

Cited in note in 17 L.R.A.(N.S.) 1182, on necessity of eviction tenancy of action on warranty of title or seisin.

Color of title as constructive possession.

Cited in *Herbage v. McKee*, 82 Neb. 354, 117 N. W. 706, holding color of title derived remotely through void sheriff's deed does constitute constructive possession upon which presumption may be based.

Color of title as essential to adverse possession.

Cited in note in 15 L.R.A.(N.S.) 1198, on necessity of color of title not expressly made a condition by statute, in adverse possession.

16 N. D. 295, NELSON v. THOMPSON, 112 N. W. 1058.

16 N. D. 306, SMITH v. SHOW, 112 N. W. 1062.

16 N. D. 313, GRAFTON v. ST. PAUL, M. & M. R. CO. 2 (N.S.) 1, 113 N. W. 598, 15 A. & E. ANN. CAS. 1062.

Measure of damages in condemnation.

Cited in *Tri State Teleg. & Teleph. Co. v. Cosgriff*, 19 N. D. 771 (N.S.) 1171, 124 N. W. 75, approving instruction on measure of damages for condemnation of right of way for electric pole line.

— Highway crossing over railway.

Cited in *New York, C. & S. L. R. Co. v. Rhodes*, 171 Ind. 521, (N.S.) 1225, 86 N. E. 840, on the award of nominal damages on condemnation of right of way over railroad tracks for highway; *N. Y. C. & St. L. R. Co. v. Rhodes*, 171 Ind. 521, 24 L.R.A.(N.S.) 1225, 86 N. E. 840, holding that railway is not entitled to compensation for increase of traffic or increased risk by reason of construction of highway under authority of statute.

Cited in note in 24 L.R.A.(N.S.) 1233, on necessity and measure of compensation, upon laying out street across railway property.

Liability of railway company for frightening horse.

Cited in note in 24 L.R.A.(N.S.) 1203, on liability of railway frightening horse by steam from engine on highway crossing.

16 N. D. 323, VAN GORDON v. GOLDAMER, 113 N. W. 609.

Consideration of point not raised below.

Cited in *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558; *Hanson v. Franklin*, 19 N. D. 259, 123 N. W. 386,—holding that appellate court will not consider point not raised in trial court.

Title to maintain conversion.

Cited in *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304, holding that lessee cannot maintain conversion until division, where contract provides that title to crops shall remain in lessor until divided.

16 N. D. 335, JOHNSON v. GLASPEY, 113 N. W. 602.

Requisites of special verdict.

Cited in note in 24 L.R.A.(N.S.) 41, 42, 77, on what special verdict must contain.

16 N. D. 341, COLEAN MFG. CO. v. BLANCHETT, 113 N. W. 614.

Waiver of defense to action for price.

Cited in *Colean Mfg. Co. v. Feckler*, 20 N. D. 188, 126 N. W. 1019, holding that acceptance of goods with knowledge of defects, is waiver of such defense to action for purchase price.

16 N. D. 347, STATE EX REL. FLAHERTY v. HANSON, 113 N. W. 371, Reversed in 215 U. S. 515, 54 L. ed. 307, 30 Sup. Ct. Rep. 179.

Limitations on power to impose license tax.

Cited in *People use of State Bd. of Health v. Wilson*, 249 Ill. 195, 94 N. E. 141, holding that tax of \$100 per month on itinerant vendor of patent and proprietary medicines unconstitutional as prohibiting pursuit of occupation.

Cited in note in 129 Am. St. Rep. 260, on constitutional limitations on power to impose license or occupation taxes.

Right to prohibit sale of liquor.

Cited in note in 15 L.R.A.(N.S.) 936, on constitutional right to prohibit sale of intoxicants.

16 N. D. 355, DEARDOFF v. THORSTENSEN, 113 N. W. 616.

Waiver of service of pleading on appeal.

Cited in *Aneta Mercantile Co. v. Groseth*, 20 N. D. 137, 127 N. W. 718, holding serving of appellant's pleading with undertaking not waived by stipulation to continue case over term.

16 N. D. 359, POWERS ELEVATOR CO. v. POTTNER, 113 N. D. 703.**Sufficiency of title of act.**

Cited in *State v. Fargo Bottling Works Co.* 19 N. D. 396, 2 (N.S.) 872, 124 N. W. 387; *State v. Minneapolis & N. Elevator Co.* 23, 114 N. W. 482; *State ex rel. Erickson v. Burr*, 16 N. D. 581, 113 N. W. 705,—holding the constitutional provision as to title of a law sufficiently met if the subject of the law is germane or reasonably connected with the subject expressed in the title; *State ex rel. Poole v. State* 16 N. D. 101, 120 N. W. 47, holding section of act providing that appointment to departmental officers of state militia shall be for a period not longer than two years is germane to subject and general purpose of act in “an act providing that all appointments to various departments of the state guard of state of North Dakota shall be made from officers and line.”

Uniformity of laws.

Cited in *State ex rel. Dorval v. Hamilton*, 20 N. D. 592, 129 N. W. 1071, holding provision of primary election law to effect that no vote shall be made unless vote cast for state, district or county officer shall be at least 30% of total number of votes cast for candidate for secretary of state of each political party at last general election lacks uniformity.

16 N. D. 363, JOHNSON v. GRAND FORKS COUNTY, 113 N. D. ST. REP. 662, 113 N. W. 1071.**Primary election as election.**

Cited in note in 18 L.R.A. (N.S.) 412, on “primary elections” as elections under Constitution or statute relating to elections generally.

Constitutionality of primary election law.

Cited in *State ex rel. Montgomery v. Anderson*, 18 N. D. 149, 113 N. W. 22, holding act providing for nominations by primary election is constitutional.

Cited in note in 22 L.R.A. (N.S.) 1142, on constitutionality of primary election laws.

Filing fees of candidates for public office.

Disapproved in *Socialist Party v. Uhl*, 155 Cal. 776, 103 Pac. 1071, holding statute requiring candidates for office to pay filing fee unconstitutional.

16 N. D. 377, MORRISON v. LEE, 113 N. D. ST. REP. 662, 113 N. W. 1071.**16 N. D. 387, FRANKEL v. HILLIER, 113 N. W. 1067, 113 N. D. ANN. CAS. 265.****16 N. D. 398, REEVES & CO. v. BRUENING, 114 N. W. 311.****16 N. D. 403, HAESSLY v. THATE, 114 N. W. 311.**

16 N. D. 408, SMITH v. JENSEN, 114 N. W. 306.

Protection of one purchasing under apparent vendee who is really a mortgagee.

Cited in note in 32 L.R.A.(N.S.) 1046, on protection of purchaser from apparent vendee under instrument intended as mortgage.

16 N. D. 420, STATE v. HUNSKOR, 114 N. W. 996.

Shooting to prevent trespass.

Cited in note in 22 L.R.A.(N.S.) 724, on right to use deadly weapon in resisting trespass.

16 N. D. 426, STATE v. HAZLET, 113 N. W. 374.

Burden of proving crime.

Cited in State v. Nelson, 17 N. D. 13, 114 N. W. 478, holding instruction that defendant has burden of proof of alibi in criminal prosecution is prejudicial error not cured by correct instruction as to state's burden to prove guilt.

Rule as to reasonable doubt.

Cited in note in 19 L.R.A.(N.S.) 488, 493, on applicability of rule of reasonable doubt to self-defense in homicide.

Knowledge imputable to one accused of crime.

Cited in State v. Denny, 17 N. D. 519, 117 N. W. 869, disapproving instruction on guilty knowledge based upon the knowledge of a man of ordinary intelligence rather than upon the knowledge imputable to one of defendant's intelligence and experience; State v. Denny, 17 N. D. 519, 117 N. W. 869 (dissenting opinion), adhering to dissenting opinion in cited case and maintaining that the mental state of an ordinary man under the circumstances rather than of an ideal man or of the defendant should be the test of knowledge imputable to defendant.

"Cooling time" in homicide.

Cited in State v. Towers, 106 Minn. 105, 118 N. W. 361, on the question of whether sufficiency of "cooling time" should be governed by the standard of a reasonable person or of the defendant.

Cited in note in 134 Am. St. Rep. 734, 735, on condition of mind of slayer which reduces murder to manslaughter.

16 N. D. 446, HIGGS v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 15 L.R.A.(N.S.) 1162, 114 N. W. 722, 15 A. & E. ANN. CAS. 97.

16 N. D. 452, GRADY v. SCHWEINLER, 14 L.R.A.(N.S.) 1089, 125 AM. ST. REP. 674, 113 N. W. 1031, 15 A. & E. ANN. CAS. 161.

16 N. D. 457, STATE EX REL. McDONALD v. HOLMES, 114 N. W. 367.

Jurisdiction of supreme court to issue original writs.

Cited in State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717,

holding supreme court without jurisdiction to issue prerogative writs; *enjoin submission to electors of county question of removal of seat*; *Homesteaders v. McCombs*, 24 Okla. 201, — L.R.A.(N.S.) 691, 20 A. & E. Ann. Cas. 181, holding that supreme court cannot oust original jurisdiction of suit instituted by foreign insurance company to compel insurance commissioner to issue permit to company to do business within state.

16 N. D. 462, FERRIS v. JENSEN, 114 N. W. 372.

16 N. D. 470, EX PARTE CORLISS, 114 N. W. 962.

Appearance of counsel before grand jury.

Cited in note in 33 L.R.A.(N.S.) 569, on appearance of special counsel or private counsel before grand jury.

Scope of powers of attorney general.

Distinguished in *State v. Heiser*, 20 N. D. 357, 127 N. W. 777, holding that attorney general either personally or through duly appointed assistant has power to institute and prosecute for contempt growing out of violation of injunctive orders enjoining maintenance of liquor.

Legislative control of duties of county attorneys.

Distinguished in *Childs v. State*, 4 Okla. Crim. Rep. 474, 33 L.R.A.(N.S.) 563, 113 Pac. 545, holding that legislature has control of duties of county attorneys.

16 N. D. 546, RUETTELL v. GREENWICH INS. CO. 114 N. W. 1029.

Weight to be given findings of trial court.

Cited in *Rindlaub v. Rindlaub*, 19 N. D. 352, 125 N. W. 479, holding that findings of trial court are entitled to same weight as verdict of jury; *James River Nat. Bank v. Weber*, 702, 124 N. W. 952, holding that findings of trial court where no jury have been waived are entitled to same weight as verdict of jury.

Dissolution of partnership.

Cited in note in 31 L.R.A.(N.S.) 473, on dissolution of partnership in formation of corporation.

16 N. D. 551, MUIR v. CHANDLER, 113 N. W. 1038.

Specific performance of oral contract to purchase land.

Cited in *Cassedy v. Robertson*, 19 N. D. 574, 125 N. W. 1047, holding that making of valuable improvements and payment of purchase price under oral contract to purchase land out of statute of frauds.

16 N. D. 555, DREVESKRACHT v. FIRST STATE BANK, 113 N. W. 1032.

16 N. D. 561, NYSTROM v. LEE, 114 N. W. 478, Later same case in 17 N. D. 463, 117 N. W. 473.

16 N. D. 569, STATE EX REL. BOCKMEIER v. ELY, 114 N. W. 638, 113 N. W. 711.

De facto officers.

Cited in *State v. Bednar*, 18 N. D. 484, 121 N. W. 614, 20

Ann. Cas. 458, holding acts of de facto judge are not subject to attack by private suitor; *State v. Cochran*, 55 Or. 157, 105 Pac. 884; *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348,—to point that acts of de facto judge are valid; *State ex rel. Shaw v. Thompson*, 21 N. D. 426, 131 N. W. 231, holding that under peculiar facts of case supreme court has jurisdiction to issue original writ to compel city auditor to prepare and cause to be furnished, ballots and election supplies necessary to conduct election on question of commission form of government.

Cited in note in 15 L.R.A.(N.S.) 104, on de jure office as condition of de facto officer.

16 N. D. 581, *STATE EX REL. ERICKSON v. BURR*, 113 N. W. 705.

Invoking original jurisdiction of supreme court.

Cited in *State ex rel. Steel v. Fabrick*, 17 N. D. 532, 117 N. W. 860, holding that to invoke the original jurisdiction of supreme court the matter must be not only publici juris but the sovereignty of the state, its franchises, prerogatives or the liberties of its people must be affected; *Homesteaders v. McCombs*, 24 Okla. 201, — L.R.A.(N.S.) —, 103 Pac. 691, 20 A. & E. *Ann. Cas.* 181, holding that supreme court has not original jurisdiction of suit instituted by foreign insurance company to compel insurance commissioner to issue permit to company to do business within state.

Sufficiency of title to act.

Cited in *State v. Minneapolis & N. Elevator Co.* 17 N. D. 23, 114 N. W. 482, holding that title to act is sufficient which readily suggests the matter in the act which is necessary to render it effective; *State v. Fargo Bottling Works Co.* 19 N. D. 396, 26 L.R.A.(N.S.) 872, 124 N. W. 387, holding that if the subject-matter of the act is germane to the expressions of the title the act will be upheld; *State ex rel. Poole v. Peake*, 18 N. D. 101, 120 N. W. 47, holding that section of act, providing that no appointment to departmental offices of state militia shall be for longer period than two years is germane to subject and general purpose expressed in "Act providing that all appointments to various departments of national guard of state of North Dakota shall be made from officers of field and line."

Acts of judge de facto.

Cited in *State ex rel. Bookmeier v. Ely*, 16 N. D. 569, 14 L.R.A.(N.S.) 638, 113 N. W. 711, refusing habeas corpus to one convicted before and sentenced by de facto judge.

16 N. D. 595, *ARONSON v. OPPEGARD*, 114 N. W. 377.

Rights in crop raised on shares.

Cited in *Wadsworth v. Owens*, 17 N. D. 173, 115 N. W. 667, on the relative rights of landlord and tenant in crop raised on "cropper's contract;" *Casey v. First Bank*, 20 N. D. 211, 126 N. W. 1011, holding that in action for damages for conversion of crops raised on shares status of

account between plaintiff and cropper may be shown; *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304, holding that lessee cannot maintain conversion until division where contract provides that title to crops shall remain in lessor until divided.

16 N. D. 601, SALZER LUMBER CO. v. CLAFLIN, 113 N. W. 1036.

Construction of mechanics' lien law.

Cited in *Langworthy Lumber Co. v. Hunt*, 19 N. D. 433, 122 N. W. 865, to point that mechanics' lien law should be liberally construed; *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. 99, holding vendor under executory contract of sale of land not "owner" within meaning of mechanics' lien law.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 17 N. D.

17 N. D. 1, GRAY v. HARVEY, 113 N. W. 1034.

17 N. D. 5, CONTINENTAL HOSE CO. NO. 1. v. FARGO, 114 N. W. 834.

17 N. D. 13, STATE v. NELSON, 114 N. W. 478.

17 N. D. 16, HARRIS BROS. v. REYNOLDS, 114 N. W. 369.

Offer and acceptance.

Cited in *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94, holding letter accepting terms of sale and asking vendor to send deed to bank and to accompany it with assigned insurance policies was not an unconditional acceptance.

Authority of broker to make sale.

Cited in note in 17 L.R.A.(N.S.) 214, on power of real estate broker to make contract of sale.

What constitutes employment of broker.

Cited in note in 27 L.R.A.(N.S.) 787, on what constitutes employment of broker entitling him to commissions otherwise earned.

17 N. D. 21, DIBBLE v. HANSON, 114 N. W. 371, 16 A. & E. ANN. CAS. 371.

17 N. D. 23, STATE v. MINNEAPOLIS & N. ELEVATOR CO. 138 AM. ST. REP. 691, 114 N. W. 482.

Followed without discussion in *State v. Minneapolis & N. Elevator Co.* 17 N. D. 31, 114 N. W. 485.

17 N. D. 31, STATE v. MINNEAPOLIS & N. ELEVATOR CO.
N. W. 485.

17 N. D. 32, STATE EX REL. NORTH DAKOTA STATE
ASSO. v. HOLMES, 112 N. W. 144.

17 N. D. 40, STATE v. DAHLQUIST, 115 N. W. 81.

Admissibility of agent's declarations.

Cited in note in 131 Am. St. Rep. 308, 309, on declarations
of agents.

Receipts as evidence.

Cited in State v. Tracy, 21 N. D. 205, 129 N. W. 1033, holding
for freight shipments competent evidence as admissions against
giving them.

17 N. D. 48, STATE v. MURPHY, 17 L.R.A. (N.S.) 609,
W. 84, 16 A. & E. ANN. CAS. 1133.

Proof of similar offense.

Cited in State v. Miller, 20 N. D. 509, 128 N. W. 1034, holding
sale of liquors by defendant within two months competent as basis
intent, in prosecution for importing liquors.

17 N. D. 67, ST. PAUL, M. & M. R. CO. v. BLAKEMORE,
W. 730.

When certiorari lies.

Cited in Schafer v. District Ct. 21 N. D. 476, 131 N. W. 240,
that certiorari does not lie where there is appeal nor in court
ment any other plain, speedy and adequate remedy.

17 N. D. 76, FIRST NAT. BANK v. WARNER, 114 N. W. 10
A. & E. ANN. CAS. 213.

Testimony as to transactions with deceased.

Cited in Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088, as
ing authorities on the disqualification of a party to testify to transac-
with deceased and holding that the fact that the party seeking to
is a codefendant with the heirs or representatives does not abate
rule.

17 N. D. 84, BROWN v. COMONOW, 114 N. W. 728.

Who may foreclose by advertisement.

Cited in Hebden v. Bina, 17 N. D. 235, 116 N. W. 85, holding that
fore one may foreclose by advertisement he must be the owner
holder of the record title of the mortgage.

17 N. D. 91, SCOTT v. NORTHWESTERN PORT HURON CO.
N. W. 192.

17 N. D. 99, PFEIFER v. HATTON, 138 AM. ST. REP. 698, 115 N. W. 191.

17 N. D. 102, F. MAYER BOOT & SHOE CO. v. FERGUSON, 14 L.R.A.(N.S.) 1126, 114 N. W. 1091.

Sufficiency of affidavit for attachment.

Cited in Weil v. Quam, 21 N. D. 344, 131 N. W. 244, holding it not sufficient to tell where goods are without definite allegations showing what they are.

17 N. D. 104, MAHON v. FANSETT, 115 N. W. 79.

Garnishment.

Cited in *Etna Ins. Co. v. Evans*, 57 Fla. 311, 49 So. 57, on the nature of garnishment proceedings.

17 N. D. 110, CARDIFF v. MARQUIS, 114 N. W. 1088.

Followed without decision in *Marquis v. Morris*, 17 N. D. 119, 114 N. W. 1091.

17 N. D. 119, MARQUIS v. MORRIS, 114 N. W. 1091.

17 N. D. 120, SMITH v. KUNERT, 115 N. W. 76.

Right to jury trial.

Followed in *Dreveskracht v. First State Bank*, 16 N. D. 555, 113 N. W. 1032, on constitutionality and effect of statute providing for reference of causes by consent.

17 N. D. 128, ZINN v. DISTRICT COURT, 114 N. W. 475.

17 N. D. 135, ZINN v. DISTRICT COURT, 114 N. W. 472.

17 N. D. 140, EX PARTE BELLAMY, 114 N. W. 376.

17 N. D. 145, STATE FINANCE CO. v. HALSTENSON, 114 N. W. 724.

Laches as barring right to foreclose.

Cited in *Hodgson v. State Finance Co.* 19 N. D. 139, 122 N. W. 336, on laches as defense to foreclosure.

17 N. D. 154, MORTON v. HOLES, 115 N. W. 256.

Legislative acts of city council.

Cited in *State ex rel. Kettle River Quarries Co. v. Duis*, 17 N. D. 319, 116 N. W. 751, holding that resolution of municipal council prescribing kind of pavement to be laid in certain districts is legislative in character and subject to veto by mayor.

17 N. D. 161, SCHUYLER v. WHEELON, 115 N. W. 259.

Dak. Rep.—36.

17 N. D. 166, PEASE v. MAGILL, 115 N. W. 260.

Order of proof.

Cited in *F. A. Patrick & Co. v. Austin*, 20 N. D. 261, 127 N. W. 109, holding that admission in rebuttal of testimony constituting part of plaintiff's original case is not error.

17 N. D. 173, WADSWORTH v. OWENS, 115 N. W. 667, Later appeal in 21 N. D. 255.

Declarations of agent.

Cited in *Rounseville v. Paulson*, 19 N. D. 466, 126 N. W. 221, on binding effect of agent's declarations.

Rights of tenant in crops.

Cited in *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304, holding that tenant cannot maintain conversion until division where contract provides that title to crops shall remain in lessor until divided.

17 N. D. 178, FOSTER COUNTY IMPLEMENT CO. v. SMITH, 115 N. W. 663.

17 N. D. 184, RE BEER, 115 N. W. 672, 17 A. & E. ANN. CAS. 126.

17 N. D. 191, HANSON v. GRONLIE, 115 N. W. 666.

17 N. D. 195, MALONEY v. GEISER MFG. CO. 115 N. W. 669.

17 N. D. 203, NORTHERN P. R. CO. v. BOYNTON, 115 N. W. 679.

17 N. D. 210, LUND v. UPHAM, 116 N. W. 88.

17 N. D. 215, BEISEKER v. AMBERSON, 116 N. W. 94.

17 N. D. 220, FORCE v. PETERSON MACH. CO. 116 N. W. 84.

17 N. D. 223, STATE EX REL. McCUE v. NORTHERN P. R. CO. 116 N. W. 92.

17 N. D. 224, FIRST NAT. BANK v. BAKKEN, 116 N. W. 92.

17 N. D. 229, ABER v. TWICHELL, 116 N. W. 95.

Attachment of property in hands of execution debtor.

Cited in *Probstfield v. Hunt*, 17 N. D. 572, 118 N. W. 226, holding that no demand or notice of title is necessary to charge sheriff who attaches property in hands of third persons; *Mariner v. Wasser*, 17 N. D. 361, 117 N. W. 343, holding sheriff not liable for conversion in taking under execution the property of a third person found in the possession of execution debtor in the absence of knowledge or notice of true ownership.

Counter motions for directed verdict.

Cited in *Segear v. Westcott*, 83 Neb. 515, 120 N. W. 170, holding that where both parties move for directed verdict there is waiver of jury trial.

Sufficiency of objection for introduction of evidence.

Cited in *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335, holding that specific objection to admissibility of evidence on account of lack of appropriate pleading cannot first be considered on appeal.

17 N. D. 235, *HEBDEN v. BINA*, 138 AM. ST. REP. 700, 116 N. W. 85.

Right to dispute landlord's title.

Cited in note in 29 L.R.A. (N.S.) 85, on right of tenant to dispute landlord's title in latter's action to establish.

17 N. D. 243, *PRATT v. BEISEKER*, 115 N. W. 835.

Power to entertain motion for new trial.

Distinguished in *State ex rel. Berndt v. Templeton*, 21 N. D. 470, 130 N. W. 1009, holding that district court has power to entertain motion for new trial upon ground of newly discovered evidence.

17 N. D. 247, *LARSON v. WALKER*, 115 N. W. 838.

17 N. D. 248, *RUSSELL v. WATERLOO THRESHING MACH. CO.* 116 N. W. 611.

17 N. D. 257, *STATE, USE OF HART-PARR CO. v. ROBB-LAWRENCE CO.* 16 L.R.A. (N.S.) 227, 115 N. W. 846.

Sufficiency of transfer of possession to purchaser.

Cited in notes in 25 L.R.A. (N.S.) 527, on setting aside property retained on premises, or under control of pledgeor or mortgagor, as a delivery or change of possession; 30 L.R.A. (N.S.) 552, on issuance and delivery by private warehouseman of receipt for own property as transfer of possession essential to valid pledge.

17 N. D. 266, *SKEFFINGTON v. PRANTE*, 115 N. W. 834.

17 N. D. 266, *ROSS v. PRANTE*, 115 N. W. 833.

Followed without discussion in *Skeffington v. Prante*, 17 N. D. 266, 115 N. W. 834.

Allowance of benefits in determining compensation in eminent domain.

Cited in *Heakin v. Herbrandson*, 21 N. D. 232, 130 N. W. 836, holding jury not authorized to consider benefits in determining full compensation.

17 N. D. 271, *BRISTOL & S. CO. v. SKAPPLE*, 115 N. W. 841.

Discretion of court as to new trial.

Cited in *Casey v. First Bank*, 20 N. D. 211, 126 N. W. 1011, holding that appellate court will not reverse denial of new trial, except for abuse of discretion.

17 N. D. 275, ANDERSON v. ANDERSON, 115 N. W. 836.

17 N. D. 281, GORDER v. HILLIBOE, 115 N. W. 843.

17 N. D. 285, STATE EX REL. LADD v. DISTRICT CT. 15 L.R.A. (N.S.) 331, 115 N. W. 675.

17 N. D. 296, YOUKER v. HOBART, 115 N. W. 839.

17 N. D. 301, STATE EX REL. McCUE v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 116 N. W. 91.

17 N. D. 302, ADAMS & F. CO. v. KENOYER, 16 L.R.A. (N.S.) 681, 116 N. W. 98.

Change in period of limitations.

Followed in A. D. Clarke & Co. v. Doyle, 17 N. D. 340, 116 N. W. 348, holding that statute shortening period of limitations for foreclosure of mortgage does not affect rights under existing mortgage as to which the statute did not give reasonable time for foreclosure.

Cited in note in 21 L.R.A. (N.S.) 157, on reasonableness of period allowed by saving clause in new statute of limitations.

17 N. D. 310, LANDIS MACH. CO. v. KONANTZ SADDLERY CO. 116 N. W. 333.

Disregard of statement on appeal.

Cited in F. A. Patrick & Co. v. Nurnberg, 21 N. D. 377, 131 N. W. 254, holding that statement on appeal will be disregarded where no specification of error is incorporated therein.

17 N. D. 313, SUCKER STATE DRILL CO. v. WIRTZ, 18 L.R.A. (N.S.) 134, 115 N. W. 844.

Interstate commerce and local regulation of corporations.

Followed in State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A. (N.S.) 227, 115 N. W. 846, on the right of a foreign corporation to maintain action on contract notwithstanding failure to comply with law as to doing business in state.

Cited in note in 19 L.R.A. (N.S.) 315, on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause.

What is "doing business" within state.

Cited in note in 18 L.R.A. (N.S.) 143, on establishing agency to handle product within state as doing business therein.

17 N. D. 319, STATE EX REL. KETTLE RIVER QUARRIES CO. v. DUIS, 116 N. W. 751.

17 N. D. 326, FIRST NAT. BANK v. BUTTERY, 16 L.R.A. (N.S.) 878, 116 N. W. 341, 17 A. & E. ANN. CAS. 52.

Negotiability of notes.

Cited in *Rossville State Bank v. Heslet*, 84 Kan. 315, 33 L.R.A. (N.S.) 738, 113 Pac. 1052, holding that stipulation that each signer and indorser makes other agent to extend time of note destroys negotiability.

Cited in note in 125 Am. St. Rep. 202, on agreements and conditions destroying negotiability.

17 N. D. 335, FULTON v. CRETIAN, 117 N. W. 344.

17 N. D. 339, BERTELSON v. EHR, 116 N. W. 335.

Disregard of statement of case on appeal.

Cited in *O'Keefe v. Omlie*, 17 N. D. 404, 117 N. W. 353, holding that statement of case will be disregarded on appeal, if evidence is not set forth in narrative form; *F. A. Patrick & Co. v. Nurnberg*, 21 N. D. 377, 131 N. W. 254, holding that statement will be disregarded on appeal, if no specification of error is embodied therein.

17 N. D. 340, A. D. CLARKE & CO. v. DOYLE, 116 N. W. 348.

17 N. D. 343, BUCHANAN v. MINNEAPOLIS THRESHING MACH. CO. 116 N. W. 335.

Waiver of formal notice of breach of warranty.

Cited in *Advance Thresher Co. v. Vinckel*, 84 Neb. 429, 121 N. W. 431, holding that stipulation in contract for sale of machine that written notice shall be given vendor of defects is ineffective where vendor receives and acts upon actual notice; *Palmer v. Reeves & Co.* 139 Mo. App. 473, 122 S. W. 1119, holding same where stipulation was for notice by registered letter.

17 N. D. 352, GROVE v. GREAT NORTHERN LOAN CO. 138 AM. ST. REP. 707, 116 N. W. 345.

Setting aside foreclosure for inadequacy of price.

Cited in *Folsom v. Norton*, 19 N. D. 722, 125 N. W. 310 (dissenting opinion), inadequacy of price as ground for setting aside foreclosure sale.

17 N. D. 361, MARINER v. WASSER, 138 AM. ST. REP. 714, 117 N. W. 343.

17 N. D. 365, RIECK v. DAIGLE, 117 N. W. 346.

Negotiability of note.

Cited in note in 30 L.R.A. (N.S.) 41, on reference to extrinsic agreement as affecting negotiability.

17 N. D. 368, J. L. OWENS CO. v. DOUGHTY, 116 N. W. 340.

17 N. D. 370, STATE EX REL. McCUE v. GREAT NORTHERN R. CO. 116 N. W. 89.

Followed without discussion in *State ex rel. McCue v. Northern P. R. Co.* 17 N. D. 223, 116 N. W. 92; *State ex rel. McCue v. Minneapolis, St. P. & S. Ste. M. R. Co.* 17 N. D. 301, 116 N. W. 91.

17 N. D. 375, AMERICAN SODA FOUNTAIN CO. v. HOGUE, 17 L.R.A. (N.S.) 1113, 116 N. W. 339.

17 N. D. 380, KEPHART v. CONTINENTAL CASUALTY CO. 116 N. W. 349.

Necessity of exception to review of error.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 532, 123 N. W. 667, holding that assignment of error based on refusal to direct verdict, to which no exception was taken, cannot be considered on appeal.

17 N. D. 386, PLANO MFG. CO. v. DOYLE, 17 L.R.A. (N.S.) 606, 116 N. W. 529.

Retention of jurisdiction after judgment.

Cited in *Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866, holding that interested parties may move to have judgment entered contrary to law, vacated and thus become parties of record.

Application to vacate default judgment.

Cited in *Williams v. Fairmount School Dist.* 21 N. D. 198, 129 N. W. 1027, holding that consideration of second application to vacate judgment is in discretion of court; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222, 130 N. W. 228, holding that ruling on motion to vacate default will not be disturbed except for manifest abuse of discretion.

17 N. D. 389, ERICKSON v. ELLIOTT, 117 N. W. 361.

Followed without discussion in *Erickson v. Elliott*, 17 N. D. 393, 117 N. W. 363.

17 N. D. 393, ERICKSON v. ELLIOTT, 117 N. W. 363.

17 N. D. 393, SOLIAH v. CORMACK, 117 N. W. 125.

17 N. D. 404, O'KEEFE v. OMLIE, 117 N. W. 353.

17 N. D. 406, DONOVAN v. BLOCK, 117 N. W. 527.

17 N. D. 409, COLE v. MINNESOTA LOAN & T. CO. 117 N. W. 354, 17 A. & E. ANN. CAS. 304.

17 N. D. 429, STATE v. CHASE, 117 N. W. 537, 17 A. & E. ANN. CAS. 520.

Harmless error as to evidence.

Cited in *State v. Staber*, 20 N. D. 545, 129 N. W. 104, holding admission

of incompetent evidence not reversible error, where facts are established by other competent evidence.

17 N. D. 433, PENDROY v. GREAT NORTHERN R. CO. 17 N. W. 531.

Care required in crossing track with automobile.

Cited in note in 21 L.R.A.(N.S.) 795, on care required of driver of automobile at railroad crossings.

Contributory negligence as question of fact.

Cited in Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830, holding contributory negligence for jury, where person is killed by train backing against him; Hollinshead v. Minneapolis, St. P. & S. Ste. M. R. Co. 20 N. D. 642, 127 N. W. 993, holding contributory negligence of person driving across tracks, question for jury; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91, holding contributory negligence of person driving on rough road, knowing its dangerous condition, question for jury; Messenger v. Valley City Street & Interurban R. Co. 21 N. D. 82, 32 L.R.A.(N.S.) 881, 128 N. W. 1023, holding contributory negligence of person attempting to board street car, question for jury.

17 N. D. 449, KASLOW v. CHAMBERLAIN, 117 N. W. 529.

17 N. D. 454, STATE v. MINOR, 19 L.R.A.(N.S.) 273, 117 N. W. 528.

Malicious mischief.

Cited in note in 128 Am. St. Rep. 165, on malicious mischief.

17 N. D. 457, STREHLOW v. McLEOD, 117 N. W. 525, 17 A. & E. ANN. CAS. 423.

Waiver of lien of chattel mortgage.

Cited in note in 24 L.R.A.(N.S.) 491, on waiver of chattel mortgage lien by attachment or execution.

17 N. D. 463, NYSTROM v. TEMPLETON, 117 N. W. 473.

17 N. D. 466, NORTH DAKOTA HORSE & CATTLE CO. v. SERUM-GARD, 29 L.R.A.(N.S.) 508, 138 AM. ST. REP. 717, 117 N. W. 453.

17 N. D. 495, McBRIDE v. WALLACE, 117 N. W. 857.

17 N. D. 502, STILES v. GRANGER, 117 N. W. 777.

17 N. D. 510, SCHOUWEILER v. ALLEN, 117 N. W. 866, Later phase of same case, 21 N. D. 198, 129 N. W. 1027.

Motion to vacate judgment.

Cited in Campbell v. Coulston, 19 N. D. 645, 124 N. W. 689 (dissenting opinion), as to who may move to vacate judgment; Racine-Sattley Mfg.

Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, holding that ruling on motion to vacate judgment will not be disturbed except for manifest abuse of discretion.

Validity of certificate of election issued pending mandamus proceeding.

Cited in State ex rel. Miller v. Miller, 21 N. D. 324, 131 N. W. 282, holding certificate of election issued by county auditor to secretary of state, nullity, where facts certified were in litigation and undetermined in mandamus proceeding.

17 N. D. 519, STATE v. DENNY, 117 N. W. 869.

Crime of receiving stolen goods.

Cited in note in 22 L.R.A.(N.S.) 834, on knowledge necessary to convict one of receiving stolen goods.

17 N. D. 532, STATE EX REL. STEEL v. FABRICK, 117 N. W. 860.

Followed without discussion in State ex rel. Cox v. Fabrick, 17 N. D. 542, 117 N. W. 864.

Original jurisdiction of supreme court.

Distinguished in State ex rel. Murphy v. Gottbreht, 17 N. D. 543, 117 N. W. 864, holding that no exceptional circumstances existed in the case at bar which warranted assumption of original jurisdiction by supreme court to adjudicate change of county seat; State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717, denying prerogative writ to enjoin county commissioners from submitting to electors question of removal of county seat.

17 N. D. 542, STATE EX REL. COX v. FABRICK, 117 N. W. 864.

17 N. W. 543, STATE EX REL. MURPHY v. GOTTBREHT, 117 N. W. 864.

Original jurisdiction of supreme court.

Cited in State ex rel. Steel v. Fabrick, 17 N. D. 532, 117 N. W. 860, assuming original jurisdiction to adjudicate matters concerning division of county solely upon the ground that an emergency and exceptional circumstances warrant departure from the general rule; State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717, denying prerogative writ to enjoin county commissioners from submitting to electors question of removal of county seat.

17 N. D. 546, RE CONNOLLY, 117 N. W. 946.

17 N. D. 554, STATE v. JOHNSON, 118 N. W. 230.

Sufficiency of information.

Followed in State v. Wright, 20 N. D. 216, 126 N. W. 1023, holding in-

formation in general words and substantially in language of statute, sufficient, on attack by motion in arrest of judgment.

Cited in *State v. Rhoades*, 17 N. D. 579, 118 N. W. 233, holding information for rape alleging that defendant by force overcame female's resistance, sufficient, on attack by motion in arrest of judgment.

Evidence as to intent.

Cited in note in 23 L.R.A.(N.S.) 373, 387, on right of one to testify as to his intent.

17 N. D. 561, *ELVICK v. GROVES*, 118 N. W. 228.

17 N. D. 567, *STATE v. WESIE*, 19 L.R.A.(N.S.) 786, 118 N. W. 20.

17 N. D. 572, *PROBSTFIELD v. HUNT*, 118 N. W. 226.

17 N. D. 575, *STATE EX REL COOPER v. BLAISDELL*, 118 N. W. 225.

17 N. D. 579, *STATE v. RHOADES*, 116 N. W. 233.

Sufficiency of evidence of rape.

Cited in *State v. Fujita*, 20 N. D. 555, 120 N. W. 360, holding corroboration of prosecutrix unnecessary to convict for assault with intent to rape.

17 N. D. 594, *HILLEBOE v. WARNER*, 118 N. W. 1047.

17 N. D. 600, *GALVIN v. TIBBS, H. & CO.* 119 N. W. 39.

Power of court to reduce verdict.

Cited in *Lohr v. Honsinger*, 20 N. D. 500, 128 N. W. 1035, holding that trial court can reduce verdict and require its acceptance or new trial.

Review of sufficiency of evidence.

Cited in *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397, holding that refusal of trial court to grant new trial because of insufficiency of evidence will not be disturbed where evidence is conflicting and verdict is supported by substantial evidence.

17 N. D. 606, *McDONELL v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO.* 118 N. W. 819.

17 N. D. 610, *DUNCAN v. GREAT NORTHERN R. CO.* 19 L.R.A.(N.S.) 952, 118 N. W. 826.

Liability of carrier for loss or injury to goods.

Cited in *Taugher v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 747, as to what relieves carrier from liability for loss.

Cited in notes in 29 L.R.A.(N.S.) 1216, on liability of carrier accepting property improperly packed or crated; 19 L.R.A.(N.S.) 1014, on lia-

bility of carrier of goods for loss on connecting line, due to its own negligence.

— Burden of proof as to.

Cited in note in 29 L.R.A. (N.S.) 663, on burden of proof when defense in action for loss or injury to goods during carriage is act of God or vis major.

Rebuttal of statutory presumption as question of law.

Cited in *Corbett v. Great Northern R. Co.* 19 N. D. 450, 125 N. W. 1054, holding that question whether statutory presumption of negligence has been fully met and overcome is in first instance one of law.

Motion by both parties for directed verdict.

Cited in *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266, holding that motion by both parties for directed verdict waives right to have facts submitted to jury.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 18 N. D.

18 N. D. 1, MINNEAPOLIS, ST. P. & S. STE. M. R. CO. v. OPPEGARD, 118 N. W. 830.

Taxation of franchises.

Cited in note in 131 Am. St. Rep. 869, 880, on taxation of franchises.

18 N. D. 8, SUCKER STATE DRILL CO. v. BROCK, 118 N. W. 348.

18 N. D. 12, KNUDTSON v. ROBINSON, 118 N. W. 1051.

18 N. D. 19, MILLER v. NORTHERN P. R. CO. 118 N. W. 344,
19 A. & E. ANN. CAS. 1215.

18 N. D. 31, STATE EX REL. McCUE v. BLAISDELL, 119 N. W. 360.

Registration as requirement to vote upon question of dividing county.

Distinguished in Fitzmaurice v. Willis, 20 N. D. 372, 127 N. W. 78, holding registration required to entitle electors to vote upon proposition to create new county.

"Majority" essential to adoption of submitted proposition.

Cited in State ex rel. Davis v. Willis, 19 N. D. 209, 124 N. W. 706, on majority essential to adoption of submitted proposition.

Cited in note in 22 L.R.A. (N.S.) 485, on basis for computation of majority essential to adoption of proposition submitted at general election.

Qualified electors.

Cited in Wagar v. Prindeville, 21 N. D. 245, 130 N. W. 224, holding that qualified electors as defined by constitution are male persons only, possessing other qualifications therein mentioned.

Original jurisdiction to issue injunction.

Cited in *State ex rel. Miller v. Miller*, 21 N. D. 324, 131 N. W. 282, holding that supreme court in exercise of its original jurisdiction will enjoin alleged new county and those assuming to act as its officers from exercising jurisdiction over territory embraced in such county until validity of organization of county involved in pending proceeding is finally adjudicated.

18 N. D. 45, WALTERS v. ROCK, 115 N. W. 511.**Use of initials in proceedings.**

Cited in note in 132 Am. St. Rep. 677, on proceedings against persons by less or other than full Christian names.

Bona fide purchaser of note.

Cited in *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99, holding that indorsee must have had actual knowledge of infirmity or defect, or knowledge of such facts as to amount to bad faith to defeat recovery on note.

18 N. D. 55, STATE EX REL. McCUE v. BLAISDELL, 24 L.R.A. (N.S.) 465, 138 AM. ST. REP. 741, 118 N. W. 141.**Constitutionality of primary election laws.**

Cited in *Socialist Party v. Uhl*, 155 Cal. 776, 103 Pac. 181; *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 A. & E. Ann. Cas. 633,—holding act providing for nomination of candidates for United States senator at primary election, valid.

Cited in notes in 18 L.R.A.(N.S.) 413, on "primary elections" as with in Constitution or statute relating to elections generally; 22 L.R.A.(N.S.) 1138, 1144-1147, on constitutionality of primary election laws.

Original jurisdiction to issue mandamus.

Cited in *State ex rel. Shaw v. Thompson*, 21 N. D. 426, 131 N. W. 231, holding that under peculiar facts of case supreme court has jurisdiction to issue original writ to compel city auditor to prepare and cause to be furnished, ballots and supplies necessary to conduct election on question of adoption of commission form of government.

18 N. D. 75, STATE EX REL. McCUE v. BEERY, 118 N. W. 150.**Constitutionality of primary election laws.**

Cited in note in 22 L.R.A.(N.S.) 1138, 1144-1147, on constitutionality of primary election laws.

18 N. D. 76, STATE EX REL. MINOT v. WILLIS, 118 N. W. 820.**Estoppel to question validity of proceedings to annex territory.**

Cited in *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393, 127 N. W. 499, holding that acquiescence for two years estopped

questioning validity of proceedings of board of education in annexing territory to school district.

18 N. D. 82, BARKER v. MORE, 118 N. W. 823.

18 N. D. 88, STATE v. LAECHELT, 118 N. W. 240.

18 N. D. 93, McFADDEN v. THORPE ELEVATOR CO. 118 N. W. 242.

Effect of mistake in election of remedy.

Cited in notes in 20 L.R.A. (N.S.) 260, on attempt to enforce lien under clause in lease giving landlord lien as election preventing enforcement as chattel mortgage; 22 L.R.A. (N.S.) 1154, on effect of choosing by mistake remedy not legally available.

18 N. D. 101, STATE EX REL. POOLE v. PEAKE, 120 N. W. 47.
Sufficiency of title of amendatory act.

Cited in *State v. Fargo Bottling Works Co.* 19 N. D. 396, 26 L.R.A. (N.S.) 872, 124 N. W. 387, holding title of amendatory act sufficient where subject matter thereof is germane to subject of original act and within title of act.

18 N. D. 125, STATE EX REL. McCUE v. LEWIS, 119 N. W. 1037.

18 N. D. 135, FOSTER COUNTY STATE BANK v. HESTER, 119 N. W. 1044.

18 N. D. 144, PFEIFER v. HATTON, 118 N. W. 19.

18 N. D. 147, STATE EX REL. PURCELL v. ANDERSON, 118 N. W. 29.

18 N. D. 149, STATE EX REL. MONTGOMERY v. ANDERSON, 118 N. W. 22.

Validity of provision in primary election law relating to requirements for nomination.

Cited in *State ex rel. Purcell v. Anderson*, 18 N. D. 147, 118 N. W. 29, holding 30% provision in primary election law as requirement for nomination valid.

Overruled in *State ex rel. Dorval v. Hamilton*, 20 N. D. 592, 129 N. W. 916, holding 30% provision in primary election law as requirement for nomination void as arbitrary, unnatural and lacking in uniformity.

18 N. D. 166, YOUNG v. ENGDAHL, 119 N. W. 169.

18 N. D. 176, McCARTHY BROS. CO. v. McLEAN COUNTY FARMERS' ELEVATOR CO. 138 AM. ST. REP. 757, 118 N. W. 1049, 20 A. & E. ANN. CAS. 574.

18 N. D. 182, LOWE v. ABRAHAMSON, 19 L.R.A.(N.S.) 1039, 119 N. W. 241, 20 A. & E. ANN. CAS. 535.

18 N. D. 185, ENGHOLM v. EKREM, 119 N. W. 35.

Part performance sufficient to take contract out of statute of frauds.

Cited in *Casseday v. Robertson*, 19 N. D. 574, 125 N. W. 1045, holding that making of valuable improvements and payment of purchase price is sufficient to take oral contract for purchase of land out of statute.

When estoppel arises.

Cited in *Justice v. Souder*, 19 N. D. 613, 125 N. W. 1029, on estoppel to question validity of mortgage.

18 N. D. 197, RANSIER v. HYNDMAN, 119 N. W. 544, 20 A. & E. ANN. CAS. 415.

18 N. D. 200, BRANDENBURG v. PHILLIPS, 119 N. W. 542.

18 N. D. 205, PETERSON v. CONLAN, 119 N. W. 367.

18 N. D. 214, SIEGEL v. MARCUS, 20 L.R.A.(N.S.) 769, 119 N. W. 358.

18 N. D. 221, ADAMS v. HARTZELL, 119 N. W. 635.

Extraterritorial effect of state bankruptcy laws.

Cited in *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78, to point that state bankruptcy act is without extraterritorial effect.

18 N. D. 233, STATE EX REL. POOLE v. NUCHOLS, 20 L.R.A.(N.S.) 413, 119 N. W. 632.

Superintending control over inferior tribunals.

Cited in note in 20 L.R.A.(N.S.) 947, on superintending control over inferior tribunals.

18 N. D. 242, STATE EX REL. MINEHAN v. WING, 119 N. W. 944.

Original jurisdiction to issue mandamus.

Cited in *State ex rel. Shaw v. Thompson*, 21 N. D. 426, 131 N. W. 231, holding that under peculiar facts of case supreme court has jurisdiction to issue original writ to compel city auditor to prepare and cause to be furnished, ballots and supplies necessary to conduct election on question of adoption of commission form of government.

18 N. D. 246, GRIFFIN v. DENISON LAND CO. 119 N. W. 1041.

18 N. D. 253, J. P. LAMB & CO. v. MERCHANTS' NAT. MUT. F. INS. CO. 119 N. W. 1048.

Effect of restrictions on power of insurance agents.

Cited in *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A. (N.S.) 539, 127 N. W. 837, holding restrictions upon power of agent to waive conditions of no effect where agent with full knowledge of facts, issues policy and collects premium and insured has acted in good faith.

18 N. D. 268, JOHNSON v. RICKFORD, 122 N. W. 386.

18 N. D. 276, KIDDER v. BARNES, 122 N. W. 378.

18 N. D. 282, CHRISTIANSON v. HUGHES, 138 AM. ST. REP. 762, 122 N. W. 384.

18 N. D. 289, STERN v. FARGO, 26 L.R.A. (N.S.) 665, 122 N. W. 403.

Sufficiency of notice of election on bond issue.

Cited in *Hughes v. Horsky*, 18 N. D. 474, 122 N. W. 799, holding notice of election on bond issue faulty in not stating denomination or rate of interest.

Construction of statute relating to noxious weeds.

Cited in *Langer v. Goode*, 21 N. D. 462, 131 N. W. 258, holding that there is no statutory liability for damages for failure to destroy noxious weeds on one's land, until after county commissioners have prescribed time and manner of destruction.

18 N. D. 309, UMSTED v. COLGATE FARMERS' ELEVATOR CO. 122 N. W. 390.

Negligence as question for jury.

Cited in *Messenger v. Valley City Street & Interurban R. Co.* 21 N. D. 82, 32 L.R.A. (N.S.) 881, 128 N. W. 1023, holding question of negligence or contributory negligence, is generally for jury and where passed upon by it will not ordinarily be disturbed.

Motion by both parties for directed verdict.

Distinguished in *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266, holding that motion by both parties for directed verdict at close of trial waives submission of facts to jury.

18 N. D. 324, HANSON v. GREAT NORTHERN R. CO. 138 AM. ST. REP. 768, 121 N. W. 78.

18 N. D. 338, GOOLER v. EIDSNESS, 121 N. W. 83.

18 N. D. 343, TAYLOR-BALDWIN CO. v. NORTHWESTERN F. & M. INS. CO. 122 N. W. 396, 20 A. & E. ANN. CAS. 432.

18 N. D. 357, STATE v. RUSSELL, 121 N. W. 918.

18 N. D. 360, ZELLMER v. PATTERSON & S. LAND CO. 122 N. W. 381.

18 N. D. 367, KUNKEL v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 121 N. W. 830.

Contributory negligence as question for jury.

Cited in *Solberg v. Schlosser*, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91, holding question of contributory negligence for jury where evidence is such that different persons may reasonably reach different conclusions.

18 N. D. 384, MEARS v. SOMERS LAND CO. 121 N. W. 916.

Possession of mortgagee under defective foreclosure as adverse.

Cited in note in 23 L.R.A.(N.S.) 754, on possession of mortgagee entering under incomplete or defective foreclosure as adverse.

18 N. D. 390, FIRST NAT. BANK v. LEWIS, 121 N. W. 836.

18 N. D. 397, DEAN v. DIMMICK, 122 N. W. 245.

Who may institute mandamus proceedings.

Distinguished in *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706, mandamus proceeding to vindicate public right may be brought in name of state on relation of any citizen of locality affected.

18 N. D. 402, STATE EX REL. DAVIS v. FABRICK, 121 N. W. 65.

18 N. D. 409, MASSEY v. RAE, 121 N. W. 75.

18 N. D. 417, TRONSRUD v. FARM LAND & FINANCE CO. 121 N. W. 68.

18 N. D. 421, SCHERER v. SCHLABERG, 24 L.R.A.(N.S.) 520, 122 N. W. 1000.

18 N. D. 441, YOUNG v. METCALF LAND CO. 122 N. W. 1101.

18 N. D. 463, ANDERSON v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 123 N. W. 281.

18 N. D. 467, MARTINSON v. REGAN, 123 N. W. 285.

Ability of vendor to perform contract for sale of land.

Cited in *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 101, 128 N. W. 691, to point that vendor need not be actually in situation to perform at time contract for sale of land is entered into.

18 N. D. 474, HUGHES v. HORSKY, 122 N. W. 799.

What may be combined in single question submitted to voters.

Cited in note in 26 L.R.A.(N.S.) 669, on what objects or purposes may be combined in single question submitted to voters.

18 N. D. 478, **RISING v. DICKINSON**, 23 L.R.A.(N.S.) 127, 128 AM. ST. REP. 779, 121 N. W. 616, 20 A. & E. ANN. CAS. 424.

18 N. D. 483, **AULTMANN-TAYLOR MACH. CO. v. CLAUSEN**, 121 N. W. 64.

18 N. D. 484, **STATE v. BEDNAR**, 121 N. W. 614, 20 A. & E. ANN. CAS. 458.

Sufficiency of indictment.

Cited in note in 26 L.R.A.(N.S.) 1036, on necessity that indictment or information show on face that prosecution carried on in name and by authority of state.

18 N. D. 488, **HEDDERICH v. HEDDERICH**, 123 N. W. 276.

Parol evidence to show intentional omission of child from will.

Cited in *Re Schultz*, 19 N. D. 688, 125 N. W. 555, holding parol evidence admissible to establish fact that testator's child omitted from will was intentionally omitted.

Orders reviewable on appeal from judgment.

Cited in *Paulsen v. Modern Woodman*, 21 N. D. 235, 130 N. W. 231, holding appeal from judgment alone ineffectual to bring up for review order made subsequent to judgment denying new trial.

Review of sufficiency of evidence.

Cited in *F. A. Patrick & Co. v. Nurnberg*, 21 N. D. 377, 131 N. W. 254, holding that sufficiency of evidence to sustain verdict cannot be reviewed where no motion for new trial is made.

Nonprejudicial error as ground for new trial.

Cited in *Hart v. Wyndmere*, 21 N. D. 383, 131 N. W. 231, holding error in failure to direct verdict, where it did not effect result, nonprejudicial and not ground for new trial.

18 N. D. 500, **STATE BANK v. CULLEN**, 121 N. W. 85.

18 N. D. 507, **BESSIE v. NORTHERN P. R. CO.** 121 N. W. 618.

18 N. D. 511, **LEISTIKOW v. ZUELSDORF**, 122 N. W. 340.

18 N. D. 517, **ENDERLIN INVEST. CO. v. NORDHAGEN**, 123 N. W. 390. Later phase of same case, 21 N. D. 25, 129 N. W. 1024.

18 N. D. 525, **STATE EX REL. HAGERT v. TEMPLETON**, 25 L.R.A.(N.S.) 234, 123 N. W. 282.

18 N. D. 528, **SCULLY STEEL & IRON CO. v. HANN**, 123 N. W. 275.

Dak. Rep.—37.

18 N. D. 532, SUCKER STATE DRILL CO. v. BROCK, 123 N. W. 667.

18 N. D. 534, STATE v. WINCHESTER, 122 N. W. 1111.

18 N. D. 550, HANSON v. SVARVERUD, 120 N. W. 550.

Presumption of writing.

Cited in *Mitchell v. Knudtson Land Co.* 19 N. D. 736, 124 N. W. 946, to point that it will be presumed that contract declared on, which is with-in statute of frauds, is in writing.

18 N. D. 556, POIRIER MFG. CO. v. KITTS, 120 N. W. 558.

Rights and remedies of conditional vendor on vendee's default.

Cited in notes in 133 Am. St. Rep. 564, on rights and remedies of conditional seller or buyer's default in payment; 23 L.R.A. (N.S.) 145, on action for price as waiver of right of conditional vendor to recover property.

18 N. D. 561, HOLCOMB v. HOLCOMB, 120 N. W. 547.

18 N. D. 570, COMFORD v. GREAT NORTHERN R. CO. 120 N. W. 875.

18 N. D. 578, HEMMI v. GROVER, 120 N. W. 561.

18 N. D. 583, STATE EX REL. STATE FARMERS' MUT. HAIL INS. CO. v. COOPER, 120 N. W. 878.

18 N. D. 587, LANDIS v. FYLES, 120 N. W. 566.

Duty to request instructions.

Cited in *State ex rel. Pepple v. Banik*, 21 N. D. 417, 131 N. W. 282, holding it duty to present written requests for instruction where party deem charge not sufficiently explicit.

18 N. D. 594, SCHNASE v. GOETZ, 120 N. W. 553.

Cross examination of witness as to conviction.

Cited in note in 30 L.R.A. (N.S.) 848, on cross-examination as proper mode of proving conviction of crime for purposes of impeachment.

18 N. D. 598, SUCKER STATE DRILL CO. v. BROCK, 120 N. W. 757.

18 N. D. 600, POWER v. KING, 123 AM. ST. REP. 784, 120 N. W. 543.

Validity of contract with intoxicated person.

Cited in note in 25 L.R.A. (N.S.) 597, 599, on validity of contract with intoxicated person.

**18 N. D. 603, QUEEN CITY F. INS. CO. v. FIRST NAT. BANK, 22
L.R.A. (N.S.) 509, 120 N. W. 545.**

18 N. D. 608, ROBERTS v. LITTLE, 120 N. W. 563.

**18 N. D. 616, STATE v. SCHOOL DIST. NO. 50, 138 AM. ST. REP.
787, 120 N. W. 555.**

NOTES
ON THE
NORTH DAKOTA REPORTS.
CASES IN 19 N. D.

19 N. D. 1, HYDE v. THOMPSON, 120 N. W. 1095.

19 N. D. 4, FLORA v. MATHWIG, 121 N. W. 63.

19 N. D. 8, EMERSON MFG. CO. v. TVEDT, 120 N. W. 1094.

19 N. D. 10, FIRST INTERNATIONAL BANK v. LEE, 120 N. W. 1093.

19 N. D. 13, YERKA v. RUTHRUFF, 25 L.R.A. (N.S.) 139, 120 N. W. 758.

19 N. D. 18, CHESLEY v. SOO LIGNITE COAL CO. 121 N. W. 73.

19 N. D. 23, SOULES v. BROTHERHOOD OF AMERICAN YEOMEN, 120 N. W. 760.

19 N. D. 34, McLAUGHLIN v. THOMPSON, 120 N. W. 554.

Presumption of suicide.

Cited in *Paulsen v. Modern Woodman*, 21 N. D. 235, 130 N. W. 231, holding that law presumes death from use of strychnine to be accidental, not suicidal.

Review of errors.

Cited in *Blessett v. Turcotte*, 20 N. D. 151, 127 N. W. 505 (dissenting opinion), on right to review errors assigned where no specifications of error are incorporated in settled statement.

19 N. D. 35, SCHMIDT v. BEISEKER, 120 N. W. 1096.

19 N. D. 38, SATTERBERG v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 121 N. W. 70.

19 N. D. 45, STATE EX REL. McCUE v. NORTHERN P. R. CO. 25 L.R.A. (N.S.) 1001, 120 N. W. 869.

Followed without discussion in State ex rel. McCue v. Minneapolis, St. P. & S. Ste. M. R. Co. 19 N. D. 57, 120 N. W. 874; State ex rel. McCue v. Great Northern R. Co. 19 N. D. 57, 120 N. W. 874.

19 N. D. 57, STATE EX REL. McCUE v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 120 N. W. 874.

19 N. D. 57, STATE EX REL. McCUE v. GREAT NORTHERN R. CO. 120 N. W. 874.

19 N. D. 58, COLUMBIAN LYCEUM BUREAU v. SHERMAN, 121 N. W. 765.

19 N. D. 61, FINN v. WALSH, 121 N. W. 766.

19 N. D. 70, YEGAN v. NORTHERN P. R. CO. 121 N. W. 205.

19 N. D. 82, SJOLI v. HOGENSON, 122 N. W. 1008.

19 N. D. 98, MAYVILLE v. ROSING, 26 L.R.A. (N.S.) 120, 123 N. W. 393.

19 N. D. 104, BOSCHKER v. VAN BEEK, 122 N. W. 338.

19 N. D. 112, WESTERN MFG. CO. v. PEABODY, 122 N. W. 332.

19 N. D. 116, FORMAN v. HEALEY, 121 N. W. 1122.

19 N. D. 131, STATE v. MAGILL, 22 L.R.A. (N.S.) 666, 122 N. W. 320.

19 N. D. 134, ST. PAUL, M. & M. R. CO. v. BLAKEMORE, 122 N. W. 333.

19 N. D. 139, HODGSON v. STATE FINANCE CO. 122 N. W. 336.
Validity of tax deed.

Cited in Tronsrud v. Farm Land Finance Co. 20 N. D. 567, 129 N. W. 359, holding tax deed void as conveyance of title where notice of redemption was not served on owner of land.

19 N. D. 144, CHANDLER v. STARLING, 121 N. W. 198.

Who may maintain action to try title to office.

Cited in *Jenness v. Clark*, 21 N. D. 160, 129 N. W. 357, holding that incumbent of public office, who has right to hold over until successor is elected and qualified as such special interest as enable him to maintain action against intruder to try title to office.

Prima facie evidence of title to office.

Cited in *Holtan v. Beck*, 20 N. D. 5, 125 N. W. 1048, to point that "certificate of appointment" to office is prima facie evidence of title to office.

19 N. D. 153, LARSON v. NEWMAN, 23 L.R.A.(N.S.) 849, 121 N. W. 202.

19 N. D. 160, HAGEN v. SACRISON, 26 L.R.A.(N.S.) 724, 123 N. W. 518.

Effect of mortgage on realty equitably converted.

Cited in *Wood v. Pehrsson*, 21 N. D. 357, 130 N. W. 1010, holding that mortgage on realty directed by will to be sold and proceeds distributed will be treated in equity as hypothecation by mortgagors of whatever interests in such estate they possessed at date of such mortgage to extent of proceeds of such realty.

19 N. D. 187, NILSON v. HORTON, 123 N. W. 397.

19 N. D. 191, JOHNSON v. SPOONHEIM, 123 N. W. 830.

19 N. D. 203, STATE v. KRUSE, 124 N. W. 385.

Sufficiency of information for maintaining liquor nuisance.

Cited in *State v. White*, 21 N. D. 444, 131 N. W. 261, holding information charging crime as having been committed at "certain place located in" named city and county sufficient, where no abatement of nuisance is sought or property levied for fine or costs.

19 N. D. 209, STATE EX REL. DAVIS v. WILLIS, 124 N. W. 706.

19 N. D. 227, BURKE v. SCHARF, 124 N. W. 79.

19 N. D. 249, STATE v. STEVENS, 123 N. W. 888.

19 N. D. 259, HANSON v. FRANKLIN, 123 N. W. 386.

19 N. D. 268, STATE v. LONGSTRETH, 121 N. W. 1114.

19 N. D. 286, STATE EX REL. McDONALD v. HOLMES, 123 N. W. 884.

19 N. D. 293, GRAND FORKS v. PAULSNESS, 123 N. W. 878.

19 N. D. 308, TUTTLE v. POLLOCK, 123 N. W. 399.

19 N. D. 317, SOCKMAN v. KEIM, 124 N. W. 64.

19 N. D. 326, STATE v. NYHUS, 27 L.R.A. (N.S.) 487, 124 N. W. 71.

19 N. D. 337, SMITH v. GAUB, 123 N. W. 827.

19 N. D. 344, STATE v. AMERICAN BOTTLING ASSO. 124 N. W. 396.

19 N. D. 345, KERMOTT v. BAGLEY, 124 N. W. 397.

19 N. D. 352, RINDLAUB v. RINDLAUB, 125 N. W. 479.

19 N. D. 396, STATE v. FARGO BOTTLING WORKS CO. 26 L.R.A. (N.S.) 872, 124 N. W. 387.

Followed without discussion in State v. American Bottling Asso. 19 N. D. 344, 124 N. W. 396.

Sufficiency of title of amendatory act.

Cited in School Dist. No. 94 v. King, 20 N. D. 614, 127 N. W. 515, holding it sufficient if amendment is germane to subject of amended act, and same is within title of original act.

19 N. D. 417, WINTERBERG v. VAN DE VORSTE, 122 N. W. 866.

19 N. D. 426, STATE v. O'NEAL, 124 N. W. 68.

19 N. D. 433, LANGWORTHY LUMBER CO. v. HUNT, 122 N. W. 865.

19 N. D. 438, HOPE v. GREAT NORTHERN R. CO. 122 N. W. 997.

19 N. D. 445, VIETS v. SILVER, 126 N. W. 239.

19 N. D. 450, CORBETT v. GREAT NORTHERN R. CO. 125 N. W. 1054.

19 N. D. 463, JOHNSON v. SOLIDAY, 126 N. W. 99.

19 N. D. 466, ROUNSEVILLE v. PAULSON, 126 N. W. 221.

19 N. D. 473, WEBER v. LEWIS, 34 L.R.A. (N.S.) 364, 126 N. W. 105.

19 N. D. 485, SECOND NAT. BANK v. WERNER, 126 N. W. 100.

19 N. D. 489, CITIZENS' NAT. BANK v. BRANDEN, 27 L.R.A. (N.S.) 858, 126 N. W. 102.

Discretion of court in vacation of default judgment.

Cited in Cline v. Duffy, 20 N. D. 525, 129 N. W. 75, reversing ruling denying motion to vacate default where it appears that court abused discretion vested in it; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, holding that ruling of trial court on motion to vacate default will not be reversed except for manifest abuse of discretion.

19 N. D. 496, F. MAYER BOOT & SHOE CO. v. FERGUSON, 126 N. W. 110.

19 N. D. 504, MARTIN v. ROYER, 125 N. W. 1027.

19 N. D. 509, NORTHERN STATE BANK v. BELLAMY, 31 L.R.A.(N.S.) 149, 125 N. W. 888.

19 N. D. 516, NORTH DAKOTA LUMBER CO. v. BULGER, 125 N. W. 832.

19 N. D. 522, BOYLE v. BOYLE, 126 N. W. 229.

19 N. D. 531, McKENZIE v. BOYNTON, 125 N. W. 1059.

Followed without special discussion in Stubbs v. Hoerr, 20 N. D. 26, 125 N. W. 1062.

Validity of tax deed.

Cited in Hanitch v. Beiseker, 21 N. D. 290, 130 N. W. 833, holding tax deed void as conveyance of title where no legal notice of expiration of time of redemption was served.

19 N. D. 538, BRAATZ v. FARGO, 27 L.R.A.(N.S.) 1169, 125 N. W. 1042.

19 N. D. 546, SINGER v. AUSTIN, 125 N. W. 560.

19 N. D. 551, LILAND v. TWETO, 125 N. W. 1032.

19 N. D. 574, CASSEDDY v. ROBERTSON, 125 N. W. 1045.

19 N. D. 582, LANG v. BAILES, 125 N. W. 891.

Review of sufficiency of evidence.

Cited in Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225, holding that refusal of trial court to set aside verdict because of insuf-

ficiency of evidence will not be disturbed where verdict is supported by substantial evidence.

19 N. D. 594, HOUGHTON IMPLEMENT CO. v. VAVROWSKI, 125 N. W. 1024.

19 N. D. 599, MCGREGOR v. HARM, 30 L.R.A.(N.S.) 649, 125 N. W. 885.

19 N. D. 606, WEBB v. WEGLEY, 125 N. W. 562.

19 N. D. 613, JUSTICE v. SOUDER, 125 N. W. 1029.

19 N. D. 621, DOWNEY v. NORTHERN P. R. CO. 26 L.R.A.(N.S.) 1017, 125 N. W. 475.

19 N. D. 630, DeLANEY v. WESTERN STOCK CO. 125 N. W. 499.

19 N. D. 634, HILDE v. NELSON, 125 N. W. 474.

19 N. D. 638, WHITNEY v. AKIN, 125 N. W. 470.

19 N. D. 645, CAMPBELL v. COULSTON, 124 N. W. 689.

19 N. D. 672, LITCHVILLE v. HANSON, 124 N. W. 1110.

19 N. D. 677, STRECKER v. RAILSON, 125 N. W. 560.

19 N. D. 679, STATE v. LANG, 125 N. W. 558.

Nature of bastardy proceedings.

Cited in *State v. Brandner*, 21 N. D. 310, 130 N. W. 941, to point that bastardy proceeding partake of nature of both civil and criminal proceedings.

19 N. D. 684, HILBISH v. ASADA, 125 N. W. 556.

19 N. D. 688, RE SCHULTZ, 125 N. W. 555.

19 N. D. 692, MATHEWS v. HANSON, 124 N. W. 1116.

19 N. D. 697, SELZER v. BAGLEY, 124 N. W. 426.

19 N. D. 699, HAMMOND v. NORTHWESTERN CONSTR. & IMPROV. CO. 124 N. W. 838.

19 N. D. 702, JAMES RIVER NAT. BANK v. WEBER, 124 N. W. 952.

19 N. D. 709, **HAMMOND v. NORTHWESTERN CONSTR. & IMPROV. CO.** 124 N. W. 427.

19 N. D. 713, **O'BRIEN v. O'BRIEN**, 125 N. W. 307.

19 N. D. 722, **FOLSOM v. NORTON**, 125 N. W. 310.

19 N. D. 736, **MITCHELL v. KNUDTSON LAND CO.** 124 N. W. 946.

19 N. D. 748, **TUTTLE v. TUTTLE**, 124 N. W. 429.

Waiver of appeal from divorce decree.

Cited in *Boyle v. Boyle*, 19 N. D. 522, 126 N. W. 229, holding that unconditional acceptance by attorney, pending appeal from divorce decree, of costs and counsel fees awarded, is waiver of appeal.

19 N. D. 751, **WEBSTER v. McLAREN**, 123 N. W. 395.

19 N. D. 756, **STATE v. WINCHESTER**, 122 N. W. 1111.

19 N. D. 771, **TRI-STATE TELEPH. & TELEG. CO. v. COSGRIFF**, 26 L.R.A.(N.S.) 1171, 124 N. W. 75.

19 N. D. 782, **STATE v. BALL**, 123 N. W. 826.

Sufficiency of information for maintaining liquor nuisance.

Cited in *State v. White*, 21 N. D. 444, 131 N. W. 261, holding information charging crime as having been committed at "certain place located in" named city and county sufficient, where no abatement of nuisance is sought or property liened for fine or costs.

19 N. D. 784, **WATERLOO GASOLINE ENGINE CO. v. O'NEIL**, 124 N. W. 951.

19 N. D. 787, **SIMMONS v. McCONVILLE**, 125 N. W. 304.

19 N. D. 794, **MARCHAND v. PERRIN**, 124 N. W. 1112.

19 N. D. 801, **REED v. HEGLIE**, 124 N. W. 1127.

19 N. D. 804, **STATE EX REL. MINEHAN v. MYERS**, 124 N. W. 701.

NOTES

ON THE

NORTH DAKOTA REPORTS.

CASES IN 20 N. D.

20 N. D. 1, SCHEER v. CLINTON FALLS NURSERY CO. 124 N. W. 1115.

20 N. D. 5, HOLTAN v. BECK, 125 N. W. 1048.

20 N. D. 18, ST. ANTHONY & D. ELEVATOR CO. v. DAWSON, 126 N. W. 1018.

20 N. D. 26, STUBBS v. HOERR, 125 N. W. 1062.

20 N. D. 27, BURLEIGH COUNTY v. KIDDER COUNTY, 125 N. W. 1062.

20 N. D. 42, FORZEN v. HURD, 126 N. W. 224.

20 N. D. 55, BERGSTROM v. SVENSON, 126 N. W. 497.

20 N. D. 62, STATE v. ILDVEDSEN, 126 N. W. 489.

Particular description in information for maintaining liquor nuisance.

Cited in State v. White, 21 N. D. 444, 131 N. W. 261, holding information charging crime as having been committed at "certain place located in" named city and county, sufficient designation of place, where no abatement of nuisance is sought or property lien for fine and costs.

20 N. D. 66, BEDDOW v. FLAGE, 126 N. W. 97.

20 N. D. 72, BRUEGGER v. CARTIER, 126 N. W. 491.

20 N. D. 86, OTTOW v. FRIESE, 126 N. W. 503.

20 N. D. 96, MILLER v. SMITH, 126 N. W. 499.

20 N. D. 105, STATE v. FLEMING, 126 N. W. 565.

20 N. D. 114, STATE v. MOELLER, 126 N. W. 568.

20 N. D. 124, CLEVELAND SCHOOL DIST. v. GREAT NORTHERN
R. CO. 28 L.R.A.(N.S.) 757, 126 N. W. 995.

Measure of damages for negligent setting out of fire.

Cited in Spicer v. Northern P. R. Co. 21 N. D. 61, 128 N. W. 302, as to
rule of damages for loss from fire negligently set out by railroad company.

20 N. D. 130, HACKNEY v. ADAM, 127 N. W. 519.

20 N. D. 137, ANETA MERCANTILE CO. v. GROSETH, 127 N.
W. 718.

20 N. D. 142, YOKELL v. ELDER, 127 N. W. 514.

20 N. D. 145, STATE v. FUNK, 30 L.R.A.(N.S.) 211, 127 N. W.
722.

20 N. D. 151, BLESSETT v. TURCOTTE, 127 N. W. 505.

20 N. D. 169, COCHRANE v. NATIONAL ELEVATOR CO. 127
N. W. 725.

20 N. D. 180, STATE EX REL. MILLER v. NORTON, 127 N. W.
717.

20 N. D. 182, KENMARE HARD COAL, BRICK & TILE CO. v.
RILEY, 126 N. W. 241.

20 N. D. 188, COLEAN MFG. CO. v. FRECKLER, 126 N. W. 1019.

20 N. D. 197, NORTHERN P. R. CO. v. BARLOW, 126 N. W. 233.

20 N. D. 211, CASEY v. FIRST BANK, 126 N. W. 1011.

20 N. D. 216, STATE v. WRIGHT, 126 N. W. 1023.

Error in refusal of instructions.

Cited in State v. Albertson, 20 N. D. 512, 128 N. W. 1122, holding that
error cannot be predicated upon refusal of court at close of state's case to
advise jury to return verdict of not guilty.

- 20 N. D. 225, **BORDEN v. McNAMARA**, 127 N. W. 104.
- 20 N. D. 238, **MEIGHEN v. CHANDLER**, 126 N. W. 992.
- 20 N. D. 247, **NORTHERN P. R. CO. v. AAS**, 126 N. W. 1016.
- 20 N. D. 256, **PAGE FARMERS' ELEVATOR CO. v. THOMPSON**, 126 N. W. 1009.
- 20 N. D. 261, **F. A. PATRICK & CO. v. AUSTIN**, 127 N. W. 109.
- 20 N. D. 268, **WIEMER v. WIEMER**, 126 N. W. 1009.
- 20 N. D. 270, **EMERADO FARMERS' ELEVATOR CO. v. FARMERS' BANK**, 29 L.R.A. (N.S.) 567, 127 N. W. 522.
- 20 N. D. 281, **STATE v. NOAH**, 124 N. W. 1121.
- 20 N. D. 295, **GOSS v. HERMAN**, 127 N. W. 78.
- 20 N. D. 307, **SOLBERG v. SCHLOSSER**, 30 L.R.A. (N.S.) 1111, 127 N. W. 91.
- 20 N. D. 316, **LEISEN v. ST. PAUL F. & M. INS. CO.** 60 L.R.A. (N.S.) 539, 127 N. W. 337.
- 20 N. D. 337, **STATE v. MERRY**, 127 N. W. 63.
- 20 N. D. 357, **STATE v. HEISER**, 127 N. W. 72.
- Followed without discussion in *State v. McAndress*, 20 N. D. 370, 127 N. W. 78; *State v. Koch*, 20 N. D. 370, 127 N. W. 78; *State v. Messer*, 20 N. D. 371, 127 N. W. 78; *State v. Andor*, 20 N. D. 372, 127 N. W. 78.
- Taxation of costs in criminal contempt.**
- Cited in *State v. Winbauer*, 21 N. D. 70, 128 N. W. 679, holding that costs and disbursements may be taxed against defendant found guilty of contempt.
- Authority of attorney general to file criminal information.**
- Cited in *State v. White*, 21 N. D. 444, 131 N. W. 261, holding that attorney general has authority to file criminal information in prosecution for keeping and maintaining liquor nuisance.
- 20 N. D. 370, **STATE v. McANDRESS**, 127 N. W. 78.
- 20 N. D. 370, **STATE v. KOCH**, 127 N. W. 78.
- 20 N. D. 371, **STATE v. MESSER**, 127 N. W. 78.

20 N. D. 372, STATE v. ANDOR, 127 N. W. 78.

20 N. D. 372, FITZMAURICE v. WILLIS, 127 N. W. 95.

Construction of statute as mandatory.

Cited in *State ex rel. Shaw v. Thompson*, 21 N. D. 426, 131 N. W. 231, to point that provision in registration statute that "no votes shall be received at any election," unless voters were registered, is mandatory.

20 N. D. 393, GREENFIELD SCHOOL DIST. v. HANNAFORD SPECIAL SCHOOL DIST. 127 N. W. 499.

20 N. D. 401, TISDALE v. WARD COUNTY, 127 N. W. 512.

20 N. D. 405, STATE EX REL. MILLER v. BURNHAM, 127 N. W. 504.

20 N. D. 406, SCHLOSSER v. GREAT NORTHERN R. CO. 127 N. W. 502.

20 N. D. 412, WINTERER v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 127 N. W. 995.

20 N. D. 412, STOLTZE v. HURD, 30 L.R.A.(N.S.) 1219, 128 N. W. 115.

20 N. D. 419, SMITH v. HOFF, 127 N. W. 1047.

20 N. D. 427, STATE EX REL. BITHULITIC & CONTRACTING v. MURPHY, 128 N. W. 303.

20 N. D. 432, STATE v. GUTTERMAN, 128 N. W. 307.

20 N. D. 434, ACTON v. FARGO & M. STREET R. CO. 128 N. W. 225.

20 N. D. 461, AULD v. CATHRO, 32 L.R.A.(N.S.) 71, 128 N. W. 1025.

Privilege of witnesses.

Cited in *Re Gray*, 88 Neb. 835, 33 L.R.A.(N.S.) 319, 130 N. W. 746 holding that physician may testify on behalf of either side in will contest between legatee and heirs at law, as to mental condition of testator, though information acquired solely in his professional capacity while attending him in his last illness.

20 N. D. 484, DIETER v. FRAINE, 128 N. W. 684.

20 N. D. 493, RANDALL v. JOHNSTONE, 128 N. W. 687.

Demurrer for misjoinder of causes of action.

Cited in *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 97,

123 N. W. 690, holding that demands for relief form no part of cause of action for purpose of determining whether demurrer lies because of misjoinder.

20 N. D. 500, LOHR v. HONSINGER, 128 N. W. 1035.

20 N. D. 509, STATE v. MILLER, 128 N. W. 1034.

20 N. D. 512, STATE v. ALBERTSON, 128 N. W. 1122.

20 N. D. 518, STATE v. ROBIDOU, 128 N. W. 1124.

20 N. D. 525, CLINE v. DUFFY, 129 N. W. 75.

Review of ruling on motion to vacate judgment.

Cited in Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, holding that ruling of court on motion to vacate default judgment will not be reversed except in case of manifest abuse of discretion.

20 N. D. 540, STATE EX REL. MOORE v. FURSTENEAU, 129 N. W. 81.

20 N. D. 545, STATE v. STABER, 129 N. W. 104.

20 N. D. 555, STATE v. FUJITA, 129 N. W. 360.

20 N. D. 567, TRONSRUD v. FARM LAND & FINANCE CO. 129 N. W. 359.

20 N. D. 570, LEE v. CHARMLEY, 33 L.R.A. (N.S.) 275, 129 N. W. 448.

20 N. D. 579, VALLANCEY v. HUNT, 34 L.R.A. (N.S.) 473, 129 N. W. 455.

20 N. D. 592, STATE EX REL. DORVAL v. HAMILTON, 129 N. W. 916.

Followed without discussion in State ex rel. Kramer v. Kiefer, 21 N. D. 69, 129 N. W. 925.

20 N. D. 614, SCHOOL DIST. NO. 94 v. KING, 127 N. W. 515.

20 N. D. 622, STATE EX REL. HAGENDORF v. BLAISDELL, 127 N. W. 720.

Original jurisdiction to issue mandamus.

Cited in State ex rel. Shaw v. Thompson, 21 N. D. 426, 131 N. W. 231, holding that under peculiar facts of case supreme court has jurisdiction to issue original writ to compel city auditor to prepare and cause to be furnished. Rep.—38.

nished ballots and election supplies necessary to conduct election on question of commission form of government.

20 N. D. 628, STATE EX REL. WILLIAMS v. MEYER, 127 N. W. 834.

20 N. D. 634, BICKFORD v. WARD COUNTY, 127 N. W. 103.

20 N. D. 635, STERNBERG v. LARSON, 127 N. W. 993.

20 N. D. 637, LOWRY v. PIPER, 127 N. W. 1046.

20 N. D. 639, SCHWARTZ v. HENDRICKSON, 128 N. W. 117.

20 N. D. 642, HOLLINSHEAD v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 127 N. W. 993.

Followed without discussion in *Winterer v. Minneapolis, St. P. & S. Ste. M. R. Co.* 20 N. D. 412, 127 N. W. 995.

20 N. D. 646, MORRIS v. BRADLEY, 128 N. W. 118.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 1 S. D.

1 S. D. 1, QUEBEC BANK v. CARROLL, 44 N. W. 723.

Appeal from dismissal of attachment or garnishment.

Cited in *Red River Valley Bank v. Freeman*, 1 S. D. 196, 46 N. W. 36, holding order vacating attachment appealable; *Hall v. Harris*, 1 S. D. 279, 36 Am. Rep. 730, 46 N. W. 931, holding an order denying a motion to discharge an attachment as to property claimed to be exempt, on the ground that the debt for which the attachment was issued was incurred for property obtained by false pretenses conclusive against the attachment defendant's right to sue the sheriff for the value of the property as exempt; *Bristol v. Brent*, 35 Utah, 213, 99 Pac. 1000, holding order discharging garnishee previous to rendition of judgment in main action in rem against garnished property is appealable.

Construction of statutes.

Cited in *Lawrence v. Ewert*, 21 S. D. 580, 114 N. W. 709 (dissenting opinion), on construction of statutes passed at different times.

Distinguished in *Hroch v. Aultman & T. Co.* 3 S. D. 477, 54 N. W. 269, on the ground that the act involved had not been construed in the state of its adoption.

1 S. D. 2, DRISCOLL v. JONES, 44 N. W. 726.

Abolishing of office.

Cited in *Smith v. Tosini*, 1 S. D. 632, 48 N. W. 299, holding that an action commenced and tried in a territorial district court, which, before rendition of the decision, became extinct by the admission of South Dakota as a state, is properly decided by the judge who tried the case, who became judge of the circuit court.

Filling of vacancy in office.

Cited in *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882, holding that since Mich. L. A. 1901, No. 284, creating the office of superintendent of public works of Detroit, was unconstitutional and void, in so far as it provides for a provisional appointment to the said office, a vacancy, within the provision of said act providing for the filling of a vacancy, existed at once.

Distinguished in *State ex rel. Holmes v. Finnerud*, 7 S. D. 237, 64 N. W. 121, holding that vacancy in Board of Regents can be filled by governor only.

Mandamus to obtain possession of office.

Cited in *State ex rel. Ayers v. Kipp*, 10 S. D. 495, 74 N. W. 440, sustaining right of one holding certificate of election or commission from officer or tribunal to sue out writ of mandamus to be put in possession of office, books, papers, and office seal; *Cameron v. Parker*, 2 Okla. 277, 319, 38 Pac. 14, holding that an incumbent of a public office who has been removed therefrom by the governor, may be compelled by mandamus to deliver the property and insignia of said office to his successor; *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025, holding that the right of one holding a valid certificate of election, who has qualified for office, to mandamus to admit him into office, cannot be defeated because of the existence of facts putting his ultimate title in question; *Chandler v. Starling*, 19 N. D. 144, 121 N. W. 198, holding mandamus proper remedy to compel recognition of title to office.

Cited in notes in 98 Am. St. Rep. 886, on mandamus as proper remedy against public officers; 31 L.R.A. 343, 347, on mandamus to compel surrender of office.

Distinguished in *Fuller v. Roberts County*, 9 S. D. 216, 68 N. W. 308, holding that it will be presumed that if plaintiff in action to recover his salary after payment to his predecessor in office, who continued to perform the duties thereof, had applied to the court, it would at once have placed him in possession of the office pending the litigation of his election and proof of due qualification.

1 S. D. 20, DORNE v. RICHMOND SILVER MIN. CO. 44 N. W. 1021.**Jurisdiction in cases pending at admission of state.**

Cited in *Higgins v. Brown*, 20 Okla. 355, 94 Pac. 703, 1 Okla. Crim. Rep. 33, holding state court has jurisdiction of indictment for murder pending in United States court at time of admission of state to Union; *Kenyon v. Knipe*, 46 Fed. 309, holding that the Federal courts have no more right to hear and determine a cause involving a state question, when the cause was begun in territorial courts and subsequently removed under said § 23 of the enabling act, than as though it was commenced since the state was admitted.

1 S. D. 28, COMMERCIAL NAT. BANK v. SMITH, 44 N. W. 1024.**Appealability of order.**

Cited in *Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co.* 2 S. D. 546, 51 N. W. 342, holding not appealable order of injunction granted by circuit judge within his circuit upon return of an order to show cause returnable before himself and concluding with the words "done at chambers," reciting that "the judge of said court having considered the return" and concluding with the words "done at chambers;" *Holden v. Haserodt*, 2 S. D. 220, 49 N. W. 97, holding not appealable, order allowing peremptory writ of mandamus made by judge without limits of his own circuit in an action in another circuit on account of the absence of the judge of the latter.

Distinguished in *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905, holding under statute refusal to vacate order enjoining foreclosure of real estate mortgage by advertisement under power of sale is not appealable.

Use of affidavits in injunction proceeding.

Cited in *McCann v. Mortgage Bank & Invest. Co.* 3 N. D. 172, 54 N. W. 1026, holding that rebutting affidavits cannot be read on an application by a mortgagor to enjoin further proceedings by advertisement.

1 S. D. 31, GORDON v. LAWRENCE COUNTY, 44 N. W. 1035.**1 S. D. 35, WYMAN v. WILMARTH, 44 N. W. 1151.****1 S. D. 35, WILLIAM DEERING & CO. v. WARREN, 44 N. W. 1068.****Who may bring attachment suit.**

Cited in *State Bank v. Mottin*, 47 Kan. 455, 28 Pac. 200, holding that although a chattel mortgagee has ample security for his debt, he may maintain an attachment for the same debt against the mortgaged and other property of the debtor.

Sufficiency of affidavit for attachment.

Cited in *F. Mayer Boot & Shoe Co. v. Ferguson*, 17 N. D. 102, 14 L.R.A.(N.S.) 1126, 114 N. W. 1091, holding affidavit by plaintiff's attorney sufficient; *Citizens' Bank v. Corkings*, 9 S. D. 614, 62 Am. St. Rep. 891, 70 N. W. 1059, sustaining right of subsequent attaching creditors to apply for dissolution of prior attachment for irregularities in or insufficiency of affidavit; *Weil v. Quam*, 21 N. D. 344, 131 N. W. 244, holding it not sufficient for affidavit to state where goods are without showing what they are.

Cited in notes in 123 Am. St. Rep. 1032, on proceedings to dissolve attachments; 14 L.R.A.(N.S.) 1127, on necessity that affidavit for attachment, made by agent or attorney, show personal knowledge.

Grounds for dissolution of attachment.

Cited in *Pech Mfg. Co. v. Groves*, 6 S. D. 504, 62 N. W. 109, holding fact that proceedings are carried on concurrently to foreclose by advertisement chattel mortgage securing debt not ground for dissolving at-

attachment on real property of nonresident; *Finch v. Armstrong*, 255, 68 N. W. 740, holding new ground of attachment created by authorizing issuance of attachment for debt incurred for property obtained under false pretenses.

1 S. D. 46, WINONA & ST. P. R. CO. v. WATERTOWN, 4 1072.

Distinction between taxes and assessments.

Cited in *Farnham v. Lincoln*, 75 Neb. 502, 106 N. W. 666, holding constitutional provision against release of taxes due municipalities applicable to special assessments; *Whittaker v. Deadwood*, 23 S. D. 139 Am. St. Rep. 1076, 122 N. W. 590, holding special assessments for local improvements not taxation.

Cited in note in 28 L.R.A.(N.S.) 1130, 1134, 1135, 1159, on authority for improvements by front foot rule.

— Local assessment on exempt property.

Cited in *Farwell v. Des Moines Brick Mfg. Co.* 97 Iowa, 286, 363, 66 N. W. 176, holding that a statute declaring that certain lands not be "taxable for any city purpose," does not exempt them from assessments for curbing and paving; *Ittner v. Robinson*, 35 N. D. 52 N. W. 846, holding that a lessee's agreement to pay "all taxes" may be assessed against said premises during the continuance of lease, does not include special assessments for the construction of sewer; *Yates v. Milwaukee*, 92 Wis. 352, 66 N. W. 248, holding that a statute providing that property shall be "exempt from taxation" so long as used for the purpose of holding the annual state fair, does not exempt said society from sewer assessments.

Cited in notes in 28 L.R.A. 252, on liability of railroad right of way for assessment for local improvements; 35 L.R.A. 35, on liability of assessments for benefits of property exempt from general taxation.

1 S. D. 62, STATE, EX REL. DRY RUN TWP. v. BOARD OF ASSESSMENT, 45 N. W. 38.

1 S. D. 71, BLOOD v. FARGO & S. ELEVATOR CO. 45 N. W. 200.

Extrinsic evidence to explain contract.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 100, holding contemporaneous contracts admissible to explain contract where no ambiguity.

1 S. D. 78, MERCHANTS' NAT. BANK v. MCKINNEY, 45 N. W. 203.

Sufficiency of record on appeal.

Cited in *D. S. B. Johnston Land-Mortg. Co. v. Case*, 13 S. D. 100, 101 N. W. 90, holding that alleged error in denying a new trial cannot be considered on appeal except in so far as disclosed by the judgment.

where the statement of facts or bill of exceptions used on motion for new trial did not specify the particulars in which the evidence is insufficient.

—Dismissal of appeal for incompleteness of record.

Followed in *Merchants' Nat. Bank v. McKinney*, 2 S. D. 106, 48 N. W. 841, refusing to dismiss appeal from judgment rendered by court on facts found by referee and from an order for judgment because no bill of exceptions is in the record.

Cited in *Ellis v. Wait*, 4 S. D. 31, 54 N. W. 925, holding that an appeal will not be dismissed because the record is not sufficiently full.

Cited in note in 25 L.R.A.(N.S.) 866, on disposition of appeal where without fault of appellant record is lost or incomplete.

1 S. D. 80, KELSEY v. CHICAGO & N. W. R. CO. 45 N. W. 204.

Presumption on appeal as to amendments.

Cited in *Bullen v. Arkansas Valley & W. R. Co.* 20 Okla. 819, 95 Pac. 476, holding amendment might be implied where court granted leave to amend and trial proceeded on theory complaint had been amended.

Discretion of trial court as to amendments.

Cited in *Green v. Hughitt School Twp.* 5 S. D. 452, 59 N. W. 224, holding that discretion of trial court as to amendment of pleadings will not be disturbed on appeal in absence of manifested use of discretion.

Sufficiency of procedure and pleadings in justice court.

Cited in *Hanson v. Gronlie*, 17 N. D. 191, 115 N. W. 666, holding all that law requires is that complaint be sufficient to apprise person of common understanding of exact nature and extent of plaintiff's claim; *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, holding oral complaint in an action before justice of the peace sufficient where it will when construed with answer enable person of common understanding to know what was intended; *Jerome v. Rust*, 19 S. D. 263, 103 N. W. 26, sustaining judgment for plaintiff rendered on appeal from judgment for plaintiff in justice court upon insufficient complaint; *Moore v. Persson*, 21 S. D. 290, 111 N. W. 633, to point that pleadings in justice court need be only such as enable person of common understanding to know what is intended.

Construction of verdict.

Cited in *Jeansch v. Lewis*, 1 S. D. 609, 48 N. W. 128, holding that a verdict should be reasonably construed so as to carry out the jury's intention; *Spofford v. Rhode Island Suburban R. Co.* 29 R. I. 34, 69 Atl. 2, holding verdict valid though title of clause did not indicate party actually held liable thereby; *Miles v. Penn Mut. L. Ins. Co.* 23 S. D. 400, 122 N. W. 249, holding verdict good, though informal, where intent of jury is clearly understood by court.

Presumption and burden of proof as to negligence in setting out fire by locomotive.

Cited in *Chicago, B. & Q. R. Co. v. Beal*, 4 Neb. (Unof.) 510, 94 N. W. 956, holding burden of proof is on railroad company to show engine

was not faulty in construction and was properly equipped and where it appears fire was set out thereby; *White v. Chicago*, P. R. Co. 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146, holding that the fire originated from a spark from one of the defendant imposes on defendant the burden of proving that it was properly with spark arresters and carefully managed; *Cronk v. Chicago*, St. P. R. Co. 3 S. D. 93, 52 N. W. 420, holding prima facie railroad company made out on proof that the damage was caused by sparks from its locomotive; *Yankton Fire Ins. Co. v. Fremont*, Valley R. Co. 7 S. D. 428, 64 N. W. 514, holding presumption of negligence raised by evidence tending to prove that fire was caused by spark from road right of way by passing engine.

Question for jury as to negligence in setting of fire by locomotive.

Cited in *Great Northern R. Co. v. Coats*, 53 C. C. A. 382, 118 P. R. Co. 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146, holding that (dissenting opinion), the majority holding that a court cannot determine as a matter of law that a locomotive, the sparks from which caused a damaging fire, was properly operated, when the defendant's negligence thereof was given by its operatives, and the plaintiff had no evidence tending to show that it was operated negligently for a very long time when in the proximity of combustible material on its right of way; *Liverpool, L. & G. Ins. Co. v. Southern P. Co.* 125 Cal. 434, 58 P. 434, holding that the use of the word "probable" in an instruction to the jury, "if you find it to be more probable that the fire was caused by sparks from the swing engine than from any other cause, your finding at that point, should be accordingly," does not put the question in the realm of surmise and conjecture; *Smith v. Northern P. R. Co.* 17, 53 N. W. 173, holding the question whether the inference of negligence on the part of a railroad company from the mere setting out of fire has been overthrown a question for the court in the first instance; *Preece v. Rio Grande Western R. Co.* 24 Utah, 493, 68 Pac. 41, holding that question of negligence is for jury where there is other evidence tending to show negligence than that showing engine started fire, though presumption that setting out of fire is overcome.

Proximate cause of loss from fire set by locomotive.

Cited in *Chicago & E. I. R. Co. v. Ross*, 24 Ind. App. 222, 451, holding that a railroad company's negligence is the proximate cause of another's loss, when a fire started by it on its right of way was caused by natural causes and without the intervention of any independent responsible human cause to a warehouse, and thence by like cause to cars containing his property, which was destroyed; *Chicago & E. I. R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033, holding that the proximate cause of fire from defendant's locomotive is the proximate cause of the loss of plaintiff's barn, where sparks from said locomotive ignited a barn and thence naturally passed to plaintiff's barn, which was destroyed.

D. 94, **BEUTER v. BEUTER**, 3 L.R.A. 562, 45 N. W. 208.

ing wife to execute instrument by duress.

d in *Wentsky v. Sirovy*, 142 Iowa, 385, 121 N. W. 27, holding it
ess of person for husband to induce wife to sign stipulation by
s to arrest her and her paramour.

s right to maintenance apart from husband without divorce.

d in *Baier v. Baier*, 91 Minn. 165, 97 N. W. 671, holding wife
apart from husband for cause legally justifying her may main-
quitable action against him for allowance for her separate support;
v. *Behrle*, 120 Mo. App. 677, 97 S. W. 1005, holding court has
jurisdiction under statute to award wife separate maintenance
of husband's estate when he has abandoned her and such proceeding
analogous to divorce action.

d in note in 77 Am. St. Rep. 231-233, 235, on wife's right to main-
separate suit for maintenance independent of suit for divorce.

tion as ground for divorce.

d in note in 9 L.R.A. 698, on divorce on ground of desertion.

y jurisdiction to compel husband to support wife.

d in *Edgerton v. Edgerton*, 12 Mont. 122, 16 L.R.A. 94, 33 Am.
ep. 557, 29 Pac. 966, holding that a suit to compel a husband, if
to support his wife, whom he has deserted and left destitute, is
the jurisdiction of equity.

D. 107, **LANE v. STARR**, 45 N. W. 212.

owed without discussion on this point in *Hornick Drug Co. v. Lane*,
D. 139, 45 N. W. 329.

of mortgagor's retention of possession or agency to sell.

d in *First Nat. Bk. v. Calkins*, 12 S. D. 411, 81 N. W. 732, holding
l mortgage not necessarily void as to creditors by fact that mortgagee
s mortgagor to sell and appropriate to his own use part of the mort-
property; *Red River Valley Nat. Bank v. Barnes*, 8 N. D. 432, 79 N.
D, holding mortgage not void as to creditors because of stipulation for
agor's retaining possession, selling at retail, and paying proceeds to
agee less reasonable monthly sum for support of mortgagor's family; *F.*
Boot & Shoe Co. v. Shenkberg Co. 11 S. D. 620, 80 N. W. 126, holding
agor's retention of chattels under agreement to sell same and ap-
alance after replenishing stock and supplying own needs to payment of
or per se evidence of actual fraud; *Noyes v. Ross*, 23 Mont. 425, 47
400, 75 Am. St. Rep. 543, 59 Pac. 367, holding that a mortgagor's
rity under a chattel mortgage to sell at retail in the usual course of
ess for cash, or on not to exceed thirty days' credit to responsible
s, does not per se render the mortgage void as to creditors.

tinguished in *Maier v. Freeman*, 112 Cal. 8, 53 Am. St. Rep. 151, 44
357, holding that the lien created by a writing, wherein mortgagees
nted the mortgagor their agent to take the mortgaged property to
er place and sell it, he to turn over the proceeds to them to be ap-

plied on the mortgage, does not attach to the proceeds of the property unpaid by the purchaser.

1 S. D. 117, GREELEY v. WINSOR, 36 AM. ST. REP. 720, 45 N. W. 325.

Validity of chattel mortgage.

Cited in *Peet v. Dakota F. & M. Ins. Co.* 7 S. D. 410, 64 N. W. 206, upholding chattel mortgage forming part of lease as between parties though not properly witnessed or filed.

— As against creditors.

Cited in *Egan State Bank v. Rice*, 56 C. C. A. 157, 119 Fed. 107, holding mortgage on stock of merchandise void as against creditors, where mortgagor retained possession of chattels under agreement allowing him to sell them; *First Nat. Bank v. Calkins*, 12 S. D. 411, 81 N. W. 732, holding chattel mortgage not necessarily void as to creditors by fact that mortgagee permits mortgagor to sell and appropriate to his own use part of mortgaged property.

Lien on tenant's property.

Cited in note in 119 Am. St. Rep. 123, on landlord's right to lien on tenant's property.

1 S. D. 125, NOYES v. LANE, 45 N. W. 327.

Sufficiency of record on appeal.

Cited in *Ellis v. Wait*, 4 S. D. 31, 54 N. W. 925, refusing to dismiss appeal because record is not sufficiently full for examination of main questions of error assigned.

— What must be set out in abstract.

Cited in *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 634, 67 N. W. 837, holding that objection by appellee after reversal to taxation of costs for printing of so much of appellant's abstract as contains the evidence on the ground that the bill of exceptions contained no specifications of errors relied on or particulars in which the evidence was insufficient cannot be considered unless the omission is shown by appellant's abstract or by an additional abstract filed by appellee; *Arenson v. Spawn*, 2 S. D. 269, 39 Am. St. Rep. 783, 49 N. W. 1066, holding exclusion of written document not available on appeal unless such document or sufficient of its contents or the facts on which its competency depends are set out in the abstract with sufficient fullness to inform the appellate court of all the material facts on which the ruling was made.

Appellant's abstract as record.

Cited in *Valley City Land & Irrig. Co. v. Schone*, 2 S. D. 344, 50 N. W. 356, holding abstract prepared and served by appellants and consented to by respondent, the record upon which a case is heard in the South Dakota supreme court; *Bem v. Bem*, 4 S. D. 138, 55 N. W. 1102, holding abstract the record upon which a case is heard in the South Dakota supreme court except in cases of dispute.

Presumption of truth of abstract.

Cited in *Cleveland v. Evans*, 5 S. D. 53, 58 N. W. 8, holding that appellant's uncontradicted abstract on appeal will be treated as true in appellate court; *Billingshurst v. Spink County*, 5 S. D. 84, 58 N. W. 272, holding that statements in appellant's abstract that notice of appeal was certified will be taken as true on appeal notwithstanding appellee's affidavit denying service of such notice where he fails to file an amended abstract showing the incorrectness of his statement.

Necessity for bill of exceptions.

Cited in *Daly v. Forsythe*, 9 S. D. 34, 67 N. W. 948, holding no bill of exceptions necessary on appeal from denial of motion for order foreclosing it for making motion for new trial for newly discovered evidence.

1 S. D. 129, HORNICK DRUG CO. v. LANE, 45 N. W. 329.**Discharge of attachment.**

Cited in *Noyes v. Lane*, 2 S. D. 55, 48 N. W. 322, reversing order discharging warrant for attachment where record presented by abstract showed that affidavit alleged defendant was about to secrete his property and defendant did not deny it; *Lindquist v. Johnson*, 12 S. D. 486, 81 N. W. 900, holding attachment should not be discharged where affidavit alleged debt was incurred for property obtained by false pretenses and defendant failed to deny it.

Cited in note in 123 Am. St. Rep. 1054, on proceedings to dissolve attachments.

—Requisites of affidavit on motion for.

Cited in *Watson v. Loewenberg*, 34 Or. 323, 56 Pac. 289, holding that a defendant who seeks to have an attachment discharged by a traverse of the facts alleged in plaintiff's affidavit must deny every statutory ground alleged in the procuring affidavit in as direct and explicit terms as if it were an answer to a complaint, and it must be tested by the same rules of pleading; *Lindquist v. Johnson*, 12 S. D. 486, 81 N. W. 900, holding that attachment issued on affidavit stating several grounds should not be discharged on affidavits which failed to traverse one of such grounds.

1 S. D. 131, HAMLIN COUNTY v. CLARK COUNTY, 45 N. W. 329.**Obligation of county to support poor.**

Cited in *Lander County v. Humboldt County*, 21 Nev. 415, 32 Pac. 849, holding that a county which has furnished aid, as required by Nev. Gen. Stat. § 1986, to nonresidents who fall sick within said county, cannot recover the amount thereof from the county of which such person is a resident; *St. Luke's Hospital Asso. v. Grand Forks County*, 8 N. D. 241, 77 N. W. 598, holding that extension of relief to pauper by stranger gives latter no right to recover expenditure from county in absence of statute providing therefor or authorization by proper party; *Ogden City v. Weber County*, 26 Utah, 129, 72 Pac. 433 (dissenting opinion), as to obligation of county to support dependent poor being purely statutory.

Action taken by appellate court on reversing judgment.

Distinguished in *McDonald v. Fuller*, 11 S. D. 355, 74 Am. St. Rep. 815, 77 N. W. 581, holding that supreme court will not on reversing judgment for plaintiff direct verdict in defendant's favor because of erroneous exclusion of execution under which defendant sought to justify seizure.

1 S. D. 138, HEGELER v. COMSTOCK, 8 L.R.A. 393, 45 N. W. 331.

Negotiability of note.

Cited in *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804, holding non-negotiable note not payable to order of bearer; *National Bank of Commerce v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874 (dissenting opinion), majority holding negotiability of notes not affected by stipulation not appearing therein for specified discount on payment before maturity; *National Bank of Commerce v. Feeney*, 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186, holding that a stipulation for 10 per cent discount if paid before maturity renders a note non-negotiable. *Brooke v. Struthers*, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 272, the majority holding a promissory note non-negotiable when the mortgage, made collateral thereto, binds the mortgagor to pay all taxes that may be levied against the mortgage, a liability which otherwise would fall on the mortgagee, as such provision makes the amount of the debt uncertain.

Cited in note in 125 Am. St. Rep. 204, on agreements and conditions destroying negotiability.

—Effect of provision for attorney's fees or cost of collection.

Cited in *Second Nat. Bank v. Basuier*, 12 C. C. A. 517, 27 U. S. App. 541, 65 Fed. 58, holding non-negotiable, note providing for payment of "costs of collection;" *Stebbins v. Lardner*, 2 S. D. 127, 48 N. W. 847, holding non-negotiable, note providing for payment of attorney's fees in addition to other costs of collection; *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, holding note containing agreement to pay reasonable attorney's fees in case of suit, non-negotiable.

Distinguished in *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439, holding negotiability of note not destroyed by stipulation for attorney's fees.

—Note bearing variable rates of interest after maturity.

Cited in *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4, holding note providing it and interest coupons shall bear increased rate of interest if not paid when due is non-negotiable under statute; *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946, holding note providing for payment of interest from date if not paid at maturity is non-negotiable under statute; *Davis v. Brady*, 17 S. D. 511, 97 N. W. 719, holding instrument bearing ten per cent interest from date until paid, payable annually on principal and overdue unpaid interest, said interest, if not paid when due to become part of principal and bear interest at twelve per cent until paid is not negotiable under statute.

Distinguished in *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859,

62 N. W. 958, holding negotiability affected by provision in note for specified higher rate of interest after maturity.

Presumption as to law of other state.

Cited in *Commercial Bank v. Jackson*, 9 S. D. 605, 70 N. W. 846, holding law of other state as to order of payment of notes held by different persons, secured by same mortgage presumed to be same as that of forum.

1 S. D. 150, THOMAS v. PENDLETON, 36 AM. ST. REP. 726, 46 N. W. 180.

Presumption as to foreign law.

Cited in *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255, holding law of foreign state is presumed to be same as law of forum concerning effect of extension in releasing surety.

Cited in note in 67 L.R.A. 53, 56, on how case determined when proper foreign law not proved.

— Action on foreign judgment.

Cited in *Angle v. Manchester*, 3 Neb. (Unof.) 252, 91 N. W. 501, holding action not maintainable on foreign judgment where foreign laws as to manner of procuring it were alleged but not proved; *Harn v. Cole*, 20 Okla. 553, 95 Pac. 415, holding action not maintainable on foreign judgment by confession not in accordance with domestic law, which is presumed to be same as law of foreign state.

1 S. W. 155, WARDER, B. & G. CO. v. INGLI, 46 N. W. 181.

Sufficiency of possession to support possessory action.

Cited in *Morgan v. Jackson*, 32 Ind. App. 169, 69 N. E. 410 (dissenting opinion), on effect of proof of peaceful possession by one party prior to taking by another to establish former's right to property.

Waiver of objection by nonaction at proper time.

Cited in *George v. Kotan*, 18 S. D. 437, 101 N. W. 31, holding right to object that affidavit in support of motion for change of venue was not served with notice of motion is waived by accepting service of affidavit and allowing same to be read without objection at hearing; *Rosum v. Hodges*, 1 S. D. 308, 9 L.R.A. 817, 47 N. W. 140, holding the failure to object to the admission of evidence of the highest market value of property converted, a concession that it might be regarded as proper evidence, although the complaint may have shown an intention to take as the measure of damages the value of the property at the time of the conversion with interest; *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816, holding that incompetent evidence, if relevant, becomes competent if admitted without objection; *Baleom v. O'Brien*, 13 S. D. 425, 83 N. W. 562, holding it proper to refuse to direct a verdict for defendants at the close of plaintiff's evidence if sufficient evidence to support plaintiff's case has been admitted without objection, although such evidence would have been inadmissible as hearsay if properly objected to; *Southern P. Co. v. Hall*, 41 C. C. A. 50, 100 Fed. 760, holding that it is not error to refuse to instruct a jury not to consider evidence which was introduced by the party making the request;

Lindsay v. Pettigrew, 6 S. D. 130, 60 N. W. 744, holding complaint in complaint supplied by evidence received without objection in support of judgment obtained on other grounds against evidence actively appearing in the record; Yetzer v. Young, 3 S. D. 263, 1054, holding objection that parol evidence of sheriff is incompetent levy, waived by failure to object thereto; Willard v. Monarch 10 N. D. 400, 87 N. W. 996, holding objection that no evidence of grain at time of conversion is before the court not first on appeal where its value at time of delivery was stipulated and as to time of conversion given.

Distinguished in Griswold Linseed Oil Co. v. Lee, 1 S. D. 5 St. Rep. 761, 47 N. W. 955, holding that an objection that counts and exhibits tending to controvert the merits of defendant's defense inadmissible on an application to set aside a judgment by court first be raised on appeal.

When verdict may be directed.

Cited in Merchants' Nat. Bank v. Stebbins, 15 S. D. 280, 89 holding that to authorize the court to direct a verdict for either evidence of the opposite party must be considered as undisputed must be given the benefit of all reasonable influences arising from

1 S. D. 158, CUMINS v. LAWRENCE COUNTY, 46 N.

Affirmed on rehearing in 2 S. D. 452, 50 N. W. 900

Sufficiency of denial.

Cited in Hill v. Walsh, 6 S. D. 421, 61 N. W. 440, holding directed against answer containing absolute and unqualified denial allegation of complaint properly overruled irrespective of an affirmative defense.

— On information and belief.

Cited in Law Trust Soc. v. Hogue, 37 Or. 544, 62 Pac. 380, 6 holding that an answer alleging that defendants have no knowledge information sufficient to form a belief as to the truth of an allegation the complaint is insufficient to put said allegation at issue, under Ann. Laws, § 72, requiring that "the answer of the defendant shall contain a specific denial of each material allegation of the complaint or by the defendant, or of any knowledge or information thereof to form a belief."

Cited in notes in 9 N. D. 633, on pleading in actions for trover conversion; 133 Am. St. Rep. 107, as to when denials on information and belief are permissible.

Distinguished in State ex rel. Milsted v. Butte City Water Co. 199, 32 L.R.A. 697, 56 Am. St. Rep. 574, 44 Pac. 966, holding answer that "as to whether relator is a tenant in possession of premises, it had no knowledge or information upon which to form a belief, and therefore denies the same," is not a sufficient denial of allegation and belief.

Payment of coupons on county bonds.

Limited in *Bailey v. Lawrence County*, 2 S. D. 533, 51 N. W. 331, holding county treasurer not justified in paying coupons from other source than specific fund raised for purpose until ordered by county commissioners under provision for payment being made only on proper warrants of all the commissioners.

1 S. D. 167, BENEDICT v. RALYA, 46 N. W. 188.

1 S. D. 172, WYMAN v. WILMARTH, 46 N. W. 190.

Grounds for attachment.

Cited in note in 30 L.R.A. 468, 479, 486, on what intent to defraud will sustain an attachment.

— Obtaining property by false pretense.

Cited in *Pearsons v. Peters*, 19 S. D. 162, 102 N. W. 606, holding attachment properly dissolved where affidavit for attachment alleged obtaining of property under false pretenses, but evidence of such fact was inadmissible, under complaint; *Finch v. Armstrong*, 9 S. D. 255, 68 N. W. 740, holding new ground of attachment created by statute authorizing issuance of attachment for debt incurred for property obtained under false pretenses.

Burden of proof on motion to discharge attachment.

Cited in *Jones v. Meyer*, 7 S. D. 152, 63 N. W. 773, holding that attaching creditor has burden of proving by fair preponderance of evidence that some ground for attachment specified in the affidavit existed; *Trebilcock v. Big Missouri Min. Co.* 9 S. D. 206, 68 N. W. 330, holding burden on plaintiff on motion to discharge attachment to prove fraud in execution of mortgages by attachment debt on which the attachment was based; *Pierie v. Berg*, 7 S. D. 578, 64 N. W. 1130, holding attachment plaintiffs charged with knowledge, from the time of service upon them of affidavits for a discharge of the attachment, traversing all the grounds mentioned in the affidavit for attachment, that the attachment would be dissolved unless proof was furnished in support of the affidavit for attachment; *Wilcox v. Smith*, 4 S. D. 125, 55 N. W. 1107, holding an attachment properly discharged where plaintiff fails to support his statements by further evidence after specific denial of each fact by defendant's affidavit on motion to discharge; *Daniels v. Solomon*, 11 App. D. C. 163, holding that under D. C. Rev. Stat. § 782, authorizing issuance of attachment upon plaintiff's affidavit, and § 783, providing that "if the defendant, his agent, or attorney, shall file an affidavit traversing the plaintiff's affidavit, the court shall determine whether the facts set forth in plaintiff's affidavit are true, and whether there was just ground for issuing the writ of attachment; and if the facts do not sustain the affidavit, the court shall quash the writ of attachment or garnishment, and this issue may be tried by a judge at chambers on three day's notice," the burden at that trial is upon the plaintiff to prove the facts which justify the attachment.

Debtor's right to dispose of his exempt property.

Cited in *Heisch v. Bell*, 11 N. M. 523, 70 Pac. 572, holding creditor cannot complain that sale of debtor's exempt property is fraudulent as to him.

1 S. D. 182, BETTS v. LETCHER, 46 N. W. 193.**Possession of realty as notice of possessor's rights.**

Cited in *Shelby v. Bowden*, 16 S. D. 531, 94 N. W. 416, holding actual, open and visible possession of real estate charges purchaser with notice of all equities of him in possession; *Dennis v. Northern P. R. Co.* 20 Wash. 320, 55 Pac. 210, holding that a purchaser of land through which runs a railroad right of way, from one to whom the railroad company sold the land by a conveyance from which by mutual mistake was omitted a reservation of said right of way, is bound to take notice of the company's rights in the right of way for its entire width as granted by Congress, where the said company is using the right of way for its road.

Cited in notes in 104 Am. St. Rep. 335, on effect of possession of real property as notice; 13 L.R.A. (N.S.) 53, 55, 58, 60, 61, 65, 67, 68, 74, 78, 92, 126, on possession of land as notice of title.

Imputing agent's notice to principal.

Cited in *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522, holding purchaser of note had constructive notice that note was obtained by fraud where his agent had sufficient notice to put purchaser on inquiry and he failed to make inquiry of proper parties.

Partnership real estate.

Cited in *Brady v. Kreuger*, 8 S. D. 464, 59 Am. St. Rep. 771, 66 N. W. 1083, holding real estate belonging to copartnership subject to same rules as personal property; *McPherson v. Swift*, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76, holding real estate purchased by partnership, personalty as respects partner's interests.

Cited in notes in 27 L.R.A. 452, as to when real estate will be considered partnership property; 28 L.R.A. 102, on rights of partners inter se in partnership real estate.

Profit sharing as test of partnership.

Cited in note in 19 Eng. Rul. Cas. 407, on agreement for sharing profits as constituting a partnership.

1 S. D. 205, WEBER v. TSCHETTER, 46 N. W. 201.**Review of evidence to justify verdict or findings.**

Cited in *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466, holding that the sufficiency of the evidence to justify the verdict will not be considered on appeal, unless brought to the attention of the court below on motion for a new trial; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding sufficiency of evidence to justify findings of court cannot be reviewed where no appeal is taken from order denying motion for new trial subsequent to judgment; *Linander v. Longstaff*, 7 S. D. 157, 63 N. W. 775, holding that a finding by the jury, on undisputed evidence in an action of claim and de-

livery against a sheriff for refusal to surrender property levied on by him under an attachment, that the property for the value of which the attachment issued was not obtained under false pretenses, will not be disturbed on appeal, although no motion was made to dismiss the attachment, and a judgment by stipulation was entered into in the attachment proceeding without denying an averment that the property was obtained by false pretenses.

Appealable orders after judgment.

Cited in *Ayers v. Anderson-Tully Co.* 89 Ark. 160, 116 S. W. 199, holding order of chancery court vacating decree rendered at former term is appealable; *St. Paul, M. & M. R. Co. v. Blakemore*, 17 N. D. 67, 114 N. W. 730, holding under statute order after entry of judgment and payment thereof to clerk, making person a party and directing retention by clerk of money paid pursuant to judgment is appealable; *Kirby v. Ramsey*, 9 S. D. 197, 68 N. W. 328, holding order setting aside foreclosure sale appealable.

Reversal of judgment after assignment.

Cited in *King v. Miller*, 53 Or. 53, 97 Pac. 542, holding judgment may be reversed, set aside or vacated after assignment thereof.

Conclusiveness of judgment or order.

Followed in *State v. Casey*, 9 S. D. 436, 69 N. W. 585, holding refusal to vacate judgment on motion not conclusive against right to vacation on subsequent motion on different grounds.

Cited in *Hall v. Harris*, 1 S. D. 279, 36 Am. St. Rep. 730, 46 N. W. 931, holding an order denying a motion to discharge an attachment as to property, claimed to be exempt, conclusive against the attachment defendant's right to bring an action against the sheriff for the value of the property as exempt; *Enderlin State Bank v. Jennings*, 4 N. D. 228, 59 N. W. 1058, holding that a motion to set aside an attachment made before a judge of a district court to which the case has been transferred should not be granted, where a motion for the same purpose on the same facts was denied by a justice of the district from which the case was transferred.

Distinguished in *Benedict v. Johnson*, 4 S. D. 387, 57 N. W. 66, holding that an order improperly refusing to dismiss an action for want of jurisdiction of defendant's person is not a bar to a similar motion after a change of venue to another county; *Whittaker v. Warren*, 14 S. D. 611, 86 N. W. 638, holding an order denying a motion to vacate a judgment for plaintiff on the ground of the insufficiency of defendant's affidavit on which alone the motion was decided not conclusive against the right to an order vacating the judgment on essentially the same grounds, but upon a sufficient affidavit.

Effect of assignment of judgment.

Cited in note in 78 Am. St. Rep. 51, 55, on effect of assignment of judgment.

Dak. Rep.—39.

1 S. D. 216, BROWN v. BON HOMME COUNTY, 46 N. W. 173.**Estoppel to deny validity of municipal bonds.**

Cited in *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049, 1 A. & E. Ann. Cas. 322, holding action by taxpayer to enjoin issuance of warrants to pay interest on municipal railroad aid bonds barred by long delay and laches; *Portsmouth Sav. Bank v. Ashley*, 91 Mich. 670, 30 Am. St. Rep. 511, 52 N. W. 74, holding that, under a statute vesting power in the village council to issue waterworks bonds, such bonds are not binding upon the village when signed by the president and clerk by direction of said council, but delivered without its authority; *Flagg v. School Dist. No. 70*, 4 N. D. 30, 25 L.R.A. 363, 58 N. W. 499, holding a school district not estopped to set up the invalidity of school bonds on the ground that the district did not own the school site, by a certificate of the county clerk that it was "issued in accordance with law and by authority of the majority of the legal voters;" *Coler v. Rhoda School Twp.* 6 S. D. 640, 63 N. W. 158, holding school district bonds voted by majority of electors present and voting at special meeting and containing recital of their regularity in issuance not invalid because question of bonding was submitted without written petition of majority of voters as required by statute.

1 S. D. 237, CAHN v. FARMERS' & T. BANK, 46 N. W. 185.**Who may set up usury.**

Followed in *Hill v. Alliance Bldg. Co.* 6 S. D. 160, 55 Am. St. Rep. 819, 60 N. W. 752, holding defense of usury a personal defense.

1 S. D. 249, MYERS v. MITCHELL, 46 N. W. 245.**Court's power to authorize additional term.**

Cited in *Re Nelson*, 19 S. D. 214, 102 N. W. 885, holding circuit judge has power to order special term of court under statute.

Dismissal of appeal for failure to prosecute.

Cited in *Keehl v. Schaller*, 1 S. D. 290, 46 N. W. 934, holding it error to dismiss appeal from justice's judgment for failure to prosecute except upon notice.

Presumption on appeal.

Cited in *Pollard v. Fidelity F. Ins. Co.* 1 S. D. 570, 47 N. W. 1060, holding that the appellate court will presume, where the admissibility of evidence depended upon the existence of another fact, that a referee in excluding such evidence found that such fact did not exist.

1 S. D. 257, LONGLEY v. DALY, 46 N. W. 247.**Validity of transfer of personal property as against creditors.**

Cited in *Pierson v. Hickey*, 16 S. D. 46, 91 N. W. 339, holding recording of mortgage operates as notice to creditors and subsequent purchasers and answers purpose of immediate delivery and change of possession.

New trial on ground of newly discovered evidence.

Cited in *Hahn v. Dickinson*, 19 S. D. 373, 103 N. W. 642, holding new trial on ground of newly discovered evidence properly denied where such

evidence was cumulative and its nonproduction at trial unexcused; *Grigsby v. Wolven*, 20 S. D. 623, 108 N. W. 250, holding new trial on ground of newly discovered evidence properly denied because of want of diligence by party asking it; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150, holding that new trial will be denied where newly discovered evidence would not probably produce different result on second trial.

When decision on motion for new trial reversed.

Cited in *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462, refusing to disturb decision on motion for new trial for newly discovered evidence except for abuse of discretion; *Braithwaite v. Aiken*, 2 N. D. 57, 49 N. W. 419, holding that an order granting a new trial on a particular ground will be reversed on appeal unless there is some legal evidence that such ground exists and is a legal ground for granting a new trial; *Merchants' Nat. Bank v. Stebbins*, 10 S. D. 466, 74 N. W. 199, holding decision of question as to consideration on motion for new trial of objection to evidence not made when evidence was offered, not reviewable on appeal in absence of abuse of discretion.

When direction of verdict proper.

Cited in *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747, holding motion to direct a verdict because the evidence is "insufficient to show or constitute a cause of action" insufficient; *Greenwald v. Ford*, 21 S. D. 28, 100 N. W. 516, holding direction of verdict proper where verdict by jury for other party would have to be set aside; *Peet v. Dakota F. & M. Ins. Co.* 1 S. D. 462, 47 N. W. 532, holding that verdict may be directed for one of parties where court would be bound to set aside as against evidence, verdict for other party.

Validity of transfer of personalty.

Cited in *Walters v. Ratliff*, 10 Okla. 262, 61 Pac. 1070, holding that where there was nothing to indicate to the world that a plaintiff had any interest in a crop of wheat sown, grown, and harvested by another on the land of such other person with whom plaintiff lived and for whom he worked as a day laborer, the plaintiff cannot defeat the levy of an execution upon the wheat as the property of the other person; *Howard v. Dwight*, 8 S. D. 398, 66 N. W. 935, holding that sale of stock of goods in store will be deemed fraudulent as against attaching creditors where purchaser did not take personal possession and same manager and clerks continued in charge and vendor's name remained on store window and in newspaper advertisements.

Cited in note in 24 L.R.A.(N.S.) 1142, as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome.

Presumption of waiver of exemption.

Cited in *Dieter v. Fraine*, 20 N. D. 484, 128 N. W. 684, holding homestead exemptions not presumed to be waived by failure or neglect of head of family to expressly claim it.

1 S. D. 268, RAUBER v. SUNDBACK, 46 N. W. 927.**Question for jury.**

Cited in *McLaughlin v. Wheeler*, 1 S. D. 497, 47 N. W. 816, holding the authority of an agent to find a purchaser for land a question for the jury, where the scope and extent of such authority is to be gathered from oral and written evidence as to which there is a conflict.

Vesting of title by consignment.

Cited in note in 45 Am. St. Rep. 206, as to when consignment for sale vests title.

1 S. D. 279, HALL v. HARRIS, 36 AM. ST. REP. 730, 46 N. W. 931.**Conclusiveness of order refusing to vacate judgment.**

Distinguished in *Whittaker v. Warren*, 14 S. D. 611, 86 N. W. 638, holding an order denying a motion to vacate a judgment on the ground of the insufficiency of defendant's affidavit on which alone the motion was heard not conclusive against defendant's right to an order vacating the judgment on substantially the same grounds.

1 S. D. 290, KEEHL v. SCHALLER, 46 N. W. 934.**1 S. D. 292, STATE EX REL. DOLLARD v. HUGHES COUNTY, 10 L.R.A. 588, 46 N. W. 1127.****When certiorari lies.**

Cited in *State ex rel. Clark v. Stakke*, 22 S. D. 228, 117 N. W. 129, holding that certiorari lies to review action of election canvassing board.

Cited in note in 50 L.R.A. 792, on exceptions to the rule that certiorari will not lie where there is an appeal.

Original jurisdiction of supreme court.

Cited in *State ex rel. Holmes v. Finnerud*, 7 S. D. 237, 64 N. W. 121, with the statement that no question was raised in this case as to the exercise of the original jurisdiction of the supreme court.

Cited in note in 51 L.R.A. 67, on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

Unorganized territory attached to county.

Cited in *Slutts v. Dana*, 138 Iowa, 244, 115 N. W. 1115, holding certain territory may be part of county for some purposes, but not for all, but the question is one of legislative intent.

1 S. D. 306, PIERCE v. MANNING, 47 N. W. 295, 51 N. W. 332, Decision on the merits in 2 S. D. 517, 51 N. W. 332.**1 S. D. 308, ROSUM v. HODGES, 9 L.R.A. 817, 47 N. W. 140.****Scope of cross examination.**

Cited in note in 11 Eng. Rul. Cas. 171, on right to cross-examine witness called and sworn though not examined.

Demand as prerequisite to action of trover.

Cited in *Consolidated Land & Irrig. Co. v. Hawley*, 7 S. D. 229, 63 N. W. 904, holding no demand necessary before bringing action for conversion against sheriff who denies plaintiff's title or right of possession and asserts ownership of another; *Guernsey v. Tuthill*, 12 S. D. 582, 82 N. W. 190, holding an allegation and proof of a demand and refusal unnecessary before bringing suit on a sheriff's bond, where plaintiff alleges and proves that the property was wrongfully and unlawfully taken from his possession by the officer; *Schwamb Lumber Co. v. Schaar*, 94 Ill. App. 544, holding that the owner of property may maintain replevin against one purchasing it from one having no title, without making a previous demand of possession.

What is a conversion.

Cited in *Willard v. Monarch Elevator Co.* 10 N. D. 400, 87 N. W. 996, holding delivery to lessee, of tickets representing grain which elevator company had express notice was claimed by lessor under chattel mortgage and which it had agreed to withhold until lessee's performance of obligations thereunder, conversion of the grain represented thereby.

Rights and damages in trover.

Cited in notes in 26 L.R.A. 596, on rights in actions for trover and conversion; 9 N. D. 636, on damages in actions for trover and conversion.

1 S. D. 316, MURPHY v. MURPHY, 9 L.R.A. 820, 47 N. W. 142.**Whether verdict is impeachable by juror's affidavit.**

Cited in *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648, holding affidavits of jurors as to what they considered in making up their verdict will not be received for that purpose; *Edward Thompson Co. v. Gunderson*, 10 S. D. 42, 71 N. W. 764, holding testimony of jurors inadmissible to support motion for new trial on ground of misconduct of jury or one or more of jurors; *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117, 1 A. & E. Ann. Cas. 268, 12 Am. Crim. Rep. 619, holding affidavit of juror that verdict was influenced by judge's communication cannot be received by court to impeach verdict; *Ralton v. Sherwood Logging Co.* 54 Wash. 254, 103 Pac. 28, holding in the absence of express statutory provision a new trial cannot be granted on the affidavits of jurors that they disregarded the instructions of the court.

Cited in note in 11 L.R.A. 706, on juror's right to impeach his own verdict.

Distinguished in *Wolfram v. Schoepke*, 123 Wis. 19, 100 N. W. 1054, 3 A. & E. Ann. Cas. 398, holding court may receive affidavits of jurors that written verdict did not express conclusion of jury.

—As to mode of reaching verdict.

Cited in *Ulrick v. Dakota Loan & Trust Co.* 2 S. D. 285, 49 N. W. 1054, holding verdict reached by adding together judgments named by different jurors and dividing result by twelve not impeachable by affidavit of jurors as a chance verdict; *Southern Nevada Gold & S. Min. Co. v. Holmes* Min. Co. 27 Nev. 107, 103 Am. St. Rep. 759, 73 Pac. 759, holding verdict

could not be impeached by affidavits of jurors showing estimates of individual jurors as to amount of damages to be awarded were averaged.

— As to use of intoxicants.

Cited in *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527, holding affidavits of jurors that one juror was intoxicated during trial inadmissible to support motion for new trial; *State v. Andre*, 11 S. D. 215, 84 N. W. 783, holding an affidavit of a juror as to misconduct in the use of intoxicating liquors during trial not admissible on motion for new trial to impeach the verdict.

Implied agreement to pay for services of relative.

Cited in note in 11 L.R.A.(N.S.) 882, 894, 895, on implication of agreement to pay for services of relative or member of household.

1 S. D. 326, WHITE v. CHICAGO, M. & ST. P. R. CO. 9 L.R.A. 824, 47 N. W. 146.

Measure of damages for destruction of buildings or trees.

Cited in *Chicago & N. W. R. Co. v. Kendall*, 186 Fed. 139, holding that measure of damages for destruction of building by fires set out by locomotive is value of building detached from land; *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 596, holding measure of damages for wrongful destruction of trees the market value independent of the real estate when action is brought for value of the trees.

Cited in note in 19 L.R.A. 659, on measure of damages for injury to or destruction of trees.

Proof required to establish negligence in starting fire.

Cited in *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305, holding charge that fire was negligently started must be borne out by proofs, not by mere speculation or possibility; *Allend v. Spokane Falls & N. R. Co.* 21 Wash. 324, 58 Pac. 244, holding that evidence that the engine used on a train at the time of an explosion of powder in the caboose was a wood burner, and emitted a large volume of sparks whenever operated,—so much so that on former occasions persons riding several car lengths behind it had holes burned in their clothes thereby; that on the day of the accident sparks were flying past the caboose, which had its side doors open; and that there was no other source from which the fire could have originated,—is sufficient to authorize a finding that the explosion was caused by a spark from the locomotive; *Finkelston v. Chicago, M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005, holding that a nonsuit is proper where the plaintiff claims that sparks from a locomotive floated for a considerable distance, and infers that those sparks then passed through a cupola window 30 feet above the ground, landed somewhere in the lower part of the building, and there remained one and a half hours before manifesting themselves.

Cited in note in 15 L.R.A. 40, on presumption of negligence from occurrence of accidents.

Care required of railroad as to fires.

Cited in *Cronk v. Chicago M. & St. P. R. Co.* 3 S. D. 93, 52 N. W. 420, holding railroad company required to exercise such care to prevent fire as

person of ordinary prudence would exercise under the particular circumstances of the case.

Cited in note in 11 L.R.A. 508, on right of railroad company to burn combustibles on its right of way.

1 S. D. 337, BAILEY v. SCOTT, 47 N. W. 286.

Necessity for statement of facts or bill of exceptions.

Cited in *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085, holding under statute failure of judge to settle statement within sixty days after its submission to him and failure to perfect appeal within thirty days after such settlement do not affect time for appeal from order, made before statement was settled; *Oliver v. Wilson*, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757, holding no statement of the case required on appeal from order based only on papers and documents transmitted by the clerk with the order appealed from; *Goose River Bank v. Gilmore*, 3 N. D. 188, 54 N. W. 1032, holding that papers used on a motion for a new trial are made part of the record on appeal from the order thereon by their identification by the judge and certification by the clerk without any bill of exceptions or statement; *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479, holding no bill of exceptions necessary on appeal from order made on evidence of other written evidence; *Daley v. Forsythe*, 9 S. D. 34, 67 N. W. 948, holding no bill of exceptions necessary on appeal from denial of motion for order foreclosing it for making motion for new trial for newly discovered evidence.

What orders appealable.

Cited in *Kirby v. Ramsey*, 9 S. D. 197, 68 N. W. 328, holding order setting aside foreclosure sale appealable.

Right to attack decision requested.

Cited in *Omaha F. Ins. Co. v. Maxwell*, 38 Neb. 353, 56 N. W. 1028, holding that a plaintiff in error who stipulated that his motion in the lower court for a new trial should be overruled cannot assign as error an order of said court made in accordance with his stipulation and request.

1 S. D. 342, McNAMARA v. DAKOTA, F. & M. INS. CO. 47 N. W. 288.

Construction of insurance policies.

Cited in *Bolte v. Equitable F. Asso.* 23 S. D. 240, 121 N. W. 773, to point that doubts in construction of insurance policy should be resolved in favor of insured; *Vesey v. Commercial Union Assur. Co.* 18 S. D. 632, 101 N. W. 1074, holding service of proofs of loss upon agent of insurance company constituted service upon company, where policy only required delivery to company; *Edge v. St. Paul F. & M. Ins. Co.* 20 S. D. 190, 105 N. W. 281, holding rights of mortgagee unaffected by act of owner in selling premises where provision against such act was not written upon, attached or appended to policy according to recital in policy; *Kansas Farmers' F. Ins. Co. v. Saindon*, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15, holding that a mortgage executed upon insured property does not

vitiating the policy or cause breach of condition therein, when it is a renewal of or in lieu of mortgages in existence at the time the application was taken and policy issued, with additional interest.

Materiality of warranty to insurance risk.

Cited in *Peet v. Dakota F. & M. Ins. Co.* 1 S. D. 462, 47 N. W. 532, holding that a verdict may be directed for one of the parties where the court would be required to set aside as against the evidence a verdict for the other party; *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434, holding that on both a motion for nonsuit and motion to direct a verdict the court passes on the legal sufficiency of the evidence to warrant a judgment.

1 S. D. 350, MARSHALL v. HARNEY PEAK TIN MIN. MILL. & MFG. CO. 47 N. W. 290.

Direction of verdict.

Cited in *Peet v. Dakota F. & M. Ins. Co.* 1 S. D. 462, 47 N. W. 532, holding that a verdict may be directed for one of the parties where the court would be required to set aside as against the evidence a verdict for the other party; *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434, holding that on both a motion for nonsuit and motion to direct a verdict the court passes on the legal sufficiency of the evidence to warrant a judgment.

Location of mining claim.

Cited in *Union Min. & Mill. Co. v. Leitch*, 24 Wash. 585, 85 Am. St. Rep. 961, 64 Pac. 829, holding that under U. S. Rev. Stat. § 2324 (U. S. Comp. Stat. 1901, p. 1426), prescribing that a mining "location must be distinctly marked on the ground," the locator has a reasonable time within which to do the marking; *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037, 19 Mor. Min. Rep. 650, holding that under the provisions of Mont. Pol. Code, § 3610, that the locator's notice of a mining claim must state the general course of the vein or lode "as near as may be," and § 3611, that within ninety days he must define the boundaries of his claim, said locator may, within said ninety days and in good faith, use his discovery post as a pivot and move his lines, at least in the general course of his vein given in his notice; and a notice describing the vein as running northerly and southerly does not confine a locator, exercising good faith toward other locators, to a line running north and south on his final survey; *Bramlett v. Flick*, 23 Mont. 95, 57 Pac. 869, 20 Mor. Min. Rep. 103, holding that a locator who posts the usual notice of discovery in good faith, in plain view, with the intention to complete his location within the twenty days prescribed by Mont. Comp. Stat. 5th Div. § 1477, after prospecting sufficiently to enable him to determine the course or strike of the vein, acquires a right to all the ground along the lead legitimately covered by his notice, to the exclusion of any location under a junior discovery; *Doe v. Waterloo Min. Co.* 17 C. C. A. 190, 44 U. S. App. 254, 18 Mor. Min. Rep. 265, 70 Fed. 455, affirming 55 Fed. 11, holding that in the absence of limitation by statute or custom of the time within which the boundary of a mining claim must be marked, a notice, dated March 26, of location and claim, on a lode running 1,000 feet northwesterly and 500 feet southeasterly, with 300 feet on each side, and reserving twenty days within which to complete boundary monuments, will render nugatory a location on April 6, within

said limits, by one knowing of said location notice although he did not read it.

Cited in note in 7 L.R.A. (N.S.) 766, 819, 833, 839, on location of mining claim.

Abandonment of mining claim.

Cited in note in 87 Am. St. Rep. 404, on abandonment and forfeiture of mining claims.

1 S. D. 365, EVERITT v. HUGHES COUNTY, 47 N. W. 296.

Original jurisdiction of supreme court.

Cited in *State ex rel Holmes v. Fennerud*, 7 S. D. 237, 64 N. W. 121, with statement that jurisdiction of supreme court was not questioned; *People ex rel. Graves v. District Ct.* 37 Colo. 443, 13 L.R.A. (N.S.) 768, 86 Pac. 87, holding writs mentioned in constitutional provision conferring original jurisdiction upon supreme court are prerogative writs of common law; *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 17 L.R.A. 145, 35 Am. St. Rep. 27, 53 N. W. 35, holding original jurisdiction may be exercised in injunction proceedings by supreme court, though not invoked by attorney general.

Cited in note in 13 L.R.A. (N.S.) 771, on exclusiveness of jurisdiction of highest court to issue remedial writs for prerogative purposes.

—In mandamus cases.

Cited in *People ex rel. Dickinson v. Chicago Bd. of Trade*, 193 Ill. 577, 62 N. E. 196, holding that the supreme court in exercising its original jurisdiction in mandamus proceedings has a discretion which is governed and controlled by legal principles; *Re Ringrose*, 9 S. D. 349, 69 N. W. 584, holding that supreme court will refuse writ of mandamus to board of election commissioners to reconvene and correct error in abstract of votes where it does not appear that such creation if made would affect the election; *People ex rel. Kocourek v. Chicago*, 193 Ill. 507, 58 L.R.A. 833, 62 N. E. 179, holding that under Ill. Const. art. 6, § 2, providing that the supreme court shall have original jurisdiction in mandamus, it was intended that the said court should have power to protect the rights, interests, and franchises of the state, and the rights and interests of the whole people, to enforce the performance of high official duties affecting the public at large, and in emergency (of which the court itself is to determine) to assume jurisdiction of cases affecting local public interests, or private rights when necessary to prevent a failure of justice; *People ex rel. Dickinson v. Chicago Bd. of Trade*, 193 Ill. 577, 62 N. E. 196, holding that under constitutional grants to both the supreme and circuit courts of power to issue mandamus, it was not intended that the former should exercise a concurrent jurisdiction with the lower courts in mandamus, but should have original jurisdiction only in cases involving questions of public right; *Homesteaders v. McCombs*, 24 Okla. 201, — L.R.A. (N.S.) —, 103 Pac. 691, 20 A. & E. Ann. Cas. 181, holding that supreme court has not original jurisdiction of suit instituted by foreign insurance company to compel insurance commissioner to issue permit to company to do business within state; *People ex rel. Dickinson v. Chicago Bd. of Trade*, 193 Ill.

577, 62 N. E. 196, holding that constitutional grants to both the supreme and circuit courts, of power to issue mandamus, indicate that there is a class of cases where the issuance of the writ will be left to the circuit court, and only a limited class in which the supreme court will exercise original jurisdiction.

Cited in notes in 51 L.R.A. 67, on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal; 58 L.R.A. 850, 864, 866, on original jurisdiction of court of last resort in mandamus case; 58 L.R.A. 857, 858, on original jurisdiction of court of last resort in mandamus case.

When mandamus lies.

Cited in *State ex rel. Dakota Cent. Teleph. Co. v. Huron*, 23 S. D. 153, 120 N. W. 1008, denying writ of mandamus to compel city to dismiss suit, rights involved being private and local and relator having adequate remedy at law.

1 S. D. 372, QUEBEC BANK v. CARROLL, 47 N. W. 397.

Dissolution of attachment.

Cited in note in 123 Am. St. Rep. 1032, 1047, on proceedings to dissolve attachments.

— Right of creditors or assignee to move for.

Cited in *Tolerton & S. Co. v. Casperson*, 7 S. D. 206, 63 N. W. 908, sustaining right of assignor for creditors to move to vacate attachment levied before the assignment.

Cited in note in 35 L.R.A. 770, on right of creditors to question validity of attachment.

Attachment of property in hands of assignee for creditors.

Cited in note in 26 L.R.A. 593, on right to attach property in the hands of an assignee for creditors.

1 S. D. 382, STATE v. HAFSOOS, 47 N. W. 400.

1 S. D. 385, PYLE v. HAND COUNTY, 47 N. W. 401.

Right to costs.

Cited in *Laney v. Ingalls*, 5 S. D. 183, 58 N. W. 572, holding recovery of costs determined by amount recovered instead of amount claimed; *Macomb v. Lake County*, 13 S. D. 103, 82 N. W. 417, holding costs in action to restrain sale of land for taxes discretionary with court; *Grosso v. Lead*, 9 S. D. 165, 68 N. W. 310, sustaining plaintiff's right to costs in action in circuit court for trespassing on real estate where denial of an allegation of complaint would raise a question of title depriving justice of jurisdiction.

1 S. D. 388, FARMERS' & T. BANK v. KIMBALL MILL. CO. 36 AM. ST. REP. 739, 47 N. W. 402.

Implied or resulting trust.

Cited in *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725,

113 N. W. 618, holding that one who procures mortgage as preference from bankrupt is trustee for all creditors; *Kahur v. Klaus*, 64 Kan. 24, 67 Pac. 542, holding one who agrees with owner of land to act as agent to manage same and procures deed by representing it is instrument embodying such agreement is trustee by implication of law; *Graham v. Selbie*, 8 S. D. 608, 67 N. W. 831, holding that payment by or for one seeking to enforce resulting trust must be established by substantial proof that the money was actually used to purchase the property with intent that it should be taken in trust; *Weeks v. Milwaukee, L. S. & W. R. Co.* 78 Wis. 501, 47 N. W. 737, holding that a land patent purporting to be issued to an assignee of the person originally entitled to it, but issued in fact to another having constructive notice of the fraud, grants no title to such pretended assignee, except for the benefit of the true assignee; *Walston v. Smith*, 70 Vt. 19, 39 Atl. 252, holding that a conveyance of realty by the trustee to the wife of the cestui que trust, by the direction and consent of the latter, without any consideration moving from her, raises the presumption, in the absence of anything to the contrary, that the conveyance was made by way of advancement for future support; but such presumption may be rebutted by parol testimony, and the fact established that she took as a passive trustee for the husband.

Knowledge of cashier imputable to bank.

Cited in *Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1058, holding knowledge of cashier knowledge of the bank; *Wyckoff v. Johnson*, 2 S. D. 91, 48 N. W. 837, holding current knowledge of cashier as to discounts imputable to bank; *Black Hills Nat. Bank v. Kellogg*, 4 S. D. 312, 56 N. W. 1071, holding the knowledge of a bank cashier as to defenses and equities existing against a note made to him individually and transferred by him to the bank the knowledge of the bank; *Morris v. Georgia Loan, Sav. & Bkg. Co.* 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378, holding that the knowledge of the cashier of a bank, that a note which he discounts with the funds of the bank was given without consideration, is chargeable to the bank.

Distinguished in *National Bank of Commerce v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874, holding bank not chargeable with cashier's knowledge as to defenses to notes transferred to bank by firm of which he is a member where bank acts entirely through discount committee of which cashier is not a member; *National Bank v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874, holding where cashier acts for firm of which he is member, and bank is represented in transaction by other officers, cashier's knowledge is not imputed to bank.

Following trust property.

Cited in *Berry v. Evendon*, 14 N. D. 1, 103 N. W. 748, holding original trust attaches to real property into which trustee of personal property has converted it; *Sullivan v. Kenney*, 148 Iowa, 361, 126 N. W. 349, holding that proceeds of sale of land situate in foreign state, pending actions involving right thereto, may be followed into hands of seller and disposed of by court having jurisdiction of his person.

Right of cestui que trust to profits of trust property.

Cited in *Kahm v. Klaus*, 64 Kan. 24, 67 Pac. 542, holding gains and profits from property impressed with constructive trust follow such trust and inure to owner's benefit; *Lincoln Sav. Bank & Safe Deposit Co. v. Morrison*, 64 Neb. 822, 57 L.R.A. 885, 90 N. W. 905, holding that where a portion of a fund made up of trust money and of individual money of the trustee is invested, and a profit results, the cestui que trust, in following the trust money into the investment, may claim such profits as the proceeds of the original fund upon which he had a charge.

Sufficiency of pleading.

Cited in *Weeks v. Milwaukee*, L. S. & W. R. Co. 78 Wis. 501, 47 N. W. 737, holding that a defendant's equities as a purchaser without notice cannot be considered on demurrer to a complaint alleging an equitable title to land in the plaintiff and admitting the legal title to be in defendant.

1 S. D. 401, STATE v. BUTCHER, 47 N. W. 406.**Sufficiency of indictment.**

Cited in *State v. Terry*, 109 Mo. 601, 19 S. W. 206, holding that Mo. Rev. Stat. § 3826, in authorizing the use of vague and general terms in an indictment, violates Mo. Const. art. 2, § 22, providing that in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation.

Cited in note in 25 L.R.A.(N.S.) 64, on complaint or information on information and belief as basis for warrant or examination preliminary thereto.

1 S. D. 406, D. M. OSBORNE & CO. v. STRINGHAM, 47 N. W. 408.**Parol evidence to explain written contract.**

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding contemporaneous contracts admissible to explain contract of guaranty; *Roberts v. Minneapolis Threshing Mach. Co.* 8 S. D. 579, 59 Am. St. Rep. 777, 67 N. W. 607, holding that written agreement appointing soliciting agent for sale of machinery in given county expressly excepting certain village therein and preserving right to sell to any one applying at home office cannot be varied by oral evidence of contemporaneous agreement that agent should receive commissions on all sales made; *D. M. Osborne & Co. v. Stringham*, 4 S. D. 593, 57 N. W. 776, holding parol evidence admissible to explain the nature of the transaction where the purposes of the receipt are expressed in short and seemingly incomplete terms; *Whiffen v. Hollister*, 12 S. D. 68, 80 N. W. 156, holding evidence as to when and under what circumstances a certificate of sale on foreclosure should be sold, the proposed application of the proceeds and the value of the land at the time plaintiff would be entitled to a deed and at the commencement of the action, admissible in an action on a note, where defendant sets up as a counterclaim the agreement by plaintiff to dispose

of such certificate which had been assigned to him by defendant as soon as possible after securing a deed and on the best possible terms.

1 S. D. 414, STATE v. CHAPMAN, 10 L.R.A. 432, 47 N. W. 411.

Discretion of court as to disqualification of judge or juror.

Cited in *Cox v. United States*, 5 Okla. 701, 50 Pac. 175, holding that it is not error for a presiding judge to overrule a motion for a change of judge, supported by defendant's affidavit which merely states a conclusion as to prejudice and bias, which case was, however, overruled and the statute held to be mandatory in *Lincoln v. Territory*, 8 Okla. 546, 58 Pac. 730; *State v. Hall*, 16 S. D. 6, 65 L.R.A. 151, 91 N. W. 325, on nonreversal of decision of trial court as to disqualification of juror by bias where there has been no abuse of discretion; *Waterloo Gasoline Engine Co. v. O'Neil*, 19 N. D. 784, 124 N. W. 951, holding that under statute no discretion whatever is vested in court or judge.

Cited in note in 11 L.R.A. 571, on removal of cause for prejudice or local influence.

Sufficiency of assignment of error.

Cited in *Hedlun v. Holy Terror Min. Co.* 16 S. D. 261, 92 N. W. 31, holding assignment of error by merely stating that court erred in giving certain instruction is too indefinite; *State v. Cleveland*, 23 S. D. 335, 121 N. W. 841, holding assignment of error too vague and indefinite where no exceptions to rulings were alleged nor pages of abstract nor of bill of exceptions given where ruling and exceptions could be found.

What is a liquor nuisance.

Cited in *State ex rel. Bartlett v. Fraser*, 1 N. D. 425, 3 Inters. Com. Rep. 577, 48 N. W. 343, holding a place where intoxicating liquors are sold in violation of the North Dakota prohibitory law a common nuisance, although they are not drunk on the premises with the seller's knowledge or consent.

Meaning of "original package."

Cited in *Cook v. Marshall County*, 119 Iowa, 384, 104 Am. St. Rep. 283, 93 N. W. 372, holding that term "original package" does not necessarily mean goods shall be inclosed in tight or sealed receptacle; that cigarettes in packages of ten are not original packages; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132, holding that the "original packages" of cigarettes, which cannot be prohibited admission to a state under its police powers, are not packages devised and put up with the express intent of evading the laws of another state; *Daniel v. Miller*, 81 Fed. 1000, holding that the "original package" of interstate commerce is the package delivered to the carrier at the initial point of shipment, in the exact condition in which it was shipped; *Haley v. State*, 42 Neb. 550, 47 Am. St. Rep. 718, 60 N. W. 962, holding that a wooden box in which bottles of intoxicating liquors, each inclosed in a sealed paper box, are packed for shipment, is the original package of interstate commerce, and not the sealed paper boxes; *McGregor v. Cone*, 104 Iowa, 465, 39 L.R.A. 484, 65 Am. St. Rep. 522, 73 N. W. 1041, holding that when the large

"original package," the unit of commerce, has been broken open, the sale of one of the small packages of cigarettes inclosed in said original package is within the prohibition of the Iowa "Anti-Cigarette Law," Acts 26th Gen. Assem. chap. 96; *Austin v. State*, 101 Tenn. 563, 50 L.R.A. 478, 70 Am. St. Rep. 703, 48 S. W. 305 (affirmed in 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132), holding that pasteboard boxes each containing ten cigarettes and separately stamped and labeled, are not original packages of commerce when they are transported in an open basket which belongs to an express company, and which is filled and emptied by its agent, but said basket is the original package.

Cited in note in 22 L.R.A. 155, on what constitutes an original package.
Power of Congress to regulate commerce.

Cited in note in 12 L.R.A. 624, on interstate commerce; supreme power of congress to regulate.

1 S. D. 434, GAINES v. WHITE, 47 N. W. 524.

Discretion as to grant of continuance.

Cited in *Nebraska Land & Livestock Co. v. Burris*, 10 S. D. 430, 73 N. W. 919; *Hood v. Fay*, 15 S. D. 84, 87 N. W. 528, holding grant or refusal of a continuance reviewable on appeal only in case of manifest abuse of discretion; *State v. Phillips*, 18 S. D. 1, 98 N. W. 171, 5 A. & E. Am. Cas. 760, holding continuance properly denied in criminal case where there was no abuse of discretion; *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107, sustaining denial of continuance where only showing in support of application therefor was inability of associate counsel to attend.
Sufficiency of affidavit for continuance.

Cited in *J. I. Case Threshing Mach. Co. v. Eichinger*, 15 S. D. 530, 91 N. W. 82, holding affidavit for continuance by defendants after amendment of complainant at opening of term insufficient where it merely states that counsel did not have time to prepare answer.

Affidavit of juror to impeach verdict.

Cited in *Edward Thompson Co. v. Gunderson*, 10 S. D. 42, 71 N. W. 764, holding testimony of jurors inadmissible to support motion for new trial on ground of misconduct of jury or one or more of jurors; *Pettitti v. State*, 2 Okla. Crim. Rep. 131, 100 Pac. 1122, holding after jury has been discharged and mingled with public their testimony that verdict as returned was mistake cannot be received; *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117, 1 A. & E. Ann. Cas. 268, 12 Am. Crim. Rep. 619, holding affidavit of juror that judge's communication influenced verdict cannot be received by court to impeach verdict.

— As to use of intoxicants.

Cited in *State v. Andre*, 14 S. D. 215, 84 N. W. 783, holding that affidavit of juror in criminal case as to misconduct of jury in use of intoxicating liquors cannot be used on motion for new trial to impeach the verdict; *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527, holding affidavit of jurors that one juror was intoxicated during trial inadmissible to support motion for new trial.

Discretion in grant of new trial generally.

Cited in *Braithwaite v. Aiken*, 2 N. D. 57, 49 N. W. 419, holding that the discretion of the court in awarding a new trial on a particular ground can be supported on appeal only when there is some legal evidence that such cause exists and is a legal ground.

New trial on ground of newly discovered evidence.

Cited in *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding it not abuse of discretion to deny new trial for newly discovered evidence which only goes to discredit or impeach witness; *Grigsby v. Wolven*, 20 S. D. 623, 108 N. W. 250, holding new trial on ground of newly discovered evidence properly refused where party asking it failed to show sufficient diligence.

New trial on ground of surprise.

Cited in *Josephson v. Sigfusson*, 13 N. D. 312, 100 N. W. 703, holding case of accident or surprise does not arise under statute unless party asking new trial has been diligent; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139, 68 Pac. 461, holding new trial on ground of accident or surprise will be denied where surprise is due to neglect or inattention of party surprised; *Woods v. Globe Nav. Co.* 40 Wash. 376, 82 Pac. 401, holding new trial on ground of surprise arising from absence of witness or unexpected testimony will not be granted unless claim of surprise is promptly made at trial and continuance asked.

First raising objection to evidence on motion for new trial.

Cited in *Merchants' Nat. Bank v. Stebbins*, 10 S. D. 466, 74 N. W. 199, holding decision of question as to consideration on motion for new trial of objection to evidence not made when evidence was offered not reviewable on appeal in absence of abuse of discretion.

Effect of general verdict in claim and delivery.

Cited in *Towne v. Liedle*, 10 S. D. 460, 74 N. W. 232, holding all issues found for plaintiff by general verdict for him in claim and delivery in which the complaint alleges ownership and right of possession and wrongful detention by defendant.

1 S. D. 452, THOMAS v. BEADLE COUNTY, 47 N. W. 529.

1 S. D. 455, WING v. CHICAGO & N. W. R. CO. 47 N. W. 530.

Jurisdiction in cases pending upon admission of state to Union.

Cited in *Higgins v. Brown*, 20 Okla. 355, 1 Okla. Crim. Rep. 33, 94 Pac. 703, holding state court has jurisdiction of indictment for murder pending in United States court at time of admission of state to Union; *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 110, 95 Pac. 606, holding right to have cause transferred from state to federal court waived where counsel was notified of hearing in state court but failed to appear; *Thompson v. Schaetzl*, 2 S. D. 395, 50 N. W. 631, holding application to remove action commenced in territorial court from state to federal court, too late after filing amended answer in state court; *Sargent v. Kindred*, 5 N. D. 8, 63 N. W. 151; *Sargent v. Kindred*, 49 Fed. 485,—holding that under said 25 Stat. at

L. 683, chap. 180, § 23, a defendant, knowing his rights and the facts, loses his right of transfer to the Federal court, and elects to remain in the state court, by submitting a motion for a continuance at the June term for 1890 and submitting to the order made by the state court for a continuance, and the settling of the cases for trial upon the peremptory call at the succeeding term of the said court, as he has thereby actively invoked the jurisdiction of the state court.

1 S. D. 462, PEET v. DAKOTA F. & M. INS. CO. 47 N. W. 532.
Later appeal in 7 S. D. 410, 64 N. W. 206.

When direction of verdict proper.

Cited in *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747, holding motion to direct verdict for defendant because evidence is "insufficient to show or to constitute a cause of action" insufficient in failing to point out specifically the grounds relied on; *Chicago R. I. & P. R. Co. v. Driggers*, 1 Ind. Terr. 412, 45 S. W. 124, holding it error for a court to refuse to direct a verdict for a defendant when there was nothing in the evidence to support a verdict for plaintiff; *McKeever v. Homestake Min. Co.* 10 S. D. 599, 74 N. W. 1053, holding verdict properly directed for defendant where evidence with all justifiable inferences is insufficient to support verdict for plaintiff; *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 112, holding that verdict may properly be directed against claimants of title under chattel mortgage when recitals of instrument in connection with evidence are insufficient to justify difference of opinion on part of jury.

Meaning of "inventory."

Cited in *Chicago, R. I. & P. R. Co. v. People*, 217 Ill. 104, 75 N. E. 368, holding "schedule" has meaning equivalent to "inventory" which is list or catalogue of property without attempt to describe it in detail.

Waiver of defect in proofs of loss.

Cited in *Vesey v. Commercial Union Assur. Co.* 18 S. D. 632, 101 N. W. 1074, holding defect in proofs of loss is waived by retention thereof without objection that they are insufficient.

Issuance of insurance policy without inquiry as to facts.

Distinguished in *Harding v. Norwich Union F. Ins. Soc.* 10 S. D. 64, 71 N. W. 755, holding that issuance of policy without written application and inquiry as to encumbrances does not avoid effect of provision rendering policy void if property is encumbered.

Disapproved in *Parsons v. Lane*. 97 Minn. 98, 4 L.R.A.(N.S.) 231, 106 N. W. 485, 7 A. & E. Ann. Cas. 1144, holding insurance company does not waive condition of policy as to title and ownership by issuing policy without written application.

1 S. D. 479, HACKETT v. GUNDERSON, 47 N. W. 546.

Double appeal.

Cited in *Prondzinski v. Garbutt*, 9 N. D. 239, 83 N. W. 23, holding that fact that notice of appeal states that appellant appeals both from an order made in the action and the judgment does not render it objectionable as

purporting to cover two entirely independent appeals where the order referred to is not appealable; *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527, holding appeal from order granting new trial and from judgment rendered in second action not double appeal where appeal from order granting new trial was surplusage, being mere nullity; *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, holding appeal from judgment and from two orders denying motion for new trial, upon same grounds after judgment not double appeal; *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38, holding that appeal may be taken from a judgment and from an order overruling a motion for new trial in the same notice; *Anderson v. Hultman*, 12 S. D. 105, 80 N. W. 165, holding that appeal from two orders, one refusing to vacate an attachment, the other denying a motion to vacate and set aside the summons will be dismissed; *Gordon v. Kelley*, 20 S. D. 70, 104 N. W. 605, holding appeal from default judgment and from order overruling motion to vacate judgment and for leave to answer is double appeal; *Ewing v. Lunn*, 21 S. D. 55, 109 N. W. 642, holding that appeal cannot be taken by plaintiffs from order vacating judgment in their favor, and from judgment in favor of defendant on second trial; *Oldland v. Oregon Coal & Nav. Co.* 55 Or. 340, 99 Pac. 423, holding right of appeal from interlocutory order determined by entry of judgment and merged therein.

Distinguished in *Kinney v. American Yeoman*, 15 N. D. 21, 106 N. W. 44, holding appeal from final judgment and from subsequent order denying new trial is not objectionable for duplicity; *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774, holding that appeal from a judgment and an order overruling a motion for new trial made after judgment for insufficiency of evidence will not be dismissed as a double appeal; *McVay v. Bridgman*, 17 S. D. 424, 97 N. W. 20, holding appeal from judgment and order denying new trial made after judgment constitutes but one appeal; *Meade County Bank v. Decker*, 17 S. D. 590, 98 N. W. 86, holding attempted appeal from order not appealable will be treated as surplusage where there is appeal from appealable order in same case upon same notice.

1 S. D. 480, *STATE v. STEVENS*. 47 N. W. 546.

Indorsement of names of witnesses upon indictment or information.

Cited in *State v. Church*, 6 S. D. 89, 60 N. W. 143, sustaining right of state to use on trial other witnesses than those examined before grand jury; *State v. Isaacson*, 8 S. D. 69, 65 N. W. 430, holding mandatory requirement of Dakota statute that names of all witnesses examined before grand jury shall be placed on indictment; *State v. Andrews*, 35 Or. 388, 58 Pac. 765, holding that where the court sustained a demurrer to a first indictment containing the indorsement of the names of twelve witnesses, and ordered the case resubmitted to the grand jury, whereupon the same grand jury returned another indictment for the same offense, the indorsement thereon of the names of the witnesses examined before the said grand jury is mandatory, under Hill's Ann. Laws, §§ 1260, 1314, providing the same as Dak. Comp. Laws, §§ 7236, 7283, respectively; *State v. Warren*, 41 Or. 348, 69 Pac. 679, holding examination of witnesses before coroner's Dak. Rep.—40.

jury at inquest touching cause of death, is not such examination in support of information as statute contemplates; *Boulter v. State*, 6 Wyo. 66, 42 Pac. 606, holding that a conviction will not be reversed for error in admitting the evidence of witnesses whose names were not indorsed on the information, where the record does not show the facts as they occurred at the time objection was made or which were relied upon by counsel, nor the prejudicial tendency or materiality of said evidence, nor why the delayed objection was not interposed sooner, nor that the defendant was not aware of the nature of said testimony and did not ask for a continuance.

1 S. D. 483, WAYNE v. CALDWELL, 36 AM. ST. REP. 750, 47 N. W. 547.

Conclusiveness of judgment of justice of the peace.

Cited in *Mallie v. Yeadon*, 10 Del. Co. Rep. 521, as to whether proceedings and judgment of justice of peace are conclusive in law as *res judicata*.

Jurisdictional errors.

Cited in *Bright v. Juhl*, 16 S. D. 440, 93 N. W. 648, holding jurisdiction to grant new trial after judgment has been entered and time to appeal expired cannot be conferred upon court by stipulation of counsel; *Weiland v. Ashton*, 18 S. D. 331, 100 N. W. 737, holding objection that verdict was not recorded and judgment entered forthwith in condemnation proceedings to extend streets and alleys are not jurisdictional questions reviewable in collateral proceeding.

Statutory requirements in laying out highway.

Cited in *Woodworth v. Spirit Mound Twp.* 10 S. D. 504, 74 N. W. 443, holding that township supervisors in laying out public road must comply substantially with all statutory requirements pertaining to that in which the public has an interest; *Kothe v. Berlin Twp.* 19 S. D. 427, 103 N. W. 657, holding provisions of statute relative to proceedings of township boards in laying out highways pertaining to individuals only may be waived by interested parties.

1 S. D. 488, SIMONS HARDWARE CO. v. WAIBEL, 11 L.R.A. 267, 36 AM. ST. REP. 755, 47 N. W. 814.

Property rights in intellectual productions.

Cited in notes in 51 L.R.A. 368, 380, on common-law rights of authors and others in intellectual productions; 13 L.R.A. 652, on property in secrets, processes, and recipes.

Injunction against divulging trade secrets.

Cited in *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149, 38 L.R.A. 200, 68 Am. St. Rep. 469, 72 N. W. 140, holding that a former employee who has learned trade secrets from his employer will be enjoined from breaking his agreement not to divulge them.

Cited in note in 12 L.R.A. (N.S.) 104, on protection of trade secrets.

Discretion as to appointment of receiver.

Cited in *Valley Nat. Bank v. H. B. Claflin Co.* 108 Iowa, 504, 79 N. W.

279, holding appointment or refusal of receiver within judicial discretion of court.

When receiver should be appointed.

Cited in *Ft. Payne Furnace Co. v. Ft. Payne Coal & I. Co.* 96 Ala. 472, 38 Am. St. Rep. 109, 11 So. 439, holding that a receiver should not be appointed for the property of a corporation to prevent its sale by the governing body of said corporation, for the purpose of satisfying a bonded indebtedness, where it is not shown that the management was acting faithfully or were wasting or destroying the property of the corporation.

Cited in note in 72 Am. St. Rep. 34, 40, as to when appointment of receiver is proper.

1 S. D. 497, McLAUGHLIN v. WHEELER, 47 N. W. 816.

Discharge of attachment.

Cited in *Wyman v. Hallock*, 4 S. D. 469, 57 N. W. 197, on validity of order discharging attachment made on motion and affidavits.

Cited in note in 123 Am. St. Rep. 1050, on proceedings to dissolve attachments.

Effect of giving undertaking to discharge attachment.

Cited in *Moffitt v. Garrett*, 23 Okla. 398, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818, 100 Pac. 533, holding obligors of bond to discharge attachment, conditioned for performance of judgment by defendant, cannot deny truth of attachment affidavit or assert defendant in attachment did not own property levied upon; *Brady v. Ouffroy*, 37 Wash. 482, 79 Pac. 1004, holding obligors of bond to discharge attachment providing for performance of judgment by defendant estopped to assert attachment was irregular; *Anvil Gold Min. Co. v. Hoxie*, 1 Alaska, 604, holding defendant admits validity and necessity of attachment and waives damages for its wrongful issuance by giving bail bond instead of redelivery bond; *Moffitt v. Garrett*, 23 Okla. 398, 32 L.R.A.(N.S.) 401, 138 Am. St. Rep. 818, 100 Pac. 533, holding that obligor on bond to discharge attachment, under Wilson's Rev. and Ann. St. 1903, is absolutely liable thereon whether attachment was rightfully or wrongfully issued.

Cited in note in 32 L.R.A.(N.S.) 409, on right of obligor in bond for release of attached property to attack attachment.

Distinguished in *Anvil Gold Min. Co. v. Hoxsie*, 60 C. C. A. 492, 125 Fed. 724, holding defendant does not, by giving undertaking for release of attachment under statute, admit estoppel as against judgment in attachment suit where cause of attachment and of action are same.

Raising issue by denial of allegation of complaint.

Cited in *Grace v. Ballou*, 4 S. D. 333, 56 N. W. 1075, holding an allegation by plaintiff that the land in suit "was the property" of another on whose prior ownership plaintiff's title depends put in issue by a denial.

Waiver of defense of statute of frauds.

Cited in *Cosand v. Bunker*, 2 S. D. 294, 50 N. W. 84, holding statute may be waived by failure to object to parol evidence of contract required thereby to be in writing; *International Harvester Co. v. Campbell*, 43 Tex.

Civ. App. 421, 96 S. W. 93, holding necessary interposition of statute of frauds in trial court cannot be made by requesting peremptory instruction without stating ground upon which it is asked.

Validity of contract of employment to sell real estate — Joinder by wife.

Cited in *Kepner v. Ford*, 16 N. D. 50, 111 N. W. 619, holding brokerage contract concerning sale of homestead of husband and wife is not void or voidable because not joined in by wife.

— Necessity for writing.

Cited in *Kepner v. Ford*, 16 N. D. 50, 111 N. W. 619, holding contract authorizing agent to find purchaser for real estate may rest in parol.

Distinguished in *Cleveland v. Evans*, 5 S. D. 53, 58 N. W. 8, holding an unexecuted verbal agreement to convey land in payment of a debt void and unenforceable; *Dal v. Fischer*, 20 S. D. 426, 107 N. W. 534, holding writing to which name of owner of land is not subscribed in accordance with statute is invalid as agreement to sell or as authority for person to sell as owner's agent.

Agent's right to commission for finding purchaser.

Cited in *Fairly v. Wappoo Mills*, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108, holding allegation that the purchaser of fertilizer was not able to pay the first draft at presentment no defense to an action for broker's commissions, under the contract for its sale which had been duly accepted, as it does not imply insolvency, but simply inability to meet a portion of the debt then due.

— Real estate broker.

Followed in *Mattes v. Engel*, 15 S. D. 330, 89 N. W. 651, holding agent employed to sell land and entitled to commission on procuring purchaser who has entered into valid contract of sale with owner although not consummated, if without agent's fault.

Cited in *Watters v. Dancey*, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430, as to what real estate broker must show to entitle him to commissions; *Scott v. Clark*, 3 S. D. 486, 54 N. W. 538, sustaining broker's right to commissions on procuring and reporting to principal party ready, able, and willing to purchase on owner's terms though latter completes the sale; *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253, holding broker entitled to commission when he procures party ready, able and willing to purchase upon owner's terms, though broker makes no binding contract of sale with purchaser; *Kepner v. Ford*, 16 N. D. 50, 111 N. W. 619, holding memorandum of agreement to purchase between owner's agent and other persons named therein admissible to show latter were willing to purchase and terms upon which they would do so; *Huntemer v. Arant*, 16 S. D. 465, 93 N. W. 653, holding agent entitled to commission where he produced purchaser ready, able and willing to purchase, but owner failed to complete sale; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747, holding broker employed to find purchaser for land not entitled to commissions without showing that he found a purchaser ready, able, and willing to purchase on the terms and conditions imposed by the owner; *Butler v. Baker*, 17 R. I. 582,

33 Am. St. Rep. 897, 23 Atl. 1019, holding broker not entitled to commission for bringing a person who is ready and willing to purchase upon the seller's terms unless he is of sufficient pecuniary ability to make the purchase; Egglund v. South, 22 S. D. 467, 118 N. W. 719, holding that real estate agent who procured purchaser to whom property was sold, was entitled to stipulated commission.

Cited in notes in 44 L.R.A. 594, 620, 624, on performance by real estate broker of contract to find purchaser or effect exchange of principal's property; 43 L.R.A. 600, 603, 609, 610, on real estate broker's commissions as affected by the negligence, fraud, or default of the principal, and a defective title; 3 L.R.A.(N.S.) 576, on broker's right to commission on failure of employer's title; 9 L.R.A.(N.S.) 934, on necessity that authority of agent to purchase or sell realty be written to enable him to recover compensation.

Escrows.

Cited in note in 130 Am. St. Rep. 925, on escrows.

1 S. D. 525, **BERRY v. BINGAMAN**, 47 N. W. 825.

Sufficiency of summons to support judgment.

Cited in *Schuttler v. King*, 12 Mont. 149, 30 Pac. 25, holding that a summons in an action upon a promissory note, stating the amount sought to be recovered and notifying the defendant that in case of failure to appear application will be made to the court for the relief demanded in the complaint, is sufficient to authorize judgment by default, under Mont. Code Civ. Proc. § 68, providing that the notice shall be that plaintiff will take judgment for the sum demanded in the complaint, stating it.

Variance between summons and complaint.

Cited in *St. Paul Harvester Co. v. Forbreg*, 2 S. D. 357, 50 N. W. 628, holding that the variance between a summons stating that plaintiff will apply to the court for the relief demanded in the complaint, and a complaint stating a cause of action in which the summons should contain the notice that plaintiff will take judgment by default for a definite sum, is ground for setting aside the judgment and complaint; *Bradey v. Mueller*, 22 S. D. 534, 118 N. W. 1035, holding variance between complaint and summons not ground for dismissal of complaint or for setting aside of summons.

1 S. D. 531, **GRISWOLD LINSEED OIL CO. v. LEE**, 36 AM. ST. REP. 761, 47 N. W. 955.

Relief from default.

Cited in *Meade County Bank v. Decker*, 19 S. D. 128, 102 N. W. 597, holding vacating and setting aside judgments and allowing parties to defend on merits, where they have excusably failed to file pleadings in time lies largely in discretion of trial court; *Kjetland v. Pederson*, 20 S. D. 58, 104 N. W. 67, holding judgment will not be vacated where defendant's failure to answer is due to his own gross negligence; *Parszyk v. Mach*, 10 S. D. 555, 74 N. W. 1027, holding order opening default and permitting

answer proper, where equitable considerations require judgment to stand as indemnity though motion was to vacate and annul findings, conclusions, and judgment as well as to be permitted to answer.

Cited in note in 41 L.R.A. 223, 225, on continuing lien of judgment opened or set aside to permit a defense.

— Who entitled to.

Cited in *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199, holding a purchaser of land pendente lite entitled to have the judgment vacated and be permitted to intervene nearly a year and a half after the judgment was taken.

— Grounds for.

Cited in *Rosebud Lumber Co. v. Serr*, 22 S. D. 389, 117 N. W. 1042, holding setting aside of default judgment not abuse of discretion where failure to secure attorney was inadvertence or excusable neglect; *Greene v. Montana Brewing Co.* 32 Mont. 102, 79 Pac. 693, holding facts sufficient to show excusable neglect, meritorious defense and exercise of due diligence in presenting motion to set aside default; *G. S. Congdon Hardware Co. v. Consolidated Apex Min. Co.* 11 S. D. 376, 77 N. W. 1022, holding a judgment entered against a corporation by default should be opened where the director on whom the summons was served neglected to notify the company's managing officers and they had no knowledge of the suit to which the corporation had a good defense on the merits; *Turner v. Coughran*, 3 S. D. 419, 66 N. W. 810, setting aside, on ground of surprise, deficiency, judgment by default against mortgagor who had sold the premises to persons assuming mortgage where failure to answer was due to executed arrangement with plaintiff for relief from deficiency by obtaining deed to premises; *Searles v. Christensen*, 5 S. D. 650, 60 N. W. 29, sustaining right to relief promptly asked from judgment on note alleged to have been procured by fraud and to be barred by limitations rendered against party at a distance who left court relying on information from his attorney that case had been dismissed.

Distinguished in *Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87, holding failure of discharged attorney to appear and interpose defense, even though valid one exists, no ground for vacating judgment; *Plano Mfg. Co. v. Murphy*, 16 S. D. 380, 102 Am. St. Rep. 692, 92 N. W. 1072, holding belief that no one but officer can serve summons in civil action, a mistake of law, not of fact and is not ground for setting aside judgment; *Sundback v. Griffith*, 7 S. D. 109, 63 N. W. 544, holding ignorance of fact that judgment rendered on debt incurred by property obtained for false pretenses would cut off right of exemptions does not entitle debtor to have judgment by default modified by striking out the statement as to false pretenses.

— Merits of proposed answer.

Cited in *Olson v. Sargent County*, 15 N. D. 146, 107 N. W. 43, holding merits of answer as defense cannot be litigated on affidavits.

1 S. D. 539, **MILLER v. ANDERSON**, 11 L.R.A. 317, 47 N. W. 957.

Priority of liens.

Cited in *Wright v. Sherman*, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093, holding the lien of a chattel mortgage properly filed paramount to that of an agister for subsequently pasturing the mortgaged stock; *Bibbins v. Clark*, 90 Iowa, 230, 29 L.R.A. 278, 57 N. W. 884, 59 N. W. 290, holding that a statute simply making personal property taxes a lien on the real estate of the owner does not give them priority over mortgage liens existing at the time they attach; *Gifford v. Callaway*, 8 Colo. App. 359, 46 Pac. 626, holding that taxes on personal property are not made a lien on the taxpayer's realty, superior to antecedent encumbrances by Colo. Gen. Stats. § 2819; *Lobban v. State ex rel. Carpenter*, 9 Wyo. 377, 64 Pac. 82, holding that taxes are not made a lien on the taxpayer's realty superior to any existing lien or encumbrance, by Wyo. Rev. Stat. § 170; *McGillivray v. McGillivray*, 9 S. D. 187, 68 N. W. 316, holding a county having a lien on land for a personal property tax, subject to a mortgage on the land which has been paid off, but is kept outstanding for the purpose of defeating the tax lien, entitled to have the mortgage canceled of record; *Minnesota v. Central Trust Co.* 36 C. C. A. 214, 94 Fed. 244, holding that under Minn. Gen. Stat. § 1623, providing that "the taxes assessed upon personal property shall be a lien upon the personal property of the person assessed from and after the time the tax books are received by the county treasurer," said lien is superior to all liens, prior or subsequent, claimed by individuals.

Distinguished in *Kirby v. Waterman*, 17 S. D. 314, 96 N. W. 129, holding mortgage executed before street improvements are made or ordered is subject to assessments levied therefor.

Right to sell land for personal property tax.

Cited in *Iowa Land Co. v. Douglas County*, 8 S. D. 491, 67 N. W. 52, holding county treasurer authorized to sell land for personal property tax assessed against owner.

Mortgagee's right to redeem from tax sale.

Cited in *Buell v. Boylan*, 10 S. D. 180, 72 N. W. 406, sustaining right of mortgagee of land sold for taxes to redeem from sale without paying amount of taxes on personal property included in amount of sale without compliance with statutory requirement as to filing of county treasurer's return.

1 S. D. 548, **NATIONAL REF. CO. v. MILLER**, 47 N. W. 962.

What constitutes a contract.

Cited in *McCormick Harvesting Mach. Co. v. Richardson*, 89 Iowa, 525, 56 N. W. 682, holding that a written order to "Please ship . . . twine as follows, . . . to," etc. does not constitute a contract in the absence of its acceptance, or of any action under it by the party whose duty it is to accept.

Right to withdraw offer.

Cited in note in 10 L.R.A. (N.S.) 1139, on right to withdraw order given agent before acceptance.

Parol evidence as to writing.

Cited in McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682, holding that extrinsic evidence is admissible to show that at the time an order for goods was signed and delivered to the plaintiff's agent, it was orally agreed that the order should be sent to the plaintiff or to its general agent, for approval and acceptance, and that it was so sent.

Submission of specific questions to jury.

Cited in Enos v. St. Paul F. & M. Ins. Co. 4 S. D. 639, 46 Am. St. Rep. 796n, 57 N. W. 919, holding submission of specific questions to jury discretionary with court.

Disapproved in Eischen v. Chicago, M. & St. P. R. Co. 81 Minn. 59, 83 N. W. 490, holding that where a jury has been instructed by the court, of its own motion, to find special answers to certain questions bearing upon the vital issues in the case, the court cannot accept a general verdict without said answers, without the consent of the parties.

1 S. D. 558, PORTER v. BOOTH, 47 N. W. 960.**Objection for failure to state cause of action in complaint.**

Cited in Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412, holding where complaint wholly fails to state cause of action, and is incapable of being made good by amendment, objection thereto may be taken at any stage of the proceedings, even upon appeal and court's own motion; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057, holding that an objection to a complaint which fails to state a substantial cause of action and which cannot be made good by amendment may be taken at any time.

Payment of principal's obligation by agent.

Distinguished in Dakota County v. Borowsky, 67 Neb. 317, 93 N. W. 686, holding county bound to pay statutory fees to which sheriff is entitled, regardless of compensation received by deputy for his services.

1 S. D. 563, EICKELBERG v. SOPER, 47 N. W. 953.**Estoppel of owner of property to assert record title.**

Cited in Eastwood v. Standard Mines & Mill. Co. 11 Idaho, 195, 81 Pac. 382, holding owner of mining property who allows posting of notice thereon that another is its owner is estopped to assert his title as against miner's liens for work done for party posted as owner; Custer County v. Walker, 10 S. D. 594, 74 N. W. 1040, holding a bank which furnishes to a county treasurer a statement of the balance due him as treasurer, in reliance upon which the accounts of the treasurer were settled by the county commissioners, estopped to deny that such money was county money; Moore v. Brownfield, 10 Wash. 439, 39 Pac. 113, holding the owner of upland, estopped to claim title to an island by selection where he has induced another to take possession of and expend money on it, with a

view of obtaining title from the government by residence and cultivation, by representing that he did not have the title to said island; *Gionnonatti v. Michelletti*, 15 S. D. 126, 87 N. W. 587, holding one who had taken a warranty deed from a mortgagee after foreclosure estopped to assert any interest in the land as against the mortgagor who had made payments through him to the mortgagee.

1 S. D. 570, *POLLARD v. FIDELITY F. INS. CO.* 47 N. W. 1060.

1 S. D. 575, *STATE v. RODWAY*, 47 N. W. 1061.

Discretion of court as to disqualification of judge.

Cited in *Waterloo Gasoline Engine Co. v. O'Neil*, 19 N. D. 784, 124 N. W. 951, holding no discretion whatever is vested in court or judge.

1 S. D. 577, *BOWLER v. EISENHOOB*, 12 L.R.A. 705, 48 N. W. 136.

Contest of election.

Cited in *Batterton v. Fuller*, 6 S. D. 257, 60 N. W. 1071, holding notice of election contest merely stating, as originally drawn, that contestant was a candidate for the office and that successful candidate was ineligible cannot twenty days after date of canvass be amended so as to state that contestant was appointed before election to fill vacancy and claims right to hold over; *Smith v. Lawrence*, 2 S. D. 185, 49 N. W. 7, holding the remedy by contesting an election not available where notice of contest was not given within twenty days after a canvass in which the return from a certain precinct was improperly omitted; *Re Moore*, 4 Wyo. 98, 31 Pac. 80, holding that an attempted assumption of the duties and powers of the office of governor, before the canvass of the vote and declaration of the result of an election to fill a vacancy in such office, as required by the Wyoming election laws, is premature and invalid, whether the election is general or special.

Decision of tie vote.

Cited in note in 47 L.R.A. 560, on decision of tie vote at election.

1 S. D. 593, *EDINBURG AMERICAN LAND & MORTG. CO. v. MITCHELL*, 48 N. W. 131.

Validity of warrant issued by county or school authorities.

Cited in *Kane v. Hughes County*, 12 S. D. 438, 81 N. W. 894, holding county warrant prima facie evidence that amount named therein is due from county; *Heffleman v. Pennington County*, 3 S. D. 162, 52 N. W. 851, holding that a county warrant is an evidence of indebtedness, and of itself makes a prima facie cause of action, although it lacks the quality of negotiability; *Merchants Nat. Bank v. McKinney*, 4 S. D. 226, 55 N. W. 929, holding a failure to find as to the validity of county warrants not ground for reversal, where the finding, if made, must have been against the party complaining; *Stewart v. Custer County*, 14 S. D. 155, 84 N. W. 764, holding an action not maintainable on a valid county warrant drawn

on the general fund "not otherwise appropriated" immediately after its presentation for payment and indorsement, as not paid for want of funds, where there is no money in the treasury belonging to such fund; *Rochford v. School Dist. No. 11*, 17 S. D. 542, 97 N. W. 747, holding school district order, duly issued, is prima facie evidence that valid claim against district has been lawfully presented and allowed; *Meyer v. School Dist. No. 31*, 4 S. D. 420, 57 N. W. 68, holding school district order regular on face prima facie binding and legal.

1 S. D. 609, JEANSCH v. LEWIS, 48 N. W. 128.

Construction of verdict.

Cited in *Spofford v. Rhode Island Suburban R. Co.* 29 R. I. 34, 69 Atl. 2, construing verdict to carry out intention of jury though papers in cause were not so entitled as to show party actually held liable; *Davidson v. State*, 40 Tex. Crim. Rep. 285, 49 S. W. 372, 50 S. W. 365, holding that a verdict in which the jury find defendants "guilty as charged and assess their punishment at two years' confinement in the state penitentiary," conveys the intent to assess a punishment of two years' confinement in the penitentiary against each of the said defendants and will be so construed.

Review of evidence to support verdict.

Cited in *Cannon v. Deming*, 3 S. D. 421, 53 N. W. 863; *Erickson v. Sophy*, 10 S. D. 71, 71 N. W. 758; *Witte v. Koepfen*, 11 S. D. 598, 74 Am. St. Rep. 826, 79 N. W. 831; *Weiss v. Evans*, 13 S. D. 185, 82 N. W. 388,—holding that appellate court will not weigh conflicting evidence; *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 A. & E. Ann. Cas. 516, holding verdict on conflicting evidence binding on supreme court; *Comeau v. Hurley*, 22 S. D. 79, 115 N. W. 521, holding that verdict on conflicting evidence will not be disturbed on appeal; *Brown v. McCaul*, 6 S. D. 16, 60 N. W. 151; *Vermillion Artesian Well, Electric Light, Min., L. & Improv. Co. v. Vermillion*, 6 S. D. 466, 61 N. W. 802; *Demon v. Mullen*, 6 S. D. 554, 62 N. W. 380; *Richison v. Mead*, 11 S. D. 639, 80 N. W. 131; *Walker v. McCaull*, 13 S. D. 512, 83 N. W. 578; *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192; *Northwestern Elevator Co. v. Lee*, 15 S. D. 114, 87 N. W. 581,—holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding where party has given sufficient legal evidence to support verdict it will not be reversed or evidence reviewed; *Anderson v. Medbery*, 16 S. D. 324, 92 N. W. 1089; *Unzelmann v. Shelton*, 19 S. D. 289, 103 N. W. 646; *Wheaton v. Liverpool & L. & G. Ins. Co.* 20 S. D. 62, 104 N. W. 850; *Mosteller v. Holborn*, 20 S. D. 545, 108 N. W. 13; *Quinn v. Chicago, M. & St. P. R. Co.* 23 S. D. 126, 22 L.R.A. (N. S.) 789, 120 N. W. 884; *Charles E. Bryant & Co. v. Arnold*, 19 S. D. 106, 102 N. W. 303,—holding evidence upon which verdict rests will be examined only to decide its sufficiency to sustain verdict; *Dickinson v. Hahn*, 23 S. D. 65, 119 N. W. 1034, holding that supreme court, where evidence was conflicting, will only determine whether verdict was sustained

by sufficient legal evidence without regard to opponent's evidence; *Quinn v. Chicago, M. & St. P. R. Co.* 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884, holding that supreme court will not weigh conflicting evidence nor go further than determine that there is evidence sufficient to sustain verdict without regard to adverse party's evidence; *Schott v. Swan*, 21 S. D. 639, 114 N. W. 1005, holding that where evidence was conflicting, only question to be determined on appeal is whether independently of evidence of adverse party, there was evidence to sustain verdict; *Hurlbut v. Leper*, 12 S. D. 321, 81 N. W. 631, holding that an appellate court will not review the sufficiency of the evidence to sustain a verdict, where it is conflicting, but substantial evidence was adduced to support the verdict; *Bennett v. Chicago, M. & St. P. R. Co.* 8 S. D. 394, 66 N. W. 934, holding that verdict for plaintiff in action for stock killed by railway train will not be disturbed on appeal where evidence as to circumstances of killing on which question of defendant's negligence depended is conflicting; *Miles v. Penn. Mut. L. Ins. Co.* 23 S. D. 400, 122 N. W. 249, holding verdict good, though informal, where intent of jury is clearly understood by court.

New trial for insufficiency of evidence.

Distinguished in *Finch v. Martin*, 13 S. D. 274, 83 N. W. 263, holding that a new trial may be granted in the discretion of the trial court for insufficiency of evidence, although there is sufficient evidence to prevent a reversal on appeal.

1 S. D. 618, GREELEY v. WINSOR, 46 N. W. 214.

Chattel mortgage in fraud of creditors.

Cited in *Egan State Bank v. Rice*, 56 C. C. A. 157, 119 Fed. 107, holding mortgage upon stock of merchandise void as to creditors of mortgagor where mortgagor retained possession with power to sell and did not account to mortgagee for sales; *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, 58 N. W. 557, holding chattel mortgage on stock of goods rendered presumptively fraudulent only by stipulation authorizing mortgagor to retain possession and sale upon without requiring proceeds to be applied on mortgage debt; *First Nat. Bank v. Calkins*, 12 S. D. 411, 81 N. W. 732, holding chattel mortgage not necessarily void as to creditors by fact that mortgagee permits mortgagor to sell and appropriate to his own use part of mortgaged property.

Cited in note in 13 L.R.A.(N.S.) 925, on validity of chattel mortgage fraudulent as to portion of property.

Statute encroaching on jurisdiction of courts.

Cited in *James v. Appel*, 192 U. S. 129, 48 L. ed. 380, 24 Sup. Ct. Rep. 222, sustaining statute providing for discharge of motion for new trial by operation of law where not determined at term at which made.

1 S. D. 632, SMITH v. TOSINI, 48 N. W. 299.

Presumption from failure to produce evidence.

Cited in *Enos v. St. Paul F. & M. Ins. Co.* 4 S. D. 639, 46 Am. St. Rep. 796n, 57 N. W. 919, holding silence of party when damaging facts are

called out in evidence not equivalent to admission of their truthfulness; *Probert v. McDonald*, 2 S. D. 495, 39 Am. St. Rep. 796, 51 N. W. 212, holding that unfavorable presumption as to good faith of conveyance arises where grantor's failure to testify, where he is present during trial.

Distinguished in *Rossiter v. Boley*, 13 S. D. 370, 83 N. W. 428, holding an instruction that the jury has a right to presume that evidence touching the matter in controversy which a party has in possession, but does not produce, would be damaging to such party, reversible error.

Proof that wife paid for property claimed by husband's creditors.

Cited in *Meighen v. Chandler*, 20 N. D. 238, 126 N. W. 992, holding that wife may show by satisfactory evidence that she purchased and paid for property from her separate estate, where husband's creditors claim property to be husband's.

1 S. D. 642, BOARD OF EDUCATION v. SWEENEY, 36 AM. ST. REP. 767, 48 N. W. 302.

Liability on official bond.

Cited in notes in 90 Am. St. Rep. 193, as to when official bond binds sureties and what irregularities fail to relieve them from liability; 40 Am. St. Rep. 52, on bonds not executed by some of the parties.

— Bond not signed by principal.

Cited in *Novak v. Pitlick*, 120 Iowa, 286, 98 Am. St. Rep. 380, 94 N. W. 916, holding bond unsigned by principal not enforceable against surety; *Deer Lodge County v. United States Fidelity & G. Co.* 42 Mont. 315, 112 Pac. 1060, holding surety on joint and several official bond, not released by failure of principal to sign bond; *State v. Teague*, 50 Tex. Civ. App. 535, 111 S. W. 234, holding that penalties for violation of liquor dealer's bond cannot be enforced when bond is not signed by principal, though delivered to county judge by principal in person, and approved; *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 46, 35 Pac. 567, holding that the failure of the principal to sign a bond which imposed a several obligation only on the sureties, is insufficient to impose any legal liability on the latter unless they intended to be bound thereby, without the principal's signature; *Martin v. Hornsby*, 55 Minn. 187, 43 Am. St. Rep. 487, 56 N. W. 751; *Gay v. Murphy*, 134 Mo. 98, 56 Am. St. Rep. 496, 34 S. W. 1091,— both cases holding that a bond executed by the sureties only does not upon its face show any contract obligation on the part of the sureties; *State v. Hill*, 47 Neb. 456, 66 N. W. 541, holding that where a state officer writes his name in the body of a paper prepared by himself as his official bond, and subscribes his oath of office, indorsed thereon, which instrument is delivered, accepted, and approved as his official bond, it is valid and binding upon both himself and his sureties, even though he inadvertently omitted to attach his signature at the bottom of the bond.

Cited in note in 12 L.R.A.(N.S.) 1107, 1111, on effect of delivery of bond unsigned by principal obligor.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 2 S. D.

2 S. D. 1, WELLS v. PENNINGTON COUNTY, 39 AM. ST. REP. 758, 48 N. W. 305.

Congressional grant of highway over public lands.

Followed in *Smith v. Pennington County*, 2 S. D. 14, 48 N. W. 309, holding present absolute grant or dedications without reservation of right of way over public lands for construction of highway made by Federal statute providing that right of constructing highways over such lands is "hereby granted."

Cited in *Great Northern R. Co. v. Viborg*, 17 S. D. 374, 97 N. W. 6, holding government grant of right to construct highway over public lands, when accepted by territorial act, took immediate effect as against grantee and persons claiming thereunder whose rights became subsequently vested; *Lawrence v. Ewert*, 21 S. D. 580, 114 N. W. 709, on construction of congressional grants for highway.

Cited in note in 24 L.R.A. (N.S.) 765, on establishment of highways over public land subsequent to entry by one who has not perfected title.

— What constitutes acceptance.

Followed in *Smith v. Pennington County*, 2 S. D. 14, 48 N. W. 309, holding Dakota statute declaring all section lines public highways as far as practicable and that highways along such line shall be of stated width, an acceptance of Congressional grant of right of way for highways over public lands.

Referred to as leading case in *Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593, holding acceptance relates back to date of grant and may be made by any acts by which public may acquire public roadway over private property other than by purchase.

Cited in *Tholl v. Koles*, 65 Kan. 802, 70 Pac. 881, holding grant of

right of way for highways over public lands by Congress and enactment of state legislature declaring all section lines highways constitute dedication and acceptance; *Hughes v. Veal*, 84 Kan. 534, 114 Pac. 1081, holding act of county officers in causing highway to be surveyed and located over public lands and act of public in traveling over and using road as highway, sufficient to constitute acceptance of congressional grant; *Wallowa County v. Wade*, 43 Or. 253, 72 Pac. 793, holding long-continued user by public together with action of county authorities in surveying and locating road constituted acceptance of dedication by Congress; *Okanogan County v. Cheetham*, 37 Wash. 682, 70 L.R.A. 1027, 80 Pac. 262, holding user of highway by general public for seven years prior to entry of the land by homesteader constitutes acceptance of grant by Congress; *Mills v. Glasscock*, 26 Okla. 123, 110 Pac. 377, holding that under United States and state statutes there was general grant and acceptance of public lands for highway purposes on each side of all section lines in Osage Indian Reservation.

Distinguished in *Rolling v. Emrich*, 122 Wis. 134, 99 N. W. 464, holding few months' desultory use by few persons of logging road or trail through woods does not constitute acceptance of governmental grant.

2 S. D. 14, SMITH v. PENNINGTON COUNTY, 48 N. W. 309.

Grant of highway over public land.

Cited in *Riverside Twp. v. Newton*, 11 S. D. 120, 75 N. W. 899, sustaining right to open highway for use along section lines without allowing compensation to adjoining owners; *Keen v. Fairview Twp.* 8 S. D. 558, 67 N. W. 623, holding unconditional conveyance of indefeasible interest to public made by Act of Congress granting right of way for construction of highways over public lands not reserved for public uses; *Walcott Twp. v. Skauge*, 6 N. D. 382, 71 N. W. 544, holding grant in praesenti taking effect as of date of grant created by provision of Federal statute that right of way for constructing highways over public lands not reserved for public uses is "hereby" granted.

2 S. D. 17, SOUTH BEND TOY MFG. CO. v. DAKOTA F. & M. INS. CO. 48 N. W. 310.

Authority of insurance agent.

Cited in *Vesey v. Commercial Union Assur. Co.* 18 S. D. 632, 101 N. W. 1074, holding agents of insurance company authorized to solicit applications for fire insurance, write and deliver policies, and do all acts proper and customary to be done by fire insurance agents are general agents.

Who is an agent.

Cited in *McLean v. Ficke*, 94 Iowa, 283, 62 N. W. 753, holding that the mere use of the word "agent" in a contract does not make one an agent who, in view of the law under the evidence, is not such.

— Insurance agent as agent of insured.

Cited in *Fromherz v. Yankton F. Ins. Co.* 7 S. D. 187, 63 N. W. 784,

holding persons styling themselves "brokers" and having no relations with a designated company who undertake at request of agents for other companies to get insurance for designated persons and send application to such company containing material misrepresentation, agents of insured.

Waiver of conditions in policy.

Cited in note in 107 Am. St. Rep. 110, on waiver of provisions of non-waiver or written waiver of conditions and forfeitures in policies.

3 S. D. 32, STATE v. MORGAN, 48 N. W. 314, Writ of error dismissed in 159 U. S. 261, 40 L. ed. 145, 15 Sup. Ct. Rep. 1041.

Title of act.

Cited in *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, holding title sufficient which partly indicates purpose of act and is not calculated to mislead; *State ex rel. Kol v. North Dakota Children's Home Soc.* 10 N. D. 493, 88 N. W. 273, holding that act having but a single purpose expressed in title may embrace all matters naturally and reasonably included therein and all measures which may facilitate accomplishment of legislative purpose; *Allopathic State Bd. of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 24 So. 809, holding that La. act 1894, No. 49, relating to the practice of medicine, surgery, and midwifery, and creating a state board of examiners and providing for the trial and punishment of violators of its provisions and repealing laws in conflict therewith, does not violate La. Const. art. 29, requiring that a statute shall embrace but one object which shall be expressed in its title, as the singleness of object, the protection of the public from unskilled medical practice, is not broken by the subsidiary details relating to the enforcement of such purpose; *Miles v. Benton Twp.* 11 S. D. 450, 78 N. W. 1004, holding provisions for disposing of water derived from wells covered by title "an act authorizing civil townships to sink artesian wells for public purposes and to issue bonds therefor;" *State v. Ayers*, 8 S. D. 517, 67 N. W. 611, holding constitutional prohibition against any law embracing more than one subject not violated by statute authorizing prosecutions on information because of a provision empowering court in its discretion to proceed without a grand jury; *Hickman v. State*, 62 N. J. L. 499, 41 Atl. 942, holding that the penalties of a statute to provide for "the incorporation and regulation of insurance companies" may be visited upon the agents of such companies by the provisions of the statute, without its violating the constitutional provision requiring that the subject-matter of every statute be expressed in its title; *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding statutory provisions allowing recovery by married woman for damages due to sale of intoxicating liquor to husband and prohibiting sale thereof to certain persons are restrictions on sale; *Davenport v. Elrod*, 20 S. D. 567, 107 N. W. 833, holding use of funds derived from sale of lands granted to state for public buildings at capital is germane to act whose subject is construction of building for state use at state capital.

Partial invalidity of statute.

Cited in *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, to point that fact that statute is void in part does not authorize court to adjudge entire act unconstitutional.

2 S. D. 55, NOYES v. LANE, 48 N. W. 322.**Sufficiency of abstracts on appeal.**

Cited in *Allen v. Lewis*, 38 Fla. 115, 20 So. 821, holding that the abstract must state the facts in the transcript so that the court can judge of them when called in question, and conclusions drawn therefrom will not do.

2 S. D. 58, RE REVENUE LAW, §§ 18, 19, 48 N. W. 813.**2 S. D. 71, RE SCHOOL LAW, CHAP. 9, § 7, 48 N. W. 812.****2 S. D. 74, NORTH STAR BOOT & SHOE CO. v. STEBBINS, 48 N. W. 833.****Authority of corporate officers.**

Cited in *Famous Shoe & Clothing Co. v. Eagle Iron Works*, 51 Mo. App. 66, holding that the secretary of a corporation duly organized for the manufacture of machinery has no implied power to make the corporation liable upon orders on a merchant for the delivery of clothing at its cost to men employed by it; *Farmers' & M. Bank v. Clancy*, 163 Mich. 586, 128 N. W. 752, holding that cashier has no authority as matter of law to compromise claim of bank.

Who may appeal.

Cited in *Schlegel v. Sisson*, 8 S. D. 476, 66 N. W. 1087, holding that executors as such cannot appeal from an order requiring them to pay to the widow the proceeds of an insurance policy on decedent's life.

Necessity for alleging copartnership.

Cited in *First Nat. Bank v. Hattenbach*, 13 S. D. 365, 83 N. W. 421, holding that a complaint in an action individually against partners on a note signed by them need not allege the copartnership.

2 S. D. 83, MacVEAGH v. BURNS, 48 N. W. 835.**Reformation of contracts.**

Cited in notes in 65 Am. St. Rep. 491, 507, on reformation of contracts; 28 L.R.A.(N.S.) 844, 846, 851, on relief from mistake of law as to effect of instrument.

2 S. D. 91, WYCKOFF v. JOHNSON, 48 N. W. 837.**Ratification of contract.**

Cited in *Union Trust Co. v. Phillips*, 7 S. D. 225, 63 N. W. 903, holding contract and negotiations by which it was procured ratified by party seeking to enforce such contract.

Account books as evidence.

Cited in note in 53 L.R.A. 536, on use of person's books of account as evidence upon issues between other parties.

2 S. D. 100, PADDOCK v. BALGORD, 48 N. W. 840.**Schedule of exempt property.**

Cited in *Wagner v. Olson*, 3 N. D. 69, 54 N. W. 286, holding debtor's right to exemptions not lost by including in schedule only the property claimed as exempt; *Ecker v. Lindskog*, 12 S. D. 428, 48 L.R.A. 155, 81 N. W. 905, holding sufficient, schedule of personal property claimed by married woman as exempt, which states that it belongs to herself and husband and is exempt as not exceeding \$750.00, and that she is wife of defendant who has been adjudged insane.

Liability of officer levying on exempt property.

Cited in *Linander v. Longstaff*, 7 S. D. 157, 63 N. W. 775, holding attaching officer's failure to act upon or recognize valid claim for exempt property scheduled no defense in action against him to recover possession or value of such property; *Nelson v. Oium*, 21 S. D. 541, 114 N. W. 691, holding action for conversion proper remedy where sheriff fails to release levy upon and return to judgment debtor property selected as exempt.

2 S. D. 106, MERCHANTS' NAT. BANK v. MCKINNEY, 45 N. W. 203, 48 N. W. 841.**Officers, courts, and public corporations de facto.**

Cited in *State ex rel. Bales v. Bailey*, 106 Minn. 138, 19 L.R.A.(N.S.) 775, 130 Am. St. Rep. 592, 118 N. W. 676, 16 A. & E. Ann. Cas. 338, holding court organized under color of law is de facto court and its judge and clerk de facto officers; *State ex rel. Bookmeier v. Ely*, 16 N. D. 569, 14 L.R.A.(N.S.) 638, 113 N. W. 711, holding person appointed as judge by governor before judicial district was created by law was de facto officer.

Cited in note in 15 L.R.A.(N.S.) 103, on de jure office as condition of de facto officer.

Prima facie validity of bonds and warrants duly issued by public authorities.

Cited in *Coler v. Rhoda School Twp.* 6 S. D. 640, 63 N. W. 158, holding bonds voted by a majority of the electors present and voting at a special meeting held by a school district, with regard to submitting the question of binding the district to build and furnish a schoolhouse, not invalidated by the fact that no written petition for, or notice of, such meeting was given, where the bonds contained a recital of authority and regularity importing strict compliance with all statutory requirements; *Stewart v. Custer County*, 14 S. D. 155, 84 N. W. 764, denying right of purchaser of valid county warrant drawn on general fund "not otherwise appropriated" to maintain action and obtain judgment thereon immediately after indorsement of nonpayment for want of funds; *Rochford v. School Dist. No. 11*, 17 S. D. 542, 97 N. W. 747, holding duly issued order of school dis-

Dak. Rep.—41.

trict is prima facie evidence that valid claim against district has been lawfully presented and allowed.

2 S. D. 124, STATE v. REDDICK, 48 N. W. 846, 8 AM. CRIM. REP. 204.

Embezzlement by partner.

Cited in *Ray v. State*, 48 Tex. Crim. Rep. 122, 86 S. W. 761, holding one partner cannot embezzle funds of consummated partnership.

Cited in notes in 87 Am. St. Rep. 44, on embezzlement; 31 L.R.A. (N.S.) 822, on failure to account to one jointly interested as theft, larceny, or embezzlement.

2 S. D. 127, STEBBINS v. LARDNER, 48 N. W. 847.

Negotiability of note.

Cited in *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804, holding non-negotiable, note not payable to order of bearer.

Inconsistent defenses.

Cited in *Ormaby v. Phenix Ins. Co.* 5 S. D. 72, 58 N. W. 301, holding that only restriction on defendant's right to set forth as many defenses as defendant may have is that they must be separately stated and refer to causes of action intended to be answered; *Gleckler v. Slavens*, 5 S. D. 364, 59 N. W. 323, holding that admissions in counterclaim set up as second defense do not destroy effect of general denial interposed as first defense; *Green v. Hughitt School Twp.* 5 S. D. 452, 59 N. W. 224, holding that defense will not be stricken out because inconsistent with other defense pleaded in answer; *Minnesota Thresher Mfg. Co. v. Schaack*, 10 S. D. 511, 74 N. W. 445, holding that it will not be presumed on appeal, for the purpose of sustaining the judgment, that the portions of an answer stricken out by the lower court were irrelevant or redundant, as under the Code a defendant may set forth, in his answer, as many defenses as he may have; *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1060, holding it reversible error to send the pleadings out with the jury where they are apparently, if not actually, inconsistent with defendant's contention; *Hardman v. Kelley*, 19 S. D. 608, 104 N. W. 272, holding defense inconsistent with prior defenses pleaded may be made.

Cited in note in 48 L.R.A. 185, on right to plead inconsistent defenses.

Disapproved in *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 48 L.R.A. 177, 43 Pac. 331, holding that however diversified the answers may be they must all contain the essential element of truth, and if the admission of the truth of one answer necessarily proves the falsity of another they cannot be allowed to stand.

Imputing cashier's knowledge to bank.

Cited in *Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1058, holding knowledge of cashier, knowledge of the bank; *Black Hills Nat. Bank v. Kellog*, 4 S. D. 312, 56 N. W. 1071, holding cashier's knowledge as to defenses and equities against note made to him individually and transferred to bank on maturity, knowledge of the bank.

Distinguished in *National Bank of Commerce v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874, holding bank not chargeable with cashier's knowledge as to defenses to notes transferred to bank by firm of which he is a member where bank acts entirely through discount committee of which cashier is not a member.

Liability of bank for contracts made by cashier.

Cited in *Security Sav. Bank v. Smith*, 144 Iowa, 203, 122 N. W. 825, holding that cashier, in absence of restrictions known to sureties, may bind bank by agreement with sureties to collect note if practicable, out of property owned by maker and pointed out to cashier by sureties.

Distinguished in *First Nat. Bank v. Alexander*, 152 Ala. 585, 44 So. 866, holding bank not bound by contract ultra vires made by cashier where it receives no benefits thereunder.

**2 S. D. 145, FIRST NAT. BANK v. BLACK HILLS FAIR ASSO.
48 N. W. 852.**

Inadequacy of consideration for judicial sale.

Cited in *Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563, holding inadequacy of price not of itself sufficient to invalidate sale of property under execution; *Trenery v. American Mortg. Co.* 11 S. D. 506, 78 N. W. 991, holding inadequacy of price insufficient to invalidate a foreclosure sale made under a power, in the absence of inequitable circumstances or proof of misconduct resulting in injury; *Power v. Larabee*, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789, denying right of defendant knowing of sale of land under execution and having fair opportunity to redeem part of sale set aside for inadequacy of price.

Distinguished in *Kirby v. Ramsey*, 9 S. D. 197, 68 N. W. 328, holding a foreclosure sale properly vacated where land sold for a tenth of its value, defendants had no actual notice of the sale, and supposed, and were justified in supposing, that the mortgagee would bid in the land for the full amount of his claim.

Waiver of irregularity in judicial sale.

Cited in *Northwestern Mortgage Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W. 648, holding an irregularity in a foreclosure sale waived by the mortgagor's failure to object thereto for more than four months after the expiration of the period of redemption.

2 S. D. 153, AVANT v. FLYNN, 49 N. W. 15.

Irregularity as to verification of assessment roll.

Referred to as leading case in *Corbet v. Rocksbury*, 94 Minn. 397, 103 N. W. 11, holding failure of auditor to sign jurat under signature of assessor to assessment list does not invalidate record.

Cited in *Bandow v. Wolven*, 20 S. D. 445, 107 N. W. 204, holding unverified assessment roll is not a nullity; *Wisconsin C. R. Co. v. Ashland County*, 81 Wis. 1, 50 N. W. 937, holding that the collection of a school and highway tax will not be restrained because certain of the subschool districts did not hold annual meetings as required by law; the clerks

thereof did not transmit to the secretary of the town board of school directors a written verified report as required by law; the school taxes were voted in the absence of such reports; the secretary of the school board did not make to the board of supervisors a written statement showing the money received and disbursed; and the town board did not render to the board of audit the written statement required by Wis. Rev. Stat. §§ 820, 1226.

Necessity and sufficiency of notice.

Cited in *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447, holding property owner not deprived of property without due process of law where ordinance for construction of sidewalk thereon provided for due notice of hearing at which he appeared and orally stated his objections; *School Dist. No. 56 v. School Dist. No. 27*, 9 S. D. 336, 69 N. W. 17, holding the prima facie evidence of the giving notice of the proposed change in the boundaries of school districts arising from the introduction of the remonstrance to the board, signed by a number of the voters of the district to be affected, including the school district officers, not overcome by evidence of some of such officers, including the clerk, that no official notice was served on them.

Distinguished in *Billingshurst v. Spink County*, 5 S. D. 84, 58 N. W. 272, holding notice of assessment of omitted property by board of equalization, not essential, as the taxpayer is charged with knowledge of the statute which requires such assessment, and which provides that he may apply to such board, during its session, for the cancelation of errors.

2 S. D. 164, GILBERT v. HOLE, 49 N. W. 1.

Power of corporation to take and hold property.

Cited in *State ex rel. Gilbert v. Union Invest. Co.* 7 S. D. 51, 63 N. W. 232, holding deed to corporation authorized to take conveyances of and hold land to limited extent not absolutely void because land was purchased as a speculation.

-- Who may question.

Cited in *Texarkana & Ft. S. R. Co. v. Texas & N. O. R. Co.* 28 Tex. Civ. App. 551, 67 S. W. 525, holding railroad company may enjoin trespass upon its track and trespasser cannot deny its authority under its charter to build the track; *Hubbard v. Worcester Art Museum*, 194 Mass. 280, 9 L.R.A.(N.S.) 689, 80 N. E. 490, 10 A. & E. Ann. Cas. 1025, holding gift to corporation under will in excess of sum specially authorized is good as against every one but the commonwealth; *Thomas v. Wilcox*, 18 S. D. 625, 101 N. W. 1072, holding where corporation is authorized to acquire and hold land for certain purposes, whether amount of land acquired and held exceeds limits authorized by law can only be determined in action on state's behalf; *Farrington v. Putnam*, 90 Me. 405, 38 L.R.A. 339, 37 Atl. 652, holding that the act of an eleemosynary corporation in accepting a bequest and devise increasing its property beyond the amount prescribed by law may be the subject of prosecution or not as the state chooses, and the heirs have no interest therein.

Cited in notes in 32 L.R.A. 294, on right of private persons to contest the

power of a corporation to take or hold property; 33 L.R.A.(N.S.) 356, as to who may take advantage of statute rendering foreign corporation incapable of taking title.

2 S. D. 171, STATE v. LEEHMAN, 49 N. W. 3.

Opinion of non-expert as to mental soundness.

Cited in *State v. McGruder*, 125 Iowa, 141, 101 N. W. 646, holding father of accused might testify as to accused's ability to distinguish between right and wrong; *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369, holding non expert witness may give opinion as to mental condition of testatrix at about time she executed will; *French v. State*, 93 Wis. 325, 10 Am. Crim. Rep. 606, 67 N. W. 706, holding that, in determining the sanity of one accused of homicide, the evidence cannot be limited arbitrarily to what occurred within four days after the day of the crime.

Cited in notes in 38 L.R.A. 722, on nonexpert opinions as to sanity or insanity; 39 L.R.A. 325, on expert opinions as to sanity or insanity.

Jurisdiction in cases pending on admission of state to Union.

Cited in *Higgins v. Brown*, 20 Okla. 355, 94 Pac. 703, 1 Okla. Crim. Rep. 33, holding state court has jurisdiction of indictment for murder pending in United States court at time of admission of state to Union.

Sufficiency of objection.

Cited in *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 596, holding other grounds waived by objections to evidence on a specific ground.

2 S. D. 185, SMITH v. LAWRENCE, 49 N. W. 7.

When mandamus lies.

Cited in *Howard v. Huron*, 6 S. D. 180, 26 L.R.A. 493, 60 N. W. 803, sustaining right to peremptory writ of mandamus commanding defendant to perform duty or act which plaintiff has shown himself entitled to when included in the relief demanded.

Parties in mandamus proceeding.

Cited in *Heintz v. Moulton*, 7 S. D. 272, 64 N. W. 135, holding that real party in interest should be named in mandamus proceedings to enforce private right; *Howard v. Huron*, 5 S. D. 539, 26 L.R.A. 493, 59 N. W. 833, holding mandamus proceedings to compel city to levy tax to pay judgment against it properly entitled in judgment creditor's name as plaintiff; *Heintz v. Moulton*, 7 S. D. 272, 64 N. W. 135, holding chairman of district school board not necessary defendant in mandamus proceedings against board, where he has always held himself ready to perform acts sought to be enforced; *Nelson v. King*, 21 S. D. 51, 109 N. W. 649, on substitution of plaintiffs in application for peremptory writ of mandamus.

Cited in note in 105 Am. St. Rep. 123, on necessary parties to proceedings in mandamus.

Demand as prerequisite to mandamus.

Cited in *Heintz v. Moulton*, 7 S. D. 272, 64 N. W. 135, holding no per-

sonal demand on members of school board necessary before commencing mandamus proceedings to compel them to perform an imperative duty.

Duty of election officers as to canvassing vote.

Cited in *State ex rel. Bennett v. Barber*, 4 Wyo. 56, 32 Pac. 14, holding that the county clerk and the justices of the peace whom he calls to his assistance, under Wyo. Laws 1890, p. 177, § 137, providing that the clerk taking to his assistance two justices shall proceed to open the returns and make abstracts of the votes, act as a board in performing such duties, the act of the majority being the act of all, although the justices constitute such majority; *Woods v. Sheldon*, 9 S. D. 392, 69 N. W. 602, holding it duty of governor and secretary of state to canvass all votes from all counties of state for presidential electors if duly authenticated returns are obtainable; *Rich v. Board of State Canvassers*, 100 Mich. 453, 59 N. W. 181, holding that the court may compel the board of state canvassers by mandamus to reconvene and recanvass a vote when the board has declared the adoption of an amendment to the Constitution by counting votes which had been fraudulently changed from the negative to the affirmative; *State ex rel. Leech v. Choteau County*, 13 Mont. 23, 31 Pac. 879, holding that a board of county canvassers which adjourn sine die, after having illegally excluded the vote of a certain precinct, the result of which showed the election to the legislative assembly of a person other than would have been elected if the votes of such precinct had been counted, may be compelled to reconvene and recanvass the returns; *Heffner v. Snohomish County*, 16 Wash. 273, 47 Pac. 430, holding that county canvassers who have not performed the duties specified in the statute within the time fixed by 1 Hill's (Wash.) Ann. Stat. §§ 2462, 2463, are not thereby precluded from subsequently performing such duties, as the statutory direction as to time is directory, and not mandatory; *People ex rel. Robinson v. Burns*, 106 App. Div. 36, 94 N. Y. Supp. 196, holding where terms of office whereby canvassers became such have expired before issuance of certificate of election they are still canvassers for that purpose; *Holdermann v. Schane*, 56 W. Va. 11, 48 S. E. 512, 3 A. & E. Ann. Cas. 170 (dissenting opinion), on treatment of election officers as still in office when their duties remain unperformed.

2 S. D. 210, WILLIAMS v. WAIT, 39 AM. ST. REP. 768, 49 N. W. 209.

Appeal from judgment omitting costs.

Cited in *Re Lemery*, 15 N. D. 312, 107 N. W. 365, as to whether omission from decree of amount allowed as costs will defeat appeal; *Mouser v. Palmer*, 2 S. D. 466, 50 N. W. 967, holding that an appeal will not be dismissed because the costs have not been taxed and inserted in the judgment; *State v. Donaldson*, 12 S. D. 259, 81 N. W. 299, holding a judgment imposing a fine and costs for keeping saloon open on Sunday not inoperative as to the fine because a writ of error was sued out before taxing the costs which were left blank in the judgment; *Re Weber*, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523 (dissenting opinion), the majority holding that

an appeal will not lie to the supreme court from the dismissal by the district court of an appeal from a justice's judgment until the entry of a formal judgment of dismissal and for costs.

Cited in note in 28 L.R.A. 630, on what entry or record is necessary to complete judgment or order.

Estoppel to deny vendor's or landlord's title.

Cited in *Coleman v. Stalnacke*, 15 S. D. 242, 88 N. W. 107, holding that one who enters into possession under a contract of purchase is estopped to deny his vendor's title, at least until he has himself acquired a better one; *Illinois Steel Co. v. Budziasz*, 139 Wis. 281, 119 N. W. 935 (dissenting opinion), on estoppel of tenant; *Browne v. Haseltine*, 9 S. D. 524, 70 N. W. 648, denying lessee's right to deny lessor's right to possession in forcible detainer by latter.

Cited in notes in 89 Am. St. Rep. 70, 109; 11 Eng. Rul. Cas. 77; 15 Eng. Rul. Cas. 305,—on estoppel of tenant to deny landlord's title.

Pleading in trover.

Cited in note in 9 N. D. 632, on pleading in actions for trover and conversion.

2 S. D. 220, HOLDEN v. HASERODT, 49 N. W. 97, Affirmed on rehearing in 3 S. D. 4, 51 N. W. 340.

What orders are appealable.

Cited in *Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co.* 2 S. D. 546, 51 N. W. 342, holding not appealable, order of injunction granted by circuit judge within his circuit upon return of an order to show cause returnable before himself and concluding with the words "done at chambers," reciting that "the judge of said court having considered the return" and concluding with the words "done at chambers;" *Farleigh v. Kelly*, 24 Mont. 369, 62 Pac. 495, holding order made by a district judge in chambers in his own district in a cause which had been tried before him while lawfully holding court in another district, valid under Mont. Code Civ. Proc. § 36, giving a judge holding court for the judge of another district the same power to make the order in court or in chambers, and § 1821 providing that orders made out of court may be made by the judge of the court in any part of the state.

Waiver of defective service by appearance.

Cited in *Davidson v. O'Donnell*, 41 Mont. 308, 110 Pac. 645, holding general appearance waiver of defect in service of notice of appeal.

2 S. D. 224, WATERTOWN NAT. BANK v. HOLABIRD SCHOOL TWP. 49 N. W. 98.

Compensation of attorney.

Cited in *Sheridan County v. Hanna*, 9 Wyo. 368, 63 Pac. 1054, holding that if by the act of the client counsel are, against their consent, prevented from obtaining a decision upon the merits as provided by the terms of their employment, the client cannot refuse to pay the agreed compensation.

2 S. D. 226, McLAUGHLIN v. ALEXANDER, 49 N. W. 99.**Property subject to levy.**

Cited in Fishburn v. Londershausen, 50 Or. 363, 14 L.R.A.(N.S.) 1234, 92 Pac. 1060, 15 A. & E. Ann. Cas. 975, holding negotiable promissory note personal "property" subject to attachment under statute; Acme Harvesting Mach. Co. v. Hinkley, 23 S. D. 509, 122 N. W. 482, holding judgment subject to levy and sale on execution.

Admissions in pleading.

Cited in Kirby v. Scanlan, 8 S. D. 623, 67 N. W. 828, holding agreement set out in answer in action on note, part of defendant's admissions and entitled to consideration by court so far as relevant in determining whether plaintiff has made out his case; Commercial Bank v. Jackson, 9 S. D. 605, 70 N. W. 846, denying right to consider admission or averment in answer to establish material fact omitted from complaint; Humpfner v. D. M. Osborne & Co. 2 S. D. 310, 50 N. W. 88, holding allegation in answer that chattels alleged in complaint to have been converted was included in chattel mortgage by plaintiff to defendant and was plaintiff's property at time of mortgage a distinct admission of plaintiff's title.

Distinguished in Baker v. Warner, 16 S. D. 292, 92 N. W. 393, holding where complaint alleges indorsement of note by payee and answer does not admit indorsement and denies each and every allegation of complaint except those specifically admitted, indorsement must be proved.

2 S. D. 238, STATE v. SEVERINE, 49 N. W. 1056.**2 S. D. 242, SYKES v. FIRST NAT. BANK, 49 N. W. 1058.****Admissibility of evidence of assent to change in contract.**

Cited in Meyer v. School Dist. No. 31, 4 S. D. 420, 57 N. W. 68, holding certificate of school district officers referring to order as payable in five years from date of certificate, admissible to show their knowledge of and assent to payee's indorsement on such order of five years extension of time of payment.

Mode of objecting to defect of parties.

Cited in Ross v. Page, 11 N. D. 458, 92 N. W. 822, holding objection on ground of defect of parties is waived by failure to demur when such defect appears on face of complaint.

Distinguished in Burnett v. Costello, 15 S. D. 89, 87 N. W. 575, holding it proper and necessary to make by answer objection to defect of parties not apparent on face of complaint.

Presumption on appeal as to admissibility of evidence.

Cited in St. Paul F. & M. Ins. Co. v. Dakota Land & Live Stock Co. 10 S. D. 191, 72 N. W. 460, holding that evidence negating truth of allegation in complaint a defective denial was directed, will be presumed on appeal to have been admitted on some other point in the case if it can be referred thereto.

Nature of action to recover land.

Cited in Burleigh v. Hecht, 22 S. D. 301, 117 N. W. 367, holding action

to recover possession of land under claim of ownership against one in possession, and to determine possessor's adverse claim, a legal action.

2 S. D. 261, BAKER v. BAKER, 39 AM. ST. REP. 776, 49 N. W. 1064.

Conclusiveness of verdict on conflicting evidence.

Cited in *Bennett v. Chicago, M. & St. P. R. Co.* 8 S. D. 394, 66 N. W. 934, holding that verdict for plaintiff in action for stock killed by railway train will not be disturbed on appeal where evidence as to circumstances of killing on which question of defendant's negligence depended is conflicting.

Subrogation to rights of mortgagee.

Cited in *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 886, holding that the grantees in a deed who, believing themselves the owners of the land conveyed, paid off a mortgage on the land and had it discharged of record, will be subrogated to the rights of the mortgagee as against those taking the title from their grantor by descent when their deed is afterwards adjudged void; *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468, holding that one who advances money to take up a note secured by a vendor's lien, under the express agreement with the debtor that he should hold the note uncanceled and that the lien should be kept alive to secure him, may enforce the lien as against a subsequent mortgagee taking with notice; *Heuser v. Sharman*, 89 Iowa, 355, 48 Am. St. Rep. 390, 56 N. W. 525, holding that one who loans money to the husband of an owner of land, for the purpose of enabling him to pay a mortgage thereon, under an agreement that the lender shall have such mortgage assigned to her, is entitled to be subrogated to the interest of the mortgagee, where the husband pays the mortgage and obtains its discharge, although the mortgaged property is a homestead and the mortgagee is not bound to assign the mortgage.

Cited in note in 99 Am. St. Rep. 521, on right of subrogation.

Parol agreement to give mortgage.

Cited in *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 114 Rep. 470, 80 Pac. 49, 6 A. & E. Ann. Cas. 44, holding oral agreement to give mortgage gives lien where promisee fully performs by advancing money for use in procuring deed.

Cited in note in 6 L.R.A.(N.S.) 586, on specific performance of contract to give security.

Distinguished in *Tucker v. Ottenheimer*, 46 Or. 585, 81 Pac. 360, holding lien upon land cannot be created by direct oral agreement.

Burden of proving payment by other than money.

Cited in *Estey v. Birnbaum*, 9 S. D. 174, 68 N. W. 290, holding burden of proving payment by order or express agreement that it should be accepted as full payment of antecedent debt, upon one making such claim.

2 S. D. 269, ARNESON v. SPAWN, 39 AM. ST. REP. 783, 49 N. W. 1066.

Conflict between monuments and calls for boundaries.

Cited in *Bridenbaugh v. Bryant*, 79 Neb. 320, 112 N. W. 571, holding fact boundaries located by early settlers coincide with old, defaced and uncertain monuments tends to prove their genuineness; *White v. Amrhien*, 14 S. D. 270, 85 N. W. 191, sustaining right to use field notes giving courses and distances of original survey for locating lost corners in absence of original monuments; *McGray v. Monarch Elevator Co.* 16 S. D. 109, 91 N. W. 457, holding it is duty of court to ascertain if possible line as indicated by monuments and mounds established by government surveyor; *Tyler v. Haggart*, 19 S. D. 167, 102 N. W. 682, holding where location of original monument is established line must be found in accordance therewith, though monument does not fully correspond with calls in field notes; *Radford v. Johnson*, 8 N. D. 182, 77 N. W. 601, holding that presumption of correctness of county surveyor's survey extends to courses, distances, variations, mathematical complications including field notes and plats but not determination of disputed boundaries or corners.

Cited in notes in 110 Am. St. Rep. 678, on conclusiveness of established boundaries; 129 Am. St. Rep. 999, on location of boundaries.

Evidence as to monuments.

Cited in *Propper v. Wohlwend*, 16 N. D. 110, 112 N. W. 967, holding where original monuments can be located definitely, they control absolutely over all other evidence including plats and field notes.

Lessor's right of action for injury to reversion.

Cited in *Southern R. Co. v. State*, 116 Ga. 276, 42 S. E. 508, holding lessor cannot maintain action for use and occupation of leased premises during term.

Actionable trespass.

Cited in *Minter v. Gose*, 13 Wyo. 178, 78 Pac. 948, holding petition showing depasturage of land by bringing herd of sheep thereon states cause of action in trespass.

Cited in note in 30 L.R.A.(N.S.) 245, on necessity and character of title or possession to sustain action of trespass.

2 S. D. 285, ULRICK v. DAKOTA LOAN & T. CO. 49 N. W. 1054.

Negligent withdrawal of soil support.

Cited in *Walker v. Strosnider*, 67 W. Va. 39, — L.R.A.(N.S.) —, 67 S. E. 1087, holding owner of land not entitled, *ex jure naturae*, to lateral support in adjacent land for buildings erected thereon; *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749, holding that statutory duty of using ordinary care and skill and taking reasonable precautions to sustain adjoining land of making excavations refers to adjoining land in natural condition without building thereon; *Walker v. Strosnider*, 67 W. Va. 39, — L.R.A.(N.S.) —, 67 S. E. 1087, holding that measure of care in excavating extends to reasonable means of temporary support of adjacent buildings; *Hannicker v. Lepper*, 20 S. D. 371, 6 L.R.A.(N.S.) 243,

129 Am. St. Rep. 938, 107 N. W. 202, holding damages recoverable for injury to property, including building due to negligence in making excavation or leaving it exposed to inclement weather for unreasonable time before putting in foundation walls; Walker v. Strosnider, 67 W. Va. 39, — L.R.A.(N.S.) —, 67 S. E. 1087, holding it duty of adjacent owner to give notice of intent to excavate so that measures for protection and security of building may be adopted.

Cited in notes in 68 L.R.A. 680, 684, 692, 704, 706, on liability for removal of lateral or subjacent support of land in its natural condition; 6 L.R.A.(N.S.) 243, on liability for injuries to buildings by negligent removal of lateral support of soil.

Juror's affidavit to impeach verdict.

Cited in Edward Thompson Co. v. Gunderson, 10 S. D. 42, 71 N. W. 764, holding testimony of jurors inadmissible to support motion for new trial on ground of misconduct of jury or one or more of jurors; State v. Kiefer, 16 S. D. 180, 91 N. W. 1117, 1 A. & E. Ann. Cas. 268, 12 Am. Crim. Rep. 619, holding affidavit of juror that judge's communication influenced verdict cannot be received by court to impeach verdict.

Overruled in Long v. Collins, 12 S. D. 621, 82 N. W. 95, holding affidavits of jurors that verdict was reached by each juror secretly writing amount reached by him on paper and dividing aggregate by twelve and accepting quotient in accordance with previous agreement admissible to show reaching of verdict by chance.

2 S. D. 294, COSAND v. BUNKER, 50 N. W. 84.

Parol agreement to transfer estate in land.

Cited in Moody v. Howe, 17 S. D. 545, 97 N. W. 841, holding action to enforce specific performance of contract to convey land not maintainable in absence of proof of written contract to convey by owner or his agent.

Presumption as to value.

Cited in Patterson v. Plummer, 10 N. D. 95, 86 N. W. 111, holding corporate stock presumptively worth par; Grigsby v. Day, 9 S. D. 585, 70 N. W. 881, holding that amount due on notes and mortgages will be presumed to be amount they were given to secure; Wyly v. Grigsby, 11 S. D. 491, 78 N. W. 957, holding amount apparently due on note presumptively its value; Alexander v. Ransom, 16 S. D. 302, 92 N. W. 418, holding where lien of mortgage was not barred by limitation but note secured thereby was, introduction of mortgage and note upon which no payments were indorsed, and testimony as to amount due, were sufficient to show amount for which foreclosure would lie.

How defense of statute of frauds made.

Cited in International Harvester Co. v. Campbell, 43 Tex. Civ. App. 421, 96 S. W. 93, holding necessary interposition of statute of frauds in trial court, not made by requesting peremptory instruction without stating ground upon which it is asked; Prior v. Sanborn County, 12 S. D. 86, 80 N. W. 169, holding that objection that contract was within statute of frauds cannot be first raised on appeal; Powder River Live Stock Co. v.

Lamb, 38 Neb. 339, 56 N. W. 1019, holding that a defendant who has failed to plead the statute of frauds as a special defense may, under a general denial, avail himself of the invalidity under such statute of the agreement sued upon; Williams-Hayward Shoe Co. v. Brooks, 9 Wyo. 430, 64 Pac. 342, holding that a defendant can avail himself of the statute of frauds by denying the validity of the contract sued upon, and seasonably objecting to oral proof thereof upon the ground that the contract belongs to the class required by statute to be in writing, without specially pleading the statute of frauds.

Cited in note in 78 Am. St. Rep. 655, as to when and how statute of frauds must be pleaded.

2 S. D. 300, KENT v. DAKOTA F. & M. INS. CO. 50 N. W. 85.

Presumptions on appeal.

Cited in Felker v. Grant, 10 S. D. 141, 72 N. W. 81, holding that errors must be affirmatively shown to entitle a party to reversal; Hagaman v. Gillis, 9 S. D. 61, 68 N. W. 192, holding that rulings of court below will be presumed correct on appeal in absence of affirmative showing of error; Merrill v. Luce, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43, holding that every reasonable presumption permissible will be made on appeal to sustain action of court below; McKennett v. Barringer, 8 S. D. 556, 67 N. W. 622, holding that it will be presumed that a state of facts authorizing the rendition of a judgment existed if within the issues where the record does not purport to contain the evidence; Ormsby v. Conrad, 4 S. D. 599, 57 N. W. 778, holding that an order will be presumed on appeal to have been made in exercise of the judicial discretion of the court below where its order and form indicate that it was so made and there is nothing in the record to the contrary; Hroch v. Aultman & T. Co. 3 S. D. 477, 54 N. W. 269, holding that presumption of sufficiency of legal evidence to support the judgment will only be made when the judgment roll only is before the court on appeal or where the bill of exceptions does not purport to contain the evidence bearing on above point; Stokes v. Green, 10 S. D. 286, 73 N. W. 100, holding that lower court will be presumed on appeal to have had before it sufficient oral evidence to justify its construction of a written contract capable of explanation by parol; Cole v. Custer County Agri. Mineral & Stock Asso. 3 S. D. 272, 52 N. W. 1086, holding that addition in judgment foreclosing mechanics' lien to description of the property will, on appeal, be presumed to have been made on proper evidence in absence of showing to the contrary; Jerauld County v. Williams, 7 S. D. 196, 63 N. W. 905, holding that order of reference will be presumed on appeal in support of judgment to have been made on agreement of the parties; Tanderup v. Hansen, 8 S. D. 375, 66 N. W. 1073, holding that proper foundation was not laid for testimony of a witness as to testimony of deceased witness on former trial by showing that the latter was duly sworn and that the former could give the substance of his testimony on both direct and cross-examination not saved by mere objection to the testimony as incompetent, irrelevant, and immaterial.

Taking and report of evidence by referee.

Cited in *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, 7 Ind. Terr. 297, 104 S. W. 624, holding exceptions to findings of fact by master may be acted upon in absence of certificate of master that he has sent up all the evidence.

2 S. D. 310, HUMPFNER v. D. M. OSBORNE & CO. 50 N. W. 88.**Rights of chattel mortgagee under insecurity clause.**

Cited in *Schouweiler v. Hough*, 7 S. D. 163, 63 N. W. 776, holding plaintiff, in an action to foreclose a chattel mortgage, entitled under an allegation in the original complaint that the mortgaged property had greatly depreciated and that plaintiffs, deeming themselves insecure, had elected to foreclose, to all the relief admissible under a supplemental complaint setting out nonpayment of the mortgage on maturity, pending the foreclosure action.

Distinguished in *Richardson v. Coffman*, 87 Iowa, 121, 127, 54 N. W. 356, holding that a chattel mortgagee acting in good faith has a right to take possession of the property at any time under a provision in the mortgage that he may take possession whenever he shall choose to do so. Iowa Code, § 1927, providing that the mortgagee of personal property is entitled to its possession.

Admissions in pleadings.

Distinguished in *Commercial Bank v. Jackson*, 9 S. D. 605, 70 N. W. 646, denying right to consider admission or averment in answer to establish material fact omitted from complaint.

Pleading title in conversion.

Cited in *Kierbow v. Young*, 20 S. D. 414, 8 L.R.A.(N.S.) 216, 107 N. W. 371, 11 A. & E. Ann. Cas. 1148, holding complaint in action in claim and delivery must allege ownership of property, or special interest therein, or right to possession thereof at time of commencement of action.

Arbitrary claim of ownership under contract.

Cited in *Belknap v. Belknap*, 20 S. D. 482, 107 N. W. 692, holding in case of transfer of brand purchaser could not arbitrarily say horse bearing brand did not belong to seller, agreement being that seller should be judge.

Requisites of findings or special verdict.

Cited in *First Nat. Bank v. McCarthy*, 13 S. D. 356, 83 N. W. 423, holding no finding of fact required as to facts alleged in answer which are specifically admitted by reply; *Anderson v. Alseth*, 8 S. D. 240, 66 N. W. 320, holding no findings of fact required on material issues tendered by complaint and admitted or not denied in answer; *Taylor v. Vandenberg*, 15 S. D. 480, 90 N. W. 142, holding that on a trial by the court it must find on all the material issues; *Bartow v. Northern Assur. Co.* 10 S. D. 132, 72 N. W. 86, holding that findings on all material issues must be made by jury where no general verdict is rendered even though some issues are established by uncontradicted evidence; *Wilson v. Commercial Union Ins. Co.* 15 S. D. 322, 89 N. W. 649, holding withdrawal from jury in action on policy of issues as to ownership, loss and proof of loss and

submission of single question as to amount of damages, not justified by plaintiff's uncontradicted evidence of ownership and loss and waiver of issue as to proofs of loss.

Cited in note in 24 L.R.A.(N.S.) 11, 35, 37, on what special verdict must contain.

Extrinsic evidence to determine issues tried in prior judgment.

Cited in *Hogle v. Smith*, 136 Iowa, 32, 113 N. W. 556 (dissenting opinion), on admission of extrinsic evidence to establish upon which of several issues prior judgment was rendered.

2 S. D. 324, MASONIC AID ASSO. v. TAYLOR, 50 N. W. 93.

Taxation of societies paying death benefits.

Cited in *Supreme Lodge M. A. F. O. v. Effingham County*, 223 Ill. 54, 79 N. E. 23, 7 A. & E. Ann. Cas. 38, holding money dispensed to discharge contracts of beneficiary societies to pay death benefits are not a charity, public or private.

Cited in notes in 16 L.R.A.(N.S.) 831, on effect of devotion of property otherwise nontaxable to purpose of particular society; 7 L.R.A.(N.S.) 382, on fraternal benefit society as benevolent or charitable association within exemption statutes.

What is an insurance company.

Cited in notes in 38 L.R.A. 41, on benefit association as insurance company; 52 Am. St. Rep. 543, on mutual or membership life or accident insurance.

2 S. D. 331, HALL v. HARRIS, 50 N. W. 98.

Sufficiency of showing that exception was taken in time.

Cited in *McAnaw v. Matthis*, 129 Mo. 142, 31 S. W. 344, holding that when it may fairly and naturally be inferred from the recitals of a bill of exceptions that an exception was taken promptly and immediately after the ruling in question the exception is timely, although the language usually employed to express the idea of prompt exception is omitted.

Waiver of objection.

Cited in *George v. Kotan*, 18 S. D. 437, 101 N. W. 31, holding right to object that affidavit in support of motion for change of venue was not served with notice of motion, waived by accepting service of affidavit and allowing it to be read at hearing without objection.

2 S. D. 334, WOOD v. CONRAD, 50 N. W. 95.

Right to recover for permanent improvements.

Cited in *Seymour v. Cleveland*, 9 S. D. 94, 68 N. W. 171, denying right of one taking possession of land under contract for purchase making time of essence of contract to recover for permanent improvements made by vendor retaking possession for breach of contract.

Cited in note in 81 Am. St. Rep. 169, 170, on what are betterments, and allowance therefor.

Distinguished in *Parker v. Vinson*, 11 S. D. 381, 77 N. W. 1023, holding tax deeds void on face color of title entitling one making improvements in reliance thereon to recover therefor.

Color of title.

Cited in *Murphy v. Pierce*, 17 S. D. 207, 95 N. W. 925, holding deeds purporting to convey title are sufficient to constitute color of title.

Cited in notes in 88 Am. St. 708, on color of title; 15 L.R.A. (N.S.) 1215, 1217, 1219, 1220, 1221,—on necessity of color of title, not expressly made a condition by statute, in adverse possession.

2 S. D. 344, VALLEY CITY LAND & IRRIG. CO. v. SCHONE, 50 N. W. 356.

Necessity for service of notice of appeal.

Followed in *Pierre Sav. Bank v. Ellis*, 9 S. D. 251, 68 N. W. 545, holding mandatory, statutory provision that an appeal "must" be taken by serving written notice on adverse party and on clerk of the court.

Cited in *First Nat. Bank v. Northwestern Elevator Co.* 2 S. D. 356, 50 N. W. 356, holding that appeal will be dismissed where abstract does not show that notice of appeal was served; *Brannon v. White Lake Twp.* 17 S. D. 83, 95 N. W. 284, holding appeal is not taken until service of notice is made on clerk of court.

Presumption of truth of statements in abstract.

Cited in *Cleveland v. Evans*, 5 S. D. 53, 58 N. W. 8, holding that appellant's uncontradicted abstract on appeal will be treated as true in appellate court; *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 272, holding that statements in appellant's abstract that notice of appeal was served will be taken as true on appeal notwithstanding appellee's affidavit denying service of such notice where he fails to file an amended abstract showing the incorrectness of his statement.

2 S. D. 346, SANDMEYER v. DAKOTA & F. M. INS. CO. 50 N. W. 353.

Confining review on appeal to questions of law.

Cited in *Aultman & T. Co. v. Gunderson*, 6 S. D. 226, 55 Am. St. Rep. 837, 60 N. W. 859; *Davis v. Cook*, 9 S. D. 319, 69 N. W. 18,—holding decision on motion for new trial for "errors in law occurring at the trial" reviewable as question of law only; *La Crosse Boot & S. Mfg. Co. v. Mons Anderson Co.* 13 S. D. 301, 83 N. W. 331, holding that review on appeal will be limited to a question of law where the decision below was made solely on such question.

Orders involving judicial discretion.

Cited in *Neeley v. Roberts*, 17 S. D. 161, 95 N. W. 921, holding discretion of lower court was not involved, where it affirmatively appeared new trial was granted for other reasons specified in order itself; *Phenix Ins. Co. v. Perkins*, 19 S. D. 59, 101 N. W. 1110, holding where order refusing temporary injunction itself discloses that no discretion was exercised, rule as to nonreversal in absence of abuse of discretion is inapplicable.

Essentials of assignment for benefit of creditors.

Cited in *Missouri-American Electric Co. v. Hamilton-Brown Shoe Co.* 91 C. C. A. 251, 165 Fed. 283, holding assignment for benefit of creditors must be absolute transfer of both legal and equitable titles of assignor.

Pleading and proving foreign law.

Cited in *Kephart v. Continental Casualty Co.* 17 N. D. 380, 116 N. W. 349, holding law of foreign state must be alleged and proved.

Cited in note in 67 L.R.A. 53, on how case determined when proper foreign law not proved.

— Presumption as to.

Cited in *Morris v. Hubbard*, 10 S. D. 259, 72 N. W. 894, holding law of sister state presumed to be same as law of forum; *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L.R.A. 81, 49 Am. St. Rep. 898, 59 N. W. 945, holding that, in the absence of evidence to the contrary, it will be presumed that the law of a foreign state as to the right of a common carrier to limit his liability is the same as the law of South Dakota; *Kennebrew v. Southern Automatic Electric Shock Mach. Co.* 106 Ala. 379, 17 So. 545, holding that where there is no proof of the law of another state nor judicial knowledge of the origin of such state which would raise a presumption that the common law prevails there, it will be presumed that the law of the forum in which the issue is being tried is the law of such foreign state on the question under consideration; *Commercial Bank v. Jackson*, 9 S. D. 605, 70 N. W. 846, holding law of other state as to order of payment of notes held by different persons, secured by same mortgage presumed to be same as that of forum; *Commercial Bank v. Jackson*, 7 S. D. 135, 63 N. W. 548, holding law of other jurisdiction as to liability of married women on contracts presumed to be the same as that of forum; *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255, holding that in absence of allegation and proof to contrary law of foreign state is presumed to be same as law of forum as to effect of extension to release surety; *Foss v. Petterson*, 20 S. D. 93, 104 N. W. 915, holding that in determining legal status of substituted beneficiary of certificate of fraternal life insurance law of sister state is presumed to be same as that of forum.

2 S. D. 356, FIRST NAT. BANK v. NORTHWESTERN ELEVATOR CO. 50 N. W. 356.**2 S. D. 357, ST. PAUL HARVESTER CO. v. FORBREG, 50 N. W. 628.****Sufficiency of service of summons.**

Cited in *Leonosio v. Bartilino*, 7 S. D. 3 63, N. W. 543, holding service of a "relief summons" returnable on election day insufficient to give a justice of the peace jurisdiction of an action to recover a definite amount as damages for breach of contract.

2 S. D. 361, GREELEY v. WINSOR, 50 N. W. 630.**Appealable orders after judgment.**

Cited in *St. Paul, M. & M. R. C. v. Blakemore*, 17 N. D. 67, 114 N. W. 730, holding order after judgment is entered making person party and directing clerk to retain money paid pursuant to judgment is appealable under statute.

Conclusiveness of order dismissing appeal.

Cited in *Rudolph v. Herman*, 4 S. D. 430, 57 N. W. 65, holding that a judgment dismissing an appeal from a justice's court for want of a proper undertaking in *res judicata* until in some manner vacated or set aside so as to bar an application to amend the undertaking.

2 S. D. 363, STATE v. SIOUX FALLS BREWING CO. 50 N. W. 629.**Who may have liquor nuisance abated.**

Cited in *State ex rel. Martin v. Bradley*, 10 N. D. 157, 86 N. W. 354, holding that any citizen of a county in which a liquor nuisance exists may bring an action in the name of the state to abate and enjoin it, without the consent of the attorney general or the state's attorney.

2 S. D. 366, DAKOTA SYNOD v. STATE, 14 L.R.A. 418, 50 N. W. 633.**Self-executing constitutional provisions.**

Cited in *Ex parte Show*, 4 Okla. Crim. Rep. 416, 113 Pac. 1062, to point that constitutional provisions merely prohibitory in character are self executing; *Ex parte McNaught*, 23 Okla. 285, 100 Pac. 27, 1 Okla. Crim. Rep. 260, holding constitutional prohibitions as to criminal prosecutions other than by presentment, indictment or information and as to prosecution without preliminary examination are self-executing; *Mannie v. Hatfield*, 22 S. D. 475, 118 N. W. 817, holding that laws in conflict with constitution at time of its adoption are inoperative.

Appropriation for sectarian institution.

Cited in notes in 42 L.R.A. 55, on what claims constitute valid demands against a state; 105 Am. St. Rep. 152, 156, on religious and sectarian teaching in public schools; 16 L.R.A.(N.S.) 863, on religious exercises or instruction in public schools; 19 L.R.A.(N.S.) 172, on right to recover back public money appropriated to sectarian institution.

Distinguished in *Roberts v. Bradfield*, 12 App. D. C. 453, holding that a law authorizing a contract to be made without discrimination or preference, or a contract made under general discretion reposed in authorized agents for the rendition of actual services in nursing the sick or preventing contagion, with a corporation which may be under the control of a religious society, cannot be declared void as "a law" or an act authorized by law "respecting an establishment of religion"; *Hysong v. Gallitzin Borough School Dist.* 164 Pa. 644, 26 L.R.A. 203, 30 Atl. 482, holding that under Pa. Const. art. 10, § 2, providing that no money raised for the support of the public schools of the commonwealth shall be appropriated to or used

Dak. Rep.—42.

for the support of any sectarian school, the courts will not restrain members of a religious order from teaching in the garb of their order in the public schools, nor the school directors from employing or permitting them to act in that capacity in the absence of proof that religious sectarian instruction was imparted by such teachers during school hours, or religious sectarian exercises engaged in.

2 S. D. 379, McLAUGHLIN v. WHEELER, 50 N. W. 834.

Waiver of irregularity of attachment by giving bond for release.

Distinguished in *Anvil Gold Min. Co. v. Hoxsie*, 60 C. C. A. 492, 125 Fed. 724, holding defendant giving undertaking in attachment under statute does not thereby admit estoppel as against judgment in attachment suit when cause of action and of attachment are same.

Service prerequisite to jurisdiction.

Cited in *Bowman v. Ward*, 152 N. C. 602, 68 S. E. 2, holding a judgment void on its face where it appears affirmatively that no service had been made either personally or by publication of the summons or the attachment.

Cited in note in 61 Am. St. Rep. 488, on effect of defects in service of process on jurisdiction.

2 S. D. 384, STATE v. BRENNAN, 50 N. W. 625.

Prohibition against sale of liquor.

Cited in note in 15 L.R.A.(N.S.) 933, 936, on constitutional right to prohibit sale of intoxicants.

Protection from improper search or evidence improperly obtained.

Cited in notes in 32 Am. St. Rep. 644, on right to protection of books and papers from examination; 101 Am. St. Rep. 329, on search of premises of private persons; 136 Am. St. Rep. 143, on admissibility of evidence wrongfully obtained.

Sufficiency of allegations on information and belief.

Cited in note in 25 L.R.A.(N.S.) 64, on complaint or information on information and belief as basis for warrant or examination preliminary thereto.

Error in detached portion of charge.

Cited in *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 857, holding isolated sentence containing erroneous statement of law but not misleading when taken with rest of charge is harmless error.

2 S. D. 395, THOMPSON v. SCHAEZEL, 50 N. W. 631.

Right of receiver of national bank to sue in state court.

Cited in *Fish v. Olin*, 76 Vt. 120, 56 Atl. 533, 1 A. & E. Ann. Cas. 295, holding receiver of national bank has legal title to its assets and may maintain action in state court in his own name to enforce statutory liability of stockholder.

2 S. D. 399, RUDOLPH v. HERMAN, 50 N. W. 833, Reaffirmed on appeal from order denying leave to file amended undertaking in 4 S. D. 203, 56 N. W. 122, rehearing of which is denied in 4 S. D. 430, 57 N. W. 65.

Perfecting appeal from justice court.

Cited in *State ex rel. Jones v. Brown*, 30 Nev. 495, 98 Pac. 871, holding order in which notice of appeal is filed and served in case of appeal from justice court is immaterial; *Edminster v. Rathbun*, 3 S. D. 129, 52 N. W. 263, holding payment of justice's fee for making return of appeal not necessary to perfect appeal; *Swope v. Smith*, 1 Okla. 283, 33 Pac. 504 holding that the district court had no jurisdiction of the subject matter of a suit on appeal from a justice's court, when a transcript of the justice's proceedings was not filed within the thirty days prescribed by Neb. Comp. Stat. § 1008.

Distinguished in *Towle v. Bradley*, 2 S. D. 472, 50 N. W. 1057, holding that an appeal should not be dismissed for insufficiency of the undertaking, but that appellant should be allowed to file a new undertaking.

—Necessity for undertaking.

Cited in *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860, holding undertaking designed to discourage frivolous and vexatious appeals; *Lough v. White*, 14 N. D. 353, 104 N. W. 518, holding service of undertaking jurisdiction under statute and must be made within time fixed for taking appeal from justice court; *Deardoff v. Thorstensen*, 16 N. D. 355, 113 N. W. 616, holding filing of notice of appeal and undertaking within prescribed period essential to jurisdiction of district court; *Brown v. Chicago, M. & St. P. R. Co.* 10 S. D. 633, 66 Am. St. Rep. 730, 75 N. W. 198, holding that undertaking from appeal on justice's judgment cannot be waived by parties; *Brown v. Brown*, 12 S. D. 380, 81 N. W. 627, holding giving of undertaking on appeal from justice's judgment not dispensed with by deputy with justice amount of costs and value of property for which judgment was recovered.

— Sufficiency of undertaking.

Cited in *Doering v. Jensen*, 16 S. D. 58, 91 N. W. 343, holding undertaking on appeal to circuit court from judgment in justice court which contains no provision for payment of costs on the appeal is insufficient; *Miller v. Lewis*, 17 S. D. 448, 97 N. W. 364, holding that where undertaking contains no provision for payment of costs on appeal from judgment in justice court, circuit court has no jurisdiction of cause.

—Necessity for and sufficiency of justification of sureties.

Cited in *McDonald v. Paris*, 9 S. D. 310, 68 N. W. 737, holding notice of justification essential to jurisdiction on appeal from justice's judgment; *Barber v. Johnson*, 4 S. D. 528, 57 N. W. 225, holding affidavits of sureties as to qualifications appended to undertaking on appeal from justice of peace at time of execution not sufficient justification.

2 S. D. 405, WOOD v. CONRAD, 50 N. W. 903.**Passing of title and possession under execution sale.**

Cited in *Harding v. Harding*, 16 S. D. 406, 102 Am. St. Rep. 694, 92 N. W. 1080, holding purchaser at sale of realty for alimony is not entitled to immediate possession; *Mac Gregor v. Pierce*, 17 S. D. 51, 95 N. W. 281, holding that after judicial sale legal title remains in mortgagor or judgment debtor until deed is executed to purchaser or redemptioner, and certificate of sale is merely lien in nature of equitable estate.

— Right to redeem.

Cited in *Hardin v. Kelley*, 75 C. C. A. 355, 144 Fed. 353, holding that after real property has been sold on execution, attaching creditor before judgment has no right under statute to redeem from sale as from superior lien.

Right to receiver in foreclosure suit.

Distinguished in *Roberts v. Parker*, 14 S. D. 323, 85 N. W. 591, holding that a receiver may be appointed in an action to foreclose a mortgage, if the property is insufficient to discharge the mortgage debt.

2 S. D. 410, GAINES v. WHITE, 50 N. W. 901.**Questions not raised below.**

Cited in *Loftus v. Agrant*, 18 S. D. 55, 99 N. W. 90, holding question whether action at law is maintainable for wrongful conversion of pledge when transaction is evidenced by bill of sale would not be considered where not raised below; *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341, holding question as to statute of limitations would not be considered, because not raised below.

Continuance of cause.

Cited in *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107, holding continuance properly denied where only showing by party asking same was inability of associate counsel to appear at trial.

New trial on ground of newly discovered evidence.

Cited in *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150, holding that new trial will not ordinarily be granted for newly discovered evidence which goes only to discredit or impeach witness; *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462, holding that new trial will not ordinarily be granted for newly discovered evidence which merely tends to discredit or impeach a witness or which is merely cumulative; *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479, holding that failure to exercise reasonable diligence to discover evidence or obtain continuance supports court's refusal to grant new trial for newly discovered evidence; *Hahn v. Dickinson*, 19 S. D. 373, 103 N. W. 642, holding new trial on ground of newly discovered evidence properly denied where evidence is cumulative and failure to produce it at trial not excused.

2 S. D. 414, GRAVES v. JASPER SCHOOL TWP. 50 N. W. 904.

Taxpayer's right to enjoin illegal acts of public corporation.

Cited in *Ewert v. Mallery*, 16 S. D. 151, 91 N. W. 479, holding resident taxpayer may maintain action to enjoin issue of illegal municipal bonds.

2 S. D. 422, GATES v. CHICAGO, M. & ST. P. R. CO. 50 N. W. 907.

Statutory liability of master.

Cited in *Hardesty v. Largey Lumber Co.* 34 Mont. 151, 86 Pac. 29, on construction of Dakota Codes relative to obligations of employer.

Cited in notes in 54 L.R.A. 76, 108, on vice principalship as determined with reference to the character of the act which caused the injury; 41 L.R.A. 68, 119, on knowledge as an element of an employer's liability to an injured servant.

2 S. D. 434, PLUNKET v. EVANS, 50 N. W. 961.

Jurisdictional amount in justice court.

Cited in *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695, on absence of jurisdiction of justice notwithstanding remittitur of excess over statutory limit after suit brought; *Blumenthal v. Lloyd*, 18 Misc. 195, 41 N. Y. Supp. 393, holding that interest demanded on the complaint is a part of "the damages claimed" for the purpose of determining jurisdiction; *Warder, B. & G. Co. v. Raymond*, 7 S. D. 451, 64 N. W. 525, denying jurisdiction of justice of action on note where amount claimed in summons exceeds one hundred dollars though part of the claim is for attorney's fees under void stipulation.

Cited in note in 28 L.R.A. 230, on voluntary credits to bring debt within jurisdiction of court.

Jurisdiction on appeal from court without jurisdiction.

Cited in *Benedict v. Johnson*, 4 S. D. 387, 57 N. W. 66, holding that a county court to which an action is transferred from another county court which had no jurisdiction after motion to dismiss on that ground had been properly made, acquires no jurisdiction and should dismiss the action on motion therefor; *Austell v. Atlanta*, 100 Ga. 182, 27 S. E. 983, holding that the entering of an appeal from a decision of assessors in condemnation proceedings does not estop the appellant from making, in the court to which the appeal is taken, a motion to dismiss the entire proceedings on the ground that the tribunal appealed from was without jurisdiction.

Questions reviewable on appeal.

Cited in *Vidger v. Nolin*, 10 N. D. 353, 87 N. W. 593, holding only such issues as were properly triable before justice of peace reviewable on appeal.

2 S. D. 442, C. AULTMAN & CO. v. SIGLINGER, 50 N. W. 911.

Exhibits attached to pleading.

Cited in *Milligan v. Keyser*, 52 Fla. 331, 42 So. 367, holding copy of contract annexed as exhibit to declaration cannot supply essential allega-

tion of fact upon demurrer to declaration; *Union Sewer Pipe Co. v. Olson*, 82 Minn. 187, 84 N. W. 756, holding that an exhibit attached to the complaint cannot supply the place of proper and essential allegations, except when the pleading is framed for that purpose and with that end in view; *Rust-Owen Lumber Co. v. Fitch*, 3 S. D. 213, 52 N. W. 879, holding that objections to account, copy of which is annexed as exhibit to complaint in action to foreclose materialman's lien cannot be considered on demurrer to complaint; *Stephens v. American F. Ins. Co.* 14 Utah, 265, 47 Pac. 83 (dissenting opinion), as to whether recitals in exhibit annexed to pleading can supply necessary allegations.

Distinguished in *Wright v. Sherman*, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093, holding that a defect in a complaint in failing to plead an essential fact, except by way of exhibit, cannot be first taken on appeal.

Overruled in *First Nat. Bank v. Dakota F. & M. Ins. Co.* 6 S. D. 424, 61 N. W. 439, holding complaint in action on policy to which pleaded directs special attention by making profert thereof and attaching to complaint demurrable as failing to state cause of action where it provides that loss shall not be payable until sixty days after receipt of notice and proofs of loss in absence of anything to show lapse of sixty days before commencement of action.

Cited as overruled in *Cranmer v. Kohn*, 11 S. D. 245, 76 N. W. 937, holding that copy of contract of employment for a year attached to complaint as exhibit in action for discharge before expiration of such period will not be stricken out as redundant, irrelevant and no part of complaint; *Murtha v. Howard*, 20 S. D. 152, 105 N. W. 100, holding so-called complaint attached to and made part of notice of contest of election must be considered in determining sufficiency of facts relied on by contestant.

Junior mortgagee as assign.

Cited in *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694, holding that a junior mortgagee is an "assign" within the meaning of a statute providing for the payment of surplus moneys to the mortgagor or his assigns.

Necessity for alleging facts.

Cited in *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512, holding that facts material to cause of action should be alleged directly and not set out by mere recital or by way of inference; *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512, holding allegation that plaintiff is entitled as mortgagor to surplus on mortgage foreclosure of no avail unless based on specific acts set out in the pleading.

Pleading in trover.

Cited in note in 9 N. D. 633, on pleading in actions for trover and conversion.

2 S. D. 452, CUMINS v. LAWRENCE COUNTY, 50 N. W. 900.

Denials on information and belief.

Cited in note in 133 Am. St. Rep. 107, as to when denials on information and belief are permissible.

Pleading in trover.

Cited in note in 9 N. D. 633, on pleading in actions for trover and conversion.

2 S. D. 457, FROST v. WILLIAMS, 50 N. W. 964.**Joint and several contracts.**

Cited in *Servant v. McCampbell*, 46 Colo. 292, 104 Pac. 394, holding powers of attorney to sell corporate stock did not impose joint liability upon owners of stock who set amount of their stock opposite their respective names; *McArthur v. Board*, 119 Iowa, 562, 93 N. W. 580, holding agreement of subscribers to pay \$100.00 for each share of stock in stallion, capital stock being \$3000.00 and number of shares 30, is several contract; *Davis & R. Bldg. & Mfg. Co. v. Booth*, 10 Ind. App. 364, 37 N. E. 818; *Gibbons v. Bente*, 51 Minn. 499, 22 L.R.A. 80, 53 N. W. 756; *Davis v. Maysville Creamery Asso.* 63 Mo. App. 477,—holding a contract in question the several, and not the joint, contract of each subscriber; *Clark v. Rumsey*, 59 App. Div. 435, 69 N. Y. Supp. 102, holding that subscribers to an agreement “to pay the sum set opposite our several names” for a specified purpose, each to share in the proceeds and profits, if any, in the same proportion as he subscribes to the expense, did not become partners inter se; *Davis v. Ravenna Creamery Co.* 48 Neb. 471, 67 N. W. 436, holding the subscribers’ liability to be several, and not joint, under a contract whereby one party agrees to erect a cheese factory for which the other party designated therein as “we, the subscribers” agree to pay the stipulated price, and to accept the same, where it is stipulated that subscribers are only liable for the amount and number of shares signed for by them; *Davis & R. Bldg. & Mfg. Co. v. Barber*, 51 Fed. 148, holding that the liability of the subscribers to a contract for the erection of a cheese factory is several, and not joint, when it is stipulated that the subscribers shall incorporate that “each stockholder shall be liable only for the amount subscribed by him,” and each wrote after his name the amount for which he meant to become liable; *Davis & R. Bldg. & Mfg. Co. v. Jones*, 14 C. C. A. 30, 32 U. S. App. 32, 66 Fed. 124, holding subscribing parties of the second part to creamery contract circulated in a rural community to raise a large sum of money in form calculated to convey idea of several liability, not jointly liable; *Chicago Bldg. & Mfg. Co. v. Graham*, 23 C. C. A. 657, 41 U. S. App. 680, 78 Fed. 83, holding that under a subscription which contained a provision that “each stockholder shall be liable to the corporation only for the amount subscribed by him,” the subscribers cannot be presumed to have incurred more than a several liability, notwithstanding that concluding a long sentence following the building specifications is the language, “there shall be no waiver of original and joint liability until the contract price is fully paid.”

Admissibility of extrinsic evidence to explain writing.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding contemporaneous contracts admissible to explain contract of guaranty.

2 S. D. 466, MOUSER v. PALMER, 50 N. W. 967.**Consideration of costs on appeal.**

Cited in *Re Weber*, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523, holding that dismissal as well as any question connected with costs properly appearing on the face of the record should be reviewed on appeal from a judgment dismissing appeal from justice's judgment embracing costs of appeal.

Amendment of record on appeal.

Cited in *State ex rel. Snell v. Third Judicial Dist. Ct.* 36 Utah, 267, 103 Pac. 261, holding that record on appeal cannot as general rule be amended in appellate court.

2 S. D. 472, TOWLE v. BRADLEY, 50 N. W. 1057.**Attorney as surety on undertaking in legal proceeding.**

Cited in *Dennett v. Reisdorfer*, 15 S. D. 466, 90 N. W. 138, holding attorney not liable on undertaking in legal proceeding executed in violation of statute; *Re Eaton*, 4 N. D. 514, 62 N. W. 597, which is an appeal in disbarment proceedings, as having been referred to by the disbarred attorney who was a surety on an attachment bond, as an authority against him.

— Appeal bond.

Cited in *Valley Nat. Bank v. Garretson*, 104 Iowa, 655, 74 N. W. 11, holding that an appeal from a justice's to the district court is not perfected when the surety upon the appeal bond is disqualified to sign as such by Iowa Code 1873, § 2931, providing that no attorney or other officer of the court shall be received as security in any proceeding in court.

Necessity for justification of sureties on appeal bond.

Distinguished in *McDonald v. Paris*, 9 S. D. 310, 68 N. W. 737, denying jurisdiction of circuit court from attempted appeal from justice's judgment not perfected by justification of sureties of undertaking if excepted to.

Effect of insufficient appeal bond.

Cited in *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595, holding that an appeal from the county court to the circuit court will not be dismissed because the undertaking fails to comply with the technical statutory requirements.

Amendment of undertaking on appeal.

Cited in *Wasem v. Bellach*, 17 S. D. 506, 97 N. W. 718, holding amendment of undertaking or filing of new one should be allowed where motion to file new undertaking is served on same day as motion to dismiss appeal and determined prior thereto.

Distinguished in *Brickner v. Sporleder*, 3 Okla. 561, 41 Pac. 726, where there was failure to comply with statute, and but one surety executed undertaking when law required two or more.

2 S. D. 480, FIRST NAT. BANK v. NORTH, 51 N. W. 96.**Evidence to explain written contract.**

Cited in *Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co.* 66 C. C. A.

67, 132 Fed. 957, holding parol evidence admissible to resolve ambiguity in written contract and prove real intention of parties.

-To identify parties.

Cited in *Van Arsdale-Osborne Brokerage Co. v. Foster*, 79 Kan. 669, 100 Pac. 480, holding parol proof admissible to show to whom contract applies and upon whom its obligations rest.

Offer combining admissible and inadmissible evidence.

Cited in *Farleigh v. Kelley*, 28 Mont. 421, 63 L.R.A. 319, 72 Pac. 756, holding offer including both competent and incompetent evidence is properly rejected in its entirety.

Conveyances fraudulent as to creditors.

Cited in *Sioux Bkg. Co. v. Kendall*, 6 S. D. 543, 62 N. W. 377, holding that false representations to be legally available must have been acted upon and formed part of inducement for action resulting in damage; *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069, holding that a fraudulent conveyance of partnership property by the firm does not estop the partners or their wives from claiming an exemption therein as against an attaching creditor.

Cited in notes in 12 Eng. Rul. Cas. 295, on what constitutes fraud and liability therefor; 31 L.R.A. 622, 629, on participation by creditor in fraudulent intent of debtor invalidating transfer.

- Chattel mortgage.

Cited in *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, 58 N. W. 557, holding fraudulent intent as against creditors not shown by fact that value of mortgaged property greatly exceeds debt secured; *Mercantile Exch. Bank v. Taylor*, 51 Fla. 473, 41 So. 22, holding mortgage of property inventoried at \$18,000.00 to secure \$4,400.00 is not fraudulent because of discrepancy in amounts alone; *Forrester v. Kearney Nat. Bank*, 49 Neb. 655, 68 N. W. 1059, holding lien of chattel mortgage, the filing of which has been delayed without intention to defraud, good as against a creditor, who causes the property to be seized on attachment or execution after such mortgage is filed, or after the mortgagee has obtained actual possession, under Neb. Comp. Stat. chap. 32, § 14, providing that every chattel mortgage not accompanied by an immediate delivery and followed by an actual and continued change of possession shall be absolutely void as against the mortgagor's creditors, unless the mortgage or a copy thereof is filed; *First Nat. Bank v. Calkins*, 12 S. D. 411, 81 N. W. 732, holding chattel mortgage not rendered void as to creditors from the mere fact that the mortgagee knowingly permits the mortgagor to sell and appropriate for his own use part of the property, while § 4659 makes the question of fraudulent intent one of fact instead of law.

- Transfer of debtor's exempt property.

Cited in *Heisch v. Bell*, 11 N. M. 523, 70 Pac. 572, holding transfer of debtor's exempt property is not fraudulent as to his creditors; *Commercial State Bank v. Kendall*, 20 S. D. 314, 129 Am. St. Rep. 936, 106 N. W. 53, holding resulting trust not created in favor of husband's creditor by husband's conveyance of homestead to wife.

— **Who may attack conveyance.**

Distinguished in *Noyes v. Brace*, 8 S. D. 190, 65 N. W. 1071, holding that a judgment creditor may, without obtaining a lien by attachment or execution, attack by a creditor's bill the validity of a chattel mortgage covering all his debtors' property.

When replevin lies.

Cited in note in 80 Am. St. Rep. 760, as to when replevin or claim and delivery is sustainable.

Pleading in trover.

Cited in note in 9 N. D. 632, on pleading in actions for trover and conversion.

2 S. D. 495, PROBERT v. McDONALD, 39 AM. ST. REP. 796, 51 N. W. 212.

Effect of silence or failure to produce evidence.

Cited in *Enos v. St. Paul F. & M. Ins. Co.* 4 S. D. 639, 46 Am. St. Rep. 796n, 57 N. W. 919, holding silence of party when damaging facts are called out in evidence not equivalent to admission of their truthfulness; *Rossiter v. Boley*, 13 S. D. 370, 83 N. W. 428, holding an instruction that the jury have the right to assume that evidence as to the matter in controversy is a party's possession which is not produced would be damaging to the party failing to produce it reversible error, when based on defendant's failure to introduce his account books without any notice to produce having been given by plaintiff.

Jurisdiction of equity.

Cited in *Brace v. Doble*, 3 S. D. 110, 52 N. W. 586, holding that a court of equity which has properly acquired jurisdiction of both parties and subject matter may, in order to prevent multiplicity of suits, continue such jurisdiction until full justice is done between the parties.

Making judgment for consideration paid lien on rescinding sale

Cited in *Wolfinger v. Thomas*, 22 S. D. 57, 133 Am. St. Rep. 900, 115 N. W. 100, holding that in suit to rescind contract and recover consideration paid, equity may make judgment for repayment of consideration lien on premises.

2 S. D. 506, CALDWELL v. MYERS, 51 N. W. 210.

Election to treat contract as rescinded.

Followed in *Davis v. Tubbs*, 7 S. D. 488, 64 N. W. 534, sustaining right of party to contract prevented by other's wrongful act from completing same to treat contract as rescinded or bring action thereon for breach thereof and recover contract price less expense of completing same.

Necessity for complete performance of contract.

Cited in note in 59 Am. St. Rep. 283, on complete performance as essential to cause of action on entire contract.

2 S. D. 512, WESTERN PUB. HOUSE v. BACHMAN, 51 N. W. 214.**Liability of agent personally executing obligation.**

Followed in *Western Publishing House v. Murdick*, 4 S. D. 207, 21 L.R.A. 671, 56 N. W. 120, holding members of school board personally liable on contract, seigned by majority of board in individual names with addresses reciting agreement with "undersigned members of the board" and that "we, the undersigned, hereby order . . . provided a majority of said board sign this agreement" with addition "we agree to pay for the above named goods when delivered."

Cited in *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536, holding where contract showed parties thereto were acting for themselves, evidence of contemporaneous transaction to show they acted for undisclosed principal was inadmissible.

2 S. D. 517, PIERCE v. MANNING, 51 N. W. 332.**Necessity for and sufficiency of assignments of error.**

Cited in *D. S. B. Johnston Land-Mortgage Co. v. Case*, 13 S. D. 28, 82 N. W. 90, holding that alleged error in denying new trial cannot be considered on appeal except in so far as disclosed by the judgment roll where the settled statement of facts or bill of exceptions used on the motion contained no specifications of the particulars in which the evidence was claimed to be insufficient, or of the errors of law accruing at the trial; *Boettcher v. Thompson*, 21 S. D. 169, 110 N. W. 108, holding that statement of case must contain proper specification of particulars as to insufficiency of evidence to entitle to review; *Williams Bros. Lumber Co. v. Kelly*, 23 S. D. 582, 122 N. W. 646, holding that granting or refusing of motion for new trial will not be reviewed unless assigned as error; *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687, holding it proper to deny a motion for a new trial on the ground of insufficiency of the evidence and errors in law, where no further specifications in regard thereto appear in the record on which the motion is heard; *Lindsay v. Pettigrew*, 3 S. D. 199, 52 N. W. 873, holding overruling of a motion for a new trial asked for on the ground presented by affidavit of misconduct of counsel in stating, against objections, facts not in evidence, properly assigned as error.

—On motion for new trial.

Cited in *Boettcher v. Thompson*, 17 S. D. 177, 95 N. W. 874, holding where motion for new trial is made on bill of exceptions not specifying particulars in which evidence is insufficient to justify decision, its sufficiency will not be reviewed; *Wenke v. Hall*, 17 S. D. 305, 96 N. W. 103, holding errors of law and particulars of insufficiency of evidence must be specified in or annexed to bill of exceptions or specified in notice of intention, when motion for new trial is on minutes of court.

Necessity for motion for new trial.

Cited in *Baird v. Gleckler*, 7 S. D. 284, 64 N. W. 118, holding that appeal from judgment only entered before application for new trial presents for review only errors of law occurring at the trial and brought up by proper bill of exceptions; *Miller v. Way*, 5 S. D. 471, 59 N. W.

467, holding errors of law in admission of evidence over objection reviewable on appeal without motion for new trial.

Distinguished in *Jones Lumber & Mercantile Co. v. Faris*, 6 S. D. 112, 55 Am. St. Rep. 814, 60 N. W. 403, holding erroneous direction of verdict at close of trial, error of law, reviewable on appeal, if properly excepted to, without motion for new trial.

— To review of sufficiency of evidence.

Cited in *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353, holding under statutes sufficiency of evidence to justify verdict will not be considered where no motion for new trial is made below; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding sufficiency of evidence to justify findings of court cannot be reviewed upon appeal from judgment alone; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding sufficiency of evidence to justify decision can be considered only on appeal presenting for review order denying new trial, which, when made after judgment, is reviewable only on appeal from the order; *Hawkins v. Hubbard*, 2 S. D. 631, 51 N. W. 774; *Evenson v. Webster*, 3 S. D. 382, 44 Am. St. Rep. 802, 53 N. W. 747; *Norwegian Plow Co. v. Bellon*, 4 S. D. 384, 57 N. W. 17; *Jones Lumber & Mercantile Co. v. Faris*, 5 S. D. 348, 58 N. W. 813; *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466; *Carroll v. Nisbet*, 9 S. D. 497, 7 N. W. 634,—holding that sufficiency of evidence to sustain verdict will not be considered on appeal where refusal of motion for new trial is not assigned as error; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial, entered after taking of appeal; *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below; *Northwestern Elevator Co. v. Lee*, 13 S. D. 450, 83 N. W. 565, holding sufficiency of evidence to establish plaintiff's ownership of wheat levied on not reviewable on appeal where issue of ownership was not brought to attention of trial court by motion for new trial.

Presumption on appeal of sufficiency of evidence.

Cited in *Adams & W. Co. v. Deyette*, 5 S. D. 418, 49 Am. St. Rep. 887, 59 N. W. 214, holding that findings of fact will be presumed on appeal to accord with and be sustained by evidence where evidence is not preserved in the record and insufficiency of evidence to sustain findings is not assigned as error; *Barnard & L. Mfg. Co. v. Galloway*, 5 S. D. 205, 58 N. W. 565, holding that the sufficiency of evidence to sustain a verdict will be presumed on appeal from motion for new trial on ground of insufficiency was overruled after judgment on appeal taken from the judgment alone without assigning such insufficiency as error.

2 S. D. 525, *STONE v. CROW*, 51 N. W. 335.

Sufficiency of filing of instrument.

Cited in *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866, holding that carrying to the office of the county clerk the records of the treasurer's

office, showing sales of real estate for taxes at public sale, and in the presence of the county clerk making a certificate on such sales record to the effect that he thereby made a return, and that the list of property as shown on the record had been sold by him at public sale as required by law, and signing his name thereto, and then on the same date returning said record, with the certificate thereon, to the county treasurer's office, do not constitute a compliance with Neb. Rev. Laws (Chap. 771, art. 1, § 112) requiring the treasurer to file in the clerk's office a return of sales as shall appear on a sale book to be kept by him; *Coler v. Rhoda School Twp.* 6 S. D. 640, 63 N. W. 158, holding that the delivery of a written description of the boundaries of the school district created by the county superintendent of schools, to the register of deeds, and the placing of the same in a separate box designed to contain the files relating to the district, without a file mark thereon showing the exact time it was received by him, not an irregularity which would invalidate proceedings to elect school district officers; *Starkweather v. Bell*, 12 S. D. 146, 80 N. W. 183, holding the indorsement of the filing of a notice of appeal and undertaking on appeal from the county clerk in probate matters not absolutely essential to the validity of the filing, if the notice and undertaking have been delivered to the proper officer at the proper place for the purpose of being filed.

When question of fact is for court.

Cited in *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.* 3 S. D. 205, 52 N. W. 866, holding that the power of the court to determine whether or not undisputed facts constitute an agency, and the powers and limitations of such agency, can only be exercised in a very clear case and when the evidence is not in any way conflicting.

2 S. D. 533, BAILEY v. LAWRENCE COUNTY, 51 N. W. 331.

When mandamus lies.

Cited in *Heintz v. Moulton*, 7 S. D. 272, 64 N. W. 135, denying right to mandamus to control action of school officers in official matters entrusted to their judgment or concerning which they are entitled to exercise a sound discretion.

—To enforce payment of public debt.

Cited in *Custer County Bank v. Custer County*, 18 S. D. 274, 100 N. W. 424, holding ordinary action against county and not mandamus was proper remedy to recover on county warrants where county alleged payment of part of them and their invalidity; *Weaver v. Ogden City*, 111 Fed. 323, denying mandamus to compel city authorities to pay a judgment against the city if there are sufficient funds therefor, and otherwise to levy and collect a tax for that purpose.

Distinguished in *Riley v. Garfield Twp.* 54 Kan. 463, 38 Pac. 360, holding that questions of law affecting the validity of the bonds, raised by a motion to quash, may be disposed of in mandamus proceedings instituted to compel the payment of interest on bonds where the writ does not show on its face that the validity of such bonds is denied.

Duty of county treasurer as to making payments.

Distinguished in *Evans v. Bradley*, 4 S. D. 83, 55 N. W. 721, holding that the county treasurer is bound to pay a warrant allowed by the county commissioners and drawn on a special fund in his hands, which fund contains sufficient unappropriated money to pay the same, where the legality of such warrant has been established by a court of competent jurisdiction; and upon his refusal to do so a peremptory writ of mandamus may issue against him.

2 S. D. 538, STATE v. SECURITY BANK, 51 N. W. 337.

Followed without special discussion in *State v. First Nat. Bank*, 3 S. D. 52, 51 N. W. 780.

Distinction between presentment and indictment.

Cited in *Jones v. People*, 101 App. Div. 55, 92 N. Y. Supp. 275, 19 N. Y. Crim. Rep. 67 (dissenting opinion), on the distinction.

Grounds for setting aside indictment.

Cited in *State v. Tough*, 12 N. D. 425, 96 N. W. 1025, holding enumeration in statute of grounds upon which indictment will be set aside excludes all others; *State v. Baughman*, 111 Iowa, 71, 82 N. W. 452, holding an indictment will not be set aside because a member of the grand jury returning it had previously formed and expressed an unqualified opinion of defendant's guilt, as this is not within the enumeration of such ground in Iowa Code, § 5319; *Bartley v. State*, 53 Neb. 310, 73 N. W. 744, holding that the pendency of a former information for embezzlement in the district court of one county is no ground for abatement of an information in the district court of another county, the venue in each case being laid in the county in which the prosecution is brought.

Prosecution of corporation for crime.

Cited in note in 133 Am. St. Rep. 779, on prosecution and punishment of corporation for crime.

Presumption that error is prejudicial.

Cited in *Buckers Irrig. Mill. & Improv. Co. v. Platte Valley Irrig. Co.* 28 Colo. 187, 63 Pac. 305, holding error is presumed to be prejudicial unless it affirmatively appears that it was harmless; *Meyer v. Chicago, M. & St. P. R. Co.* 22 S. D. 377, 117 N. W. 1037, holding that material errors in charge will be presumed prejudicial unless contrary affirmatively appears; *Clay v. State*, 15 Wyo. 42, 86 Pac. 17, on the consideration of what may constitute prejudicial error.

2 S. D. 546, BLACK HILLS FLUME & MIN. CO. v. GRAND ISLAND & W. C. R. CO. 51 N. W. 342.**Right of appeal.**

Cited in *McClain v. Williams*, 10 S. D. 332, 43 L.R.A. 287, 73 N. W. 72, holding that right to appeal depends on statutory provisions when not specially granted by the Constitution; *Custer County Bank v. W. H. Walling Mercantile Co.* 16 S. D. 579, 94 N. W. 582, holding order made at chambers not appealable; *State ex rel. Lehman v. King*, 46 La. Ann. 163, 15 So. 283, holding that an order of a lower court suspending an in-

junction "until further orders of court after hearing" is not reviewable under the supervisory powers of the appellate court, when no step has been taken to suspend the order revoked, or to obtain the hearing; *Grigsby v. Minnehaha County*, 6 S. D. 492, 62 N. Y. 105, holding that the county board of equalization cannot appeal from a decision of the city board of equalization in striking exempt property from the assessment list; *Huron v. Carter*, 5 S. D. 4, 57 N. W. 947, holding decision of inferior court or tribunal when acting within peculiar jurisdiction final if no provision for appeal is made.

What is a judge's order.

Cited in *Brown v. Edmonds*, 5 S. D. 508, 59 N. W. 731, holding that an order which the judge as distinguished from the court has the power to make will be treated on appeal as made by the judge instead of the court, where it is evident that the judge so intended it.

Distinguished in *Lawrence County v. Meade County*, 6 S. D. 626, 62 N. W. 957, holding that recital in order which could only be properly made in court that it was heard and "done in chambers" will be taken on appeal to mean that it was tried in the judge's private office but before him as a court.

Manner of taking appeal.

Cited in *Brown v. Brown*, 12 S. D. 380, 81 N. W. 627, holding that party seeking to take an appeal must do so in the manner and on the conditions prescribed by statute.

Premature issuance of mandamus.

Cited in *State ex rel. McGregor v. Young*, 6 S. D. 406, 61 N. W. 165, holding issuance of peremptory writ of mandamus before rendition of a judgment as a basis therefor premature and irregular.

2 S. D. 557, GORMAN MIN. CO. v. ALEXANDER, 51 N. W. 346.

Followed without special discussion in *Gorman Min. Co. v. Alexander*, 3 S. D. 3, 51 N. W. 349.

Who may object to alien's possession of mining claim.

Cited in *Wilson v. Triumph Consol. Min. Co.* 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300, holding that only the United States can object to the possession of a mining claim on the ground of noncitizenship under U. S. Rev. Stat. § 2319, U. S. Comp. Stat. 1901, p. 1424.

Validity of oral agreement to convey part of mining claim.

Cited in *Reagan v. McKibben*, 11 S. D. 270, 19 Mor. Min. Rep. 556, 76 N. W. 943, holding an agreement to convey part of a mining claim after location not binding on the one making it unless evidenced by writing subscribed by him or his agent authorized in writing.

2 S. D. 568, STATE v. FIRST NAT. BANK, 51 N. W. 587, Writ of error dismissed in 163 U. S. 686, 41 L. ed. 308, 16 Sup. Ct. Rep. 1201.

Criminal responsibility of corporation.

Cited in *United States v. Mac Andrews & F. Co.* 149 Fed. 823, holding corporation may conspire and be held criminally liable for so doing.

Status of national banks with reference to state laws.

Cited in *Merchants' Nat. Bank v. Ford*, 124 Ky. 403, 99 S. W. 260, as to right of national banks to all privileges accorded most favored state banks.

Cited in note in 56 L.R.A. 676, on forfeiture or other effect of taking or reserving illegal interest by national bank.

Distinguished in *Lanham v. First Nat. Bank*, 46 Neb. 663, 65 N. W. 786, holding national bank not subject to the provisions of state statute as to consequences of a civil nature of taking or reserving usurious interest, but only to the Federal statutes regulating the subject.

Venue of criminal prosecution.

Cited in *Dix v. State*, 89 Wis. 250, 61 N. W. 760, holding that the failure of an employee while in a certain county to pay over as required by his contract of employment money collected in other counties and converted to his own use does not, in the absence of a demand, make a prima facie case of embezzlement in such county so as to make him liable to trial therein.

2 S. D. 577, ALBRIGHT v. SMITH, 51 N. W. 590.**Labor and materialmen's lien law — Constitutionality.**

Cited in *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 788, 24 Sup. Ct. Rep. 576, holding Ohio labor and materialmen's lien law is constitutional; *Hightower v. Bailey*, 108 Ky. 98, 49 L.R.A. 255, 56 S. W. 147, holding that the lien given for materials or labor by Ky. Stat. § 2463, although given irrespective of any notice of the claim or state of account between the owners and contractors, is not unconstitutional, as to future contracts, as a taking of one man's property to pay another's debt, or as an unwarrantable interference with the right to contract.

— Subcontractor's lien.

Cited with special approval in *Hightower v. Bailey*, 108 Ky. 198, 49 L.R.A. 255, 94 Am. St. Rep. 350, 56 S. W. 147, as containing statement of grounds upon which statutes rest which give lien for labor or materials furnished for others than owner.

— Unity of transaction.

Cited in *Taylor v. Dall Lead & Zinc Co.* 131 Wis. 348, 111 N. W. 490, holding items of lumber furnished at different times were furnished in one transaction for purposes of lien law.

2 S. D. 593, TRIPP v. RINGSRUD, 51 N. W. 655.**2 S. D. 596, WRIGHT v. LEE, 51 N. W. 706, Reaffirmed on later appeal in 10 S. D. 263, 72 N. W. 895.****Contracts and transactions of unlicensed foreign corporations.**

Cited with special approval in *Cooper v. Ft. Smith & W. R. Co.* 23 Okla. 139, 99 Pac. 785, holding failure of foreign corporation to comply

with statutory provisions as to doing business does not render its contracts void.

Cited in *Pech Mfg. Co. v. Groves*, 6 S. D. 504, 62 N. W. 109, on necessity for compliance by foreign corporation with statutory requirements as to doing business in state; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203, holding right to sue on contract not affected by failure of foreign corporation to comply with statutory requirements; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138, 54 N. W. 544, denying right of persons contracting with foreign corporation as such to assert invalidity of contract for noncompliance with statutory requirements after receiving and retaining benefits thereof; *Dorsey County v. Whitehead*, 77 Ark. 205, 1 S. W. 97, holding contract made by foreign corporation before compliance with terms of statute is not void, but is enforceable after compliance; *Vermont Loan & T. Co. v. Hoffman*, 5 Idaho, 376, 37 L.R.A. 509, 95 Am. St. Rep. 186, 49 Pac. 314, holding loan by foreign corporation without securing license to loan money is not void; *State v. American Book Co.* 69 Kan. 1, 1 L.R.A.(N.S.) 1041, 76 Pac. 411, 2 A. & E. Ann. Cas. 56, holding contracts between foreign corporation and state school text-book commission were not subject to cancelation because made before admission of corporation to do business in state; *Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 893, holding innocent contracts and acts of foreign corporation done without compliance with statutory requirements as to doing business are valid in absence of express provision of statute to contrary; *Reorganized Church of Jesus Christ of L. D. S. v. Church of Christ*, 60 Fed. 937, holding that a corporation if not forbidden by its charter may take and hold real estate in a foreign state, unless interdicted by the positive law or declared policy of such other state; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736, holding that in the absence of statutes showing a contrary intent or policy, foreign corporations will be permitted to do business and make contracts which, under the doctrine of state comity, will be held valid and enforced by the courts upon the presumption of acquiescence which will arise from silence upon the subject by the legislature; *Vermont Loan & T. Co. v. Hoffman*, 5 Idaho, 376, 37 L.R.A. 509, 49 Pac. 314, holding a contract for the loan of money by a foreign corporation which has not paid the license tax required by Idaho Rev. Stat. § 1644, valid, although the statute makes a loan under such circumstances a misdemeanor, and provides for suit to recover the tax, with damages; *Foster v. Charles Betcher Lumber Co.* 5 S. D. 57, 23 L.R.A. 490, 49 Am. St. Rep. 859, 58 N. W. 9, holding that a foreign corporation cannot avoid service of summons on a managing agent within the state on the ground that it has failed to file a copy of its articles of incorporation and a certificate of the appointment of an agent authorized to accept service of process as required by statute; *Reorganized Church of Jesus Christ of L. D. S. v. Church of Christ*, 60 Fed. 937, holding that whether or not the amount of land acquired by a religious corporation is in excess of the amount "necessary" to be held for the use and purpose of such corporation, will not be determined in a collateral proceeding. Dak. Rep.—43.

ing, but the question belongs to the state; *Chattanooga, R. & C. R. Co. v. Evans*, 14 C. C. A. 116, 31 U. S. App. 432, 66 Fed. 809, holding that a foreign corporation is not prevented from acquiring the title to realty without filing a copy of its charter as required by Tenn. act March 26, 1891, providing that a failure to do so before attempting to do any business in the state shall subject it to a fine; *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317, holding a mortgagor liable to the assignee of a corporate mortgagee which had not conformed to the statutory conditions upon which a foreign corporation was permitted to carry on business in South Dakota; *Tolerton & S. Co. v. Barch*, 84 Minn. 497, 88 N. W. 19, holding that Minn. Laws 1895, chap. 332, providing for the appointment of local agents to receive service of summons, does not render contracts and dealings with noncomplying foreign corporations void and unenforceable; *American Bldg. & L. Asso. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493, holding that Neb. Laws 1891, p. 212, chap. 14, §§ 17, 19, making it a misdemeanor punishable by fine for any foreign building and loan association to transact business within the state without first obtaining a certificate of approval and authorization does not render invalid contracts made by noncomplying corporations.

Distinguished in *American Copying Co. v. Eureka Bazaar*, 20 S. D. 526, 9 L.R.A.(N.S.) 1176, 108 N. W. 15, holding foreign corporation cannot enforce contract made before compliance with statutory requirements as to doing business.

Power of corporate directors to make voluntary assignment.

Cited in *Goetz v. Knie*, 103 Wis. 366, 79 N. W. 401, holding that in the absence of a statute the board of directors of an insolvent corporation has power to make a voluntary assignment of all its property for the benefit of its creditors without the consent of its stockholders.

Cited in note in 58 Am. St. Rep. 74, 94, 96, on fraudulent assignments for creditors.

Supplementary proceedings against corporation.

Cited in *South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.* 4 S. D. 173, 56 N. W. 98, holding proceedings supplementary to execution available against a corporation as it may appear and answer by its general officer.

Attachment of property in hands of assignee for creditors.

Cited in note in 26 L.R.A. 599, on right to attach property in the hands of an assignee for creditors.

2 S. D. 631, HAWKINS v. HUBBARD, 51 N. W. 774.

Followed without special discussion in *Lindsay v. Pettigrew*, 3 S. D. 199, 52 N. W. 783.

Double appeal.

Cited in *Kinney v. American Yeoman*, 15 N. D. 21, 106 N. W. 44, holding appeal from final judgment and from subsequent order denying motion for new trial is not objectionable for duplicity; *Sucker State Drift Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, holding appeal from judgment

and two orders denying motion for new trial, made upon same grounds after judgment, not double appeal; *Kountz v. Kountz*, 15 S. D. 66, 87 N. W. 523, holding that appeal from a judgment and from an order denying an application for new trial made after entry of the judgment will not be dismissed as constituting a double appeal; *McVay v. Bridgman*, 17 S. D. 424, 97 N. W. 20, holding appeal from judgment and order denying new trial made after judgment constitutes but one appeal; *Meade County Bank v. Decker*, 17 S. D. 590, 98 N. W. 86, holding attempted appeal from nonappealable order will be treated as surplusage where there is appeal from appealable order in same case upon same notice.

Distinguished in *Gordon v. Kelley*, 20 S. D. 70, 104 N. W. 606, holding appeal from default judgment and from order overruling motion to vacate judgment and for leave to answer is double appeal.

Review of evidence on appeal from judgment only.

Cited in *Aultman, M. & Co. v. Becker*, 10 S. D. 58, 71 N. W. 753, holding that appeal from a judgment only does not bring up for review errors occurring after the judgment.

— Sufficiency of evidence.

Cited in *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353, holding under statutes sufficiency of evidence will not be reviewed where no motion for new trial is made below; *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466, holding sufficiency of evidence to support verdict or finding not reviewable on appeal unless presented to court below by motion for new trial; *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below; *Parrish v. Mahany*, 10 S. D. 276, 66 Am. St. Rep. 715, 73 N. W. 97, holding sufficiency of evidence to justify referee's findings not reviewable on appeal from judgment alone; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding sufficiency of evidence to justify findings of court cannot be reviewed upon appeal from judgment alone; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding sufficiency of evidence to justify decision is considered only upon appeal presenting for review order denying new trial, and such order when made after judgment, is reviewable only upon appeal from the order.

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2 S. D. 638, *ROSS v. WAIT*, 51 N. W. 866.

Appealable orders.

Distinguished in *Lawrence County v. Meade County*, 6 S. D. 626, 62

N. W. 957, holding order dismissing action and awarding costs to defendant a final judgment for purpose of appeal.

2 S. D. 640, MASON v. SIOUX FALLS, 39 AM. ST. REP. 803, 51 N. W. 770.

Followed without discussion in *Mason v. Sioux Falls*, 2 S. D. 652, 51 N. W. 774.

Procedure to impose local assessment.

Cited in *Lidgerwood v. Michalek*, 12 N. D. 348, 97 N. W. 541, holding statute fixing time for advertisement when property was to be taken for street did not apply to proceedings to assess cost of improvement, the two being distinct proceedings; *Whittaker v. Deadwood*, 12 S. D. 608, 82 N. W. 202, holding that where a city charter provided for the sale of property of delinquent taxpayers, on the first Mondays of March and December, a sale made on December 20th under a special assessment is invalid.

— Description of proposed work.

Cited in *Coulter v. Phoenix Brick & Constr. Co.* 131 Mo. App. 230, 110 S. W. 655, holding resolution declaring street improvement necessary must describe proposed work and materials of which it is to be composed.

Dedication of highway.

Cited in *Deadwood v. Whittaker*, 12 S. D. 515, 81 N. W. 908, holding a finding that land described on a plat as a street had been dedicated for that purpose sustained by evidence that the owner conveyed a lot describing it as fronting thereon, and made no objection to the use of the street by the public; *Whittaker v. Deadwood*, 12 S. D. 523, 81 N. W. 910, holding one using a recognized street claimed to have been dedicated by his grantor and knowingly permitting public to use same without objection estopped to deny dedication; *Sweatman v. Bathrick*, 17 S. D. 138, 95 N. W. 422, holding conveyances recognizing plat by city engineer, showing changed location of street, and failure to object to public use of street so changed, implied dedication of street as changed; *Larson v. Chicago, M. & St. P. R. Co.* 19 S. D. 284, 103 N. W. 35, holding crossing impliedly dedicated to public use where railroad company's superintendent directed its maintenance, which continued four years.

Cited in note in 12 Eng. Rul. Cas. 522, on long use of public road as evidence of dedication.

2 S. D. 652, MASON v. SIOUX FALLS, 51 N. W. 774.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 3 S. D.

3 S. D. 1, SIOUX FALLS NAT. BANK v. MCKEE, 50 N. W. 1057.

When certiorari lies.

Cited in *State ex rel. Johnson v. Case*, 14 Mont. 520, 37 Pac. 95, holding where justice court eight days after its judgment is rendered amends judgment as to costs, which is beyond its jurisdiction, certiorari will lie to review the case.

Distinguished in *State ex rel. Johnson v. Case*, 14 Mont. 520, 37 Pac. 95, holding that certiorari will lie to annul a judgment rendered in excess of jurisdiction, when a prior valid judgment, of which the applicant for the writ does not complain, will thus be restored, since an appeal to the district court would subject the appellant to a trial de novo concerning a matter of which he does not complain.

Questions reviewable on certiorari.

Followed in *Kirby v. McCook County Circuit Ct.* 10 S. D. 38, 71 N. W. 140, holding that only questions brought up by certiorari to review proceedings of circuit court are whether that court exceeded its jurisdiction or failed to properly pursue its authority.

3 S. D. 3, GORMAN MIN. CO. v. ALEXANDER, 51 N. W. 349.

3 S. D. 4, HOLDEN v. HASERODT, 51 N. W. 340.

Place for decision of cause.

Cited in *Griffin v. Walworth County*, 20 S. D. 142, 104 N. W. 1117, on authority of judge of one circuit to enter judgment in his own circuit in contest proceeding in another circuit.

Appealable orders.

Cited in *Black Hills Flume & Min. Co. v. Grand Island & W. C. R. Co.*

2 S. D. 546, 51 N. W. 342, holding not appealable, order of injunction granted by circuit judge within his circuit upon return of an order to show cause returnable before himself and concluding with the words "done at chambers," reciting that "the judge of said court having considered the return" and concluding with the words "done at chambers." Premature issuance of mandamus.

Distinguished in *State ex rel. McGregor v. Young*, 6 S. D. 406, 61 N. W. 165, holding the issuance of a peremptory writ of mandamus by the court before the rendition of a judgment as a basis therefor, premature and irregular.

3 S. D. 11, CUTTING v. TAYLOR, 15 L.R.A. 691, 51 N. W. 949.

Followed without special discussion in *Lyman County v. State*, 9 S. D. 413, 69 N. W. 601; Same case on the merits, 11 S. D. 391, 78 N. W. 17; *State ex rel. Farrar v. Hipple*, 7 S. D. 234, 64 N. W. 120.

Effect of adoption of constitution on existing laws.

Cited in *Doherty v. Ransom County*, 5 N. D. 1, 63 N. W. 148, holding statute giving boards of county commissioners power to fix salaries of state attorneys not repealed by subsequent adoption of Constitution providing that the legislative assembly "shall prescribe the duties and compensation" of all county, township, and district officers; *Kirby v. Western U. Teleg. Co.* 4 S. D. 105, 30 L.R.A. 612, 46 Am. St. Rep. 765, 55 N. W. 759, holding a statute making a telegraph company a common carrier not repealed by S. D. Const. art. 17, § 11, requiring the legislature to provide reasonable regulations by general law for giving effect to the right of telegraph companies to maintain telegraph lines within the state; *Remington v. Higgins*, 6 S. D. 313, 60 N. W. 73, holding the special territorial act of 1885 authorizing the removal by a majority vote of a county seat previously located by a two thirds vote superseded by S. D. Const. art. 9, § 3, making a two-thirds vote necessary for the removal of a county seat so located; *Grigsby v. Minnehaha County*, 6 S. D. 492, 62 N. W. 105, raising, but not deciding, the question whether the exemption provided for in *Dak. Comp. Laws*, § 1542, subd. 14, is in the nature of a contract, so as not to be affected by S. D. Const. art. 11, §§ 5-7, if there is a conflict between them; *Re Nelson*, 19 S. D. 214, 102 N. W. 885, holding all territorial statutes not repugnant to the state constitution, in force when state was organized, continue in force; *Betts v. Land Office Comrs.* 27 Okla. 64, 110 Pac. 766, holding that appropriation act, valid when passed, continues valid until legislature acts under subsequently adopted constitution, providing different rules as to appropriations; *State ex rel. Holcombe v. Burdick*, 4 Wyo. 290, 33 Pac. 131, holding that a territorial statute is in force as a valid law of the state, when said statute is not obnoxious to any constitutional provision.

Distinguished in *People ex rel. Wayside Home v. Kings County*, 12 Misc. 187, 33 N. Y. Supp. 602, holding that N. Y. Laws 1892, chap. 439, § 4, providing that the county treasurer "shall" pay \$110 a year to the managers of a private reformatory institution for the support and main-

tenance of persons committed thereto by the magistrates, is modified by the adoption of N. Y. Const. 1895, art. 8, § 14, providing that such payments to reformatory institutions wholly or partly under private control may be authorized, but shall not be required by the legislature, to the extent of striking out the command that the county shall pay, but leaving still in force the authorization to pay if the county sees fit to do so; *Shattuck v. Kincaid*, 31 Or. 379, 49 Pac. 758, holding that Hill's Ann. [Or.] Laws, § 2297, providing that each of the judges of the circuit courts shall receive an annual salary of \$3,000, and § 2230, providing that the salaries of state officers shall be paid quarterly out of the state treasury, upon the warrant of the secretary of state, commencing from and after they enter upon the duties of their respective offices, did not effectuate a continuous appropriation for the payment of said salaries.

Retroactive statutes.

Cited in *American Invest. Co. v. Beadle County*, 5 S. D. 410, 59 N. W. 212, holding South Dakota statute for repayment of taxes by county to purchaser at tax sale where the entry is cancelled by the Federal government after the land had been listed and sold for such taxes, not retroactive; *American Invest. Co. v. Thayer*, 7 S. D. 72, 63 N. W. 233, holding act directing county treasurer to refund to holder and owner of tax certificate for real property not liable to taxation, does not apply to sale made prior to its enactment; *Arey v. Lindsey*, 103 Va. 250, 48 S. E. 889, holding constitutional provision cannot be given retroactive operation unless that is the unmistakable intention of the words used or obvious design of the authors.

3 S. D. 18, COLLINS v. STATE, 51 N. W. 776.

Repeal of statutes by implication.

Cited in *State ex rel. Edgerly v. Currie*, 3 N. D. 310, 55 N. W. 858, holding statute as to amount of salary impliedly repealed by act appropriating as salary less amount than that allowed by statute creating office.

Determination of time of passage of act.

Cited in *Somers v. State*, 5 S. D. 321, 58 N. W. 804, holding that the court may on its own motion examine the legislative journals and take judicial notice of what they show, for the purpose of determining which of two inconsistent laws approved on the same day was the later.

Distinguished in *State ex rel. Davis v. Cutler*, 34 Utah, 99, 95 Pac. 1071, holding law providing for contract by district court for court stenographers with payment of mileage at certain rate was not repealed by subsequent general appropriation act limiting appropriations for payment of such mileage to amount actually expended.

Course of action when appropriation is insufficient.

Cited in *Meade County Bank v. Reeves*, 13 S. D. 193, 82 N. W. 751, holding that treasurers' certificates for wolf bounties should be paid in full, in the order in which they are filed, until the appropriation for the year is exhausted, instead of pro rata.

Valid demands against state.

Cited in note in 42 L.R.A. 38, on what claims constitute valid demands against state.

3 S. D. 29, STATE v. BECKER, 51 N. W. 1018.**Appointive assistants to state's attorney.**

Cited in Ex parte Corliss, 16 N. D. 470, 114 N. W. 962 (dissenting opinion), on right of one claiming to have been appointed assistant prosecuting attorney to visit grand jury room.

Title of act.

Cited in State v. Anaconda Copper Min. Co. 23 Mont. 498, 59 Pac. 854, holding that Mont. Laws 1897, p. 245, is constitutional although entitled "An Act to Amend § 705 of Title 10 of the Penal Code of the State of Montana, to Have Cages in all Mines Cased in," but containing provisions limited to mines more than 300 feet deep, as the effect of the comprehensiveness of the title is not reasonably to mislead or deceive; State v. Ayers, 8 S. D. 517, 67 N. W. 611, holding constitutional prohibition against any law embracing more than one subject not violated by statute authorizing prosecution on information because of a provision empowering court in its discretion to proceed without a grand jury; State v. Mitchell, 3 S. D. 223, 52 N. W. 1052, holding constitutional provision as to title of statute not violated by South Dakota laws of 1890, c. 101, prohibiting sale of intoxicating liquors; Garrigan v. Kennedy, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding title of act providing for licensing, restriction and regulation of liquor business, covers allowance of recovery damages by married woman resulting from sale of liquor to her husband, and provision making it unlawful to sell to intoxicated person; Davenport v. Elrod, 20 S. D. 567, 107 N. W. 833, holding title "act relating to creation of state capitol commission to provide for erection of building for capitol purposes" on designated property, covered authorization for use of funds derived from sale of lands granted to state for public buildings at capitol.

When courts will declare statute unconstitutional.

Cited in Wickhem v. Alexandria, 23 S. D. 556, 122 N. W. 597, holding that courts will declare statute void, only when collision between statute and constitution is certain and inevitable.

Who may question constitutionality of act.

Cited in Cram v. Chicago, B. & Q. R. Co. 84 Neb. 607, 26 L.R.A.(N.S.) 1022, 122 N. W. 31, holding common carrier cannot attack validity of law increasing liability of common carrier, on ground of injury to shipper, in a hypothetical case which may never be presented to court; Ely v. Rosholt, 11 N. D. 559, 93 N. W. 864, holding constitutionality of a law will not be considered on appeal where raised by one not in position so to raise question; State v. Mitchell, 3 S. D. 223, 52 N. W. 1052, holding that one having no interest in and not affected by statute cannot take advantage of its unconstitutionality; State v. Church, 6 S. D. 89, 60 N. W. 143, holding that the appellate court will not examine the con-

stitutionality of an independent provision of a statute, which does not affect the rights of the parties raising the question; *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709, denying right of defendant in proceedings to abate liquor nuisance, to attack constitutionality of statute relating to seizure of liquors under search warrants where no warrant has been issued and no liquors seized; *Pugh v. Pugh*, 25 S. D. 7, 32 L.R.A.(N.S.) 954, 124 N. W. 959, holding that nonresident cannot question constitutionality of divorce law.

Partial invalidity of statute.

Cited in *State v. Beddo*, 22 Utah, 432, 63 Pac. 96, holding Utah Laws 1899, chap. 56, void so far as it attempted to amend Rev. Stat. §§ 633, 2061, 2449, 4692, 4693, without re-enacting and publishing at length said provisions as revised, but that the remainder must be sustained, as the main subject is independent, embracing matter not previously legislated upon, and properly described in the title, and the foreign matter consists of the amendatory portion of the act, which may be readily separated and rejected and leave a sensible and complete enactment which may be executed.

Construction of statutes in view of precise question made.

Cited in *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321, holding where person is arrested for violation of particular provision of law imposing occupation tax, statute will be considered only with reference to its effect on the particular business in which he was engaged.

Cruel and inhuman punishment.

Cited in *Territory v. Ketchum*, 10 N. M. 718, 55 L.R.A. 90, 65 Pac. 169, on limitation on discretion of legislature in prescribing punishment for crime; *Fisher v. McDaniel*, 9 Wyo. 457, 87 Am. St. Rep. 971, 64 Pac. 1056, holding a punishment for contempt of court in offering a bribe to witnesses to swear falsely, of \$500 and costs and imprisonment for six months in the county jail and until the fine is paid, not cruel and unusual, in view of a statute authorizing the discharge of accused after a prescribed period; *Jackson v. United States*, 42 C. C. A. 452, 102 Fed. 473, holding that a sentence imposing upon one convicted of the crime of assault with a dangerous weapon the maximum statutory sentence of imprisonment for the period of ten years is not cruel, unusual, and excessive; *Weems v. Miller*, 217 U. S. 407, 54 L. ed. 815, 30 Sup. Ct. Rep. 544 (dissenting opinion), on what constitutes cruel and unusual punishment.

Cited in note in 35 L.R.A. 564, 576, on cruel and unusual punishments.

Allegations on information and belief.

Cited in note in 25 L.R.A.(N.S.) 64, on complaint or information on information and belief as basis for warrant or examination preliminary thereto.

Right to prohibit sales of liquor.

Cited in note in 15 L.R.A.(N.S.) 920, on constitutional right to prohibit sale of intoxicants.

3 S. D. 44, ULRICK v. DAKOTA LOAN & T. CO. 51 N. W. 1023.

Actual notice dispensing with necessity for formal notice.

Cited in *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, holding formal notice to adjoining owner of intention to excavate unnecessary where such owner has full knowledge thereof; *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749, holding formal notice of an intention to excavate on adjoining land dispensed with by actual knowledge of such intention: *School Dist. No. 56 v. School Dist. No. 27*, 9 S. D. 336, 69 N. W. 17, holding that a school district cannot escape liability to pay a new district created out of a part thereof the amount apportioned thereto, on the technical ground that a proper form of notice of the proposed change was not given, where the officers of the board and voters of the district have been heard and their protest considered.

Liability for removal of lateral support.

Cited in *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, holding owner liable for injuries to neighbor's building caused by former's negligence in excavating on his own land.

Act of God.

Cited in *Vyse v. Chicago, B. & Q. R. Co.* 126 Iowa, 90, 101 N. W. 736, holding railroad liable for injury from flood if its negligence in construction concurred with flood producing injury which would not have occurred but for such negligent construction.

3 S. D. 49, CARPENTER v. INGALLS, 44 AM. ST. REP. 753, 51 N. W. 948.

Sufficiency of pleading.

Cited in *Rust-Owen Lumber Co. v. Fitch*, 3 S. D. 213, 52 N. W. 879, holding sufficient, averment in complaint to enforce mechanic's lien that specified defendants other than owner have or claim some interest in or lien upon the premises accruing subsequently to plaintiff's lien.

3 S. D. 52, STATE v. FIRST NAT. BANK, 51 N. W. 780.

Judicial notice of localities.

Cited in note in 82 Am. St. Rep. 443, on judicial notice of localities and boundaries.

3 S. D. 55, STATE v. SCOUGAL, 15 L.R.A. 477, 44 AM. ST. REP. 756, 51 N. W. 858.

Regulation of banking business.

Cited in *First State Bank v. Shallenberger*, 172 Fed. 999, on right of state to regulate banking business; *Re Surety Guarantee & T. Co.* 56 C. C. A. 654, 121 Fed. 73, as denying state control over banks; *Williams v. Lewis Invest. Co.* 110 Iowa, 635, 82 N. W. 332, holding that Acts 18th Iowa Gen. Assem. chap. 208, § 1, relative to liability of stockholders in certain corporations organized "for the purpose of transacting a banking business, buying or selling exchange, receiving deposits of money, or discounting notes," does not apply to a corporation not organized to

do a "banking business" in the general understanding of that term, although it was organized to, and did in fact, receive "deposits," as a device for borrowing money, which was to be secured and draw interest.

Cited in notes in 135 Am. St. Rep. 61, on business of banking as a proper subject for legislative regulation; 5 L.R.A.(N.S.) 875, on power to prohibit or impose conditions upon right of individuals to engage in banking.

Distinguished in *Blaker v. Hood*, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115, holding Kan. Laws 1891, chap. 43, imposing reasonable regulations upon the banking business, within the police powers of the state; *Noble State Bank v. Haskell*, 22 Okla. 48, 97 Pac. 590, under different constitutional provision, upholding law establishing a depositor's guaranty fund.

Restriction of occupations to corporations.

Cited in note in 25 L.R.A. 239, on restrictions on insurance by unincorporated associations or individuals.

Disapproved in *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 258, upholding law restricting business of "building and loan associations" to corporations.

— Banking.

Cited in *Marymont v. Nevada State Bkg. Bd.* — Nev. —, 32 L.R.A. (N.S.) 477, 111 Pac. 295, holding that state cannot limit transaction of ordinary banking business to corporations.

Cited in note in 55 L. ed. U. S. 130, on prohibiting or restricting private banking.

Distinguished in *Weed v. Bergh*, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664, upholding, under different constitutional provision, a law restricting business of banking to corporations.

Grant of Monopoly.

Cited in *Evans v. Hughes County*, 3 S. D. 244, 52 N. W. 1062, holding that if a county has no legal authority to grant an exclusive ferry privilege the one taking such grant from the county is chargeable with knowledge of its lack of authority.

Cited in note in 53 L.R.A. 763, on constitutionality of statute attempting to grant a monopoly.

3 S. D. 77, EDMISON v. LOWRY, 17 L.R.A. 275, 44 AM. ST. REP. 774, 52 N. W. 583.

Title to land in street.

Cited in *Sweatman v. Bathrick*, 17 S. D. 138, 95 N. W. 422, holding grantor who conveys lot abutting on street does not retain title in street, whether there has been a statutory or common law dedication.

— Presumption of ownership.

Cited in *Hamby v. Dawson Springs*, 126 Ky. 451, 12 L.R.A.(N.S.) 1164, 104 S. W. 259, holding owner of lot abutting on street is presumed to own the soil to the center of the street subject to public easement; *Dell Rapids Mercantile Co. v. Dell Rapids*, 11 S. D. 116, 74 Am. St. Rep.

783, 75 N. W. 898, holding that owner of lot abutting on street will be presumed to own to center thereof.

— Rights of abutting property owners.

Cited in *Lovejoy v. Campbell*, 16 S. D. 231, 92 N. W. 24, holding although under statute title to soil in street is vested in city in fee, abutting property owner has such interest therein as to be entitled to recover for injury to trees planted by him in street.

Eviction.

Cited in *Hamilton v. Graybill*, 43 N. Y. Supp. 1079, 19 Misc. 521, 26 N. Y. Civ. Proc. Rep. 184, holding there is an actual eviction where tenant occupies two rooms in office building and door to outer office room is obstructed, although tenant has access thereto from other room and has means of access to inner office from hallway; *Rogers v. Grote Paint Co.* 118 Mo. App. 300, 94 S. W. 548, holding there is not an eviction of lessee where part of the building is destroyed by accidental fire and landlord in reconstructing leaves off one story but lessee remains in building after reconstruction, there being no covenant by landlord to restore in case of fire; *Wusthoff v. Schwartz*, 32 Wash. 337, 73 Pac. 407, holding there is an eviction where landlord enters upon premises, tears down portion of building by taking down stairway and removing toilets and water pipes, tears up basement, including floor, railing on front porch removed, and similar acts.

Cited in notes in 38 Am. St. Rep. 489, on what justifies tenant in abandoning leased premises; 15 Eng. Rul. Cas. 810, on statutory requirements as excuse for landlord's breach of covenant.

What constitutes a taking.

Cited in note in 15 L.R.A.(N.S.) 51, on cutting off access to highway as a taking.

3 S. D. 87, *BUNN v. KINGSBURY COUNTY*, 52 N. W. 673.

3 S. D. 90, *NAUGHTON v. SIOUX FALLS*, 52 N. W. 324.

Quantum meruit.

Cited in *Hall v. Luckman*, 133 Iowa, 518, 110 N. W. 916, holding where minds of parties never meet on compensation to be paid for services rendered, the reasonable value thereof may be recovered.

3 S. D. 93, *ORONK v. CHICAGO, M. & ST. P. R. CO.* 52 N. W. 420.

Ordinary care in management of trains.

Cited in *Continental Ins. Co. v. Chicago & N. W. R. Co.* 97 Minn. 467, 5 L.R.A.(N.S.) 99, 107 N. W. 548, holding railroad has right to run trains with regularity and on schedule time though laboring of the engine causes emission of sparks.

3 S. D. 106, *McKINNEY v. SUNDBACK*, 52 N. W. 322.

3 S. D. 110, BRACE v. DOBLE, 52 N. W. 586.**Equitable relief.**

Cited in *Johnson v. Burnside*, 3 S. D. 230, 52 N. W. 1057, holding that one seeking to rescind a contract on the ground of fraud need not make a formal tender of the consideration received, where the other party refuses to receive the property and restore to him the consideration received from him.

—By making debt a lien on land.

Cited in *Wolfinger v. Thomas*, 22 S. D. 57, 133 Am. St. Rep. 900, 115 N. W. 100, holding that equity may make judgment for repayment of consideration lien on land, in action to rescind contract; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535, holding party who refuses to execute a mortgage to pay a debt long overdue, having contracted so to do cannot complain of a decree charging the indebtedness on the land and ordering a sale thereof.

3 S. D. 118, FULLERTON v. LEONARD, 52 N. W. 325.**Entire or partial liens under statutes.**

Cited in *Schlosser v. Moores*, 16 N. D. 185, 112 N. W. 78, holding under statute one who in good faith furnishes another seed grain is entitled to lien for entire purchase price on crop grown therefrom whether all of such seed is sown or not.

—Mechanics' liens.

Cited in *Stoltze v. Hurd*, 20 N. D. 412, 30 L.R.A.(N.S.) 1219, 128 N. W. 115, holding subcontractor entitled to joint lien for materials, where adjoining owners make joint contract for building on both lots; *Williamette Mills Co. v. Shea*, 24 Or. 40, 32 Pac. 759, holding that a single lien for materials furnished or work done as a whole on several separate and distinct houses upon adjoining lots constituting one tract belonging to one person, under an entire contract for a stipulated sum, is valid; *Meixell v. Griest*, 1 Kan. App. 145, 40 Pac. 1070, holding that where the several owners of two adjoining lots join in making an entire contract for the erection of two houses, one upon each lot, the contractor who furnishes material and labor has a lien upon each lot and building; *Beach v. Stamper*, 44 Or. 4, 102 Am. St. Rep. 597, 74 Pac. 208, holding subcontractor not entitled to a lien on entire property although work is done under entire contract with contractor where latter has separate contracts with owner, although statute provides contractor shall be considered owner's agent.

Distinguished in *Tom Sweeney Hardware Co. v. Gardner*, 18 S. D. 166, 99 N. W. 1105, holding interest of cotenant subject to lien for repairs where they are necessary to preserve the property, where such tenant not only knew of but consented to and approved them and by her statements induced the making of repairs which otherwise would not have been made.

Verification of mechanic's lien by agent.

Cited in *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73

N. W. 203, holding that verification of mechanic's lien may be made by lienor's agent.

3 S. D. 124, DALBKERMAYER v. SCHOLTES, 52 N. W. 261.
Retaxation of costs 3 S. D. 183, 52 N. W. 871.

Unauthorized prosecution of appeal.

Cited in McCormick Harvesting Mach. Co. v. Snedigar, 3 S. D. 302, 53 N. W. 83, holding that appeal by administrator taken after his discharge and appointment of new administrator gives no appellate jurisdiction over the estate or over cause of action against the estate.

3 S. D. 129, EDMINSTER v. RATHBUN, 52 N. W. 263.

Waiver of undertaking for costs on appeal from justice.

Cited in Brown v. Brown, 12 S. D. 380, 81 N. W. 627, holding failure to appeal undertaking for costs on appeal from justice's judgment not waived by appearance without objection and proceeding to trial.

Dismissal of appeal from justice for failure to file record.

Cited in Haukland v. Minneapolis & St. L. R. Co. 11 S. D. 493, 78 N. W. 958, holding appeal from justice's judgment properly dismissed for failure to file records and transcript within statutory period; Fargo v. Graves, 12 S. D. 293, 81 N. W. 291, holding that appeal from justice's judgment will be dismissed where record was not sent up by justice within prescribed time because of nonpayment of his fees.

Distinguished in McLaughlin v. Michel, 14 S. D. 189, 84 N. W. 777, holding motion to dismiss appeal from justice's judgment for nonfiling of transcript within statutory period properly denied where appellant filed undertaking for costs of justice's fee for making out transcript and are told by latter that transcript had been transmitted.

3 S. D. 134, HOLDBRIDGE v. LEE, 52 N. W. 265.

When trover lies.

Cited in Nelson v. Oium, 21 S. D. 541, 114 N. W. 691, holding conversion proper remedy, where sheriff sells property levied on, after claim of exemption.

Pleading in trover.

Cited in note in 9 N. D. 633, on pleading in actions for trover and conversion.

Scope of cross-examination.

Cited in Bedtkey v. Bedtkey, 15 S. D. 310, 89 N. W. 479, holding it discretionary with court to exclude on cross-examination of plaintiff in action against father-in-law for slander, question as to pendency of divorce suit between herself and husband at time of trial when not touched on, in direct examination.

Sufficiency of schedule of exempt property.

Cited in Ecker v. Lindskog, 12 S. D. 428, 48 L.R.A. 155, 81 N. W. 906, holding that a schedule of personalty claimed as exempt by a married

roman, which states that it belongs to herself and husband and is exempt as not exceeding in value \$750, and that affiant is the wife of defendant, who had been adjudged insane, sufficiently states the ownership, and shows that she bases her exemption right on the claim that she is the head of the family.

3 S. D. 138, GREELEY v. WINSOR, 52 N. W. 674.

Effect of judgment of dismissal.

Cited in *Todd v. Todd*, 7 S. D. 174, 63 N. W. 777, holding that while a judgment of dismissal remains in effect no order can be made in the case except in relation to the vacation of such judgment; *Connor v. Knott*, 10 S. D. 384, 73 N. W. 264, holding that after a judgment of dismissal a second judgment of dismissal imposing conditions on the right to commence a new action cannot be made.

3 S. D. 141, BUSTA v. WARDALL, 52 N. W. 418.

Sufficiency of complaint.

Cited in *Parazyk v. Mach*, 10 S. D. 555, 74 N. W. 1027, holding that complaint in action to set aside deed as obtained by undue influence while plaintiff was insane need not allege that plaintiff acted with reasonable promptness on restoration to reason; *Ball v. Beaumont*, 59 Neb. 631, 81 N. W. 858, holding that the issue presented in a petition alleging that on a certain day plaintiff paid to and for the use of the defendants, and at their instance and request, the sum of \$834, which sum defendants agreed to pay plaintiff; that no part of said amount has been repaid; and that there is now due thereon from the defendants to the plaintiff the principal and accrued interest,—is not materially changed by an amendment adding to said statement the words “which sum the defendants agreed to pay plaintiff,” as the law implies said promise to pay, and it need not be averred.

3 S. D. 147, UNION SCHOOL FURNITURE CO. v. MASON, 52 N. W. 671.

Books of account as evidence.

Cited in *Harmon v. Decker*, 41 Or. 587, 93 Am. St. Rep. 748, 68 Pac. 11, holding large loans and payments of money by banker or broker may be proved by his books when in pursuance of his ordinary business methods, but books of general merchant not admissible where it does not appear therefrom that an account therein mentioned was money loaned.

Cited in notes in 138 Am. St. Rep. 466, 468, 470, on admissibility in evidence of books of account; 52 L.R.A. 697, on what is provable by books of account.

Agent's authority as to medium of payment.

Cited in *Pioneer Press Co. v. Gossage*, 13 S. D. 624, 84 N. W. 195, holding that a client is not bound by the agreement of an attorney employed generally to collect a note, that the maker may apply in payment the cost of printing done for the attorney individually.

Cited in note in 17 L.R.A.(N.S.) 607, on assumption of debt by agent as payment.

Distinguished in *St. John & M. Co. v. Cornwell*, 52 Kan. 712, 35 Pac. 785, holding principal not bound by the act of its agent authorized to collect accounts due it, who agrees that a debt due the principal shall be discharged by the board to be furnished to said agent for his personal benefit.

3 S. D. 154, ALDRICH v. COLLINS, 52 N. W. 854.

Authority of town supervisors to incur debt for roads.

Cited in *Van Antwerp v. Dell Rapids Twp.* 5 S. D. 447, 59 N. W. 209, denying power of either town or board of township supervisors to contract for resurvey of highways of township; *Huston v. Sioux Falls Twp.* 17 S. D. 260, 96 N. W. 88, holding town supervisors are not authorized to enter into a contract for repair of road by which a debt would be created; *F. C. Austin Mfg. Co. v. Twin Brook Twp.* 16 S. D. 126, 91 N. W. 470, holding town supervisors cannot buy a road machine unless authorized so to do by vote of the electors.

3 S. D. 162, HEFFLEMAN v. PENNINGTON COUNTY, 52 N. W. 851.

Effect of seal on instrument.

Cited in *Landauer v. Sioux Falls Improv. Co.* 10 S. D. 205, 72 N. W. 467, holding the negotiability of a note not destroyed by affixing the maker's corporate seal thereto; *Condon v. Eureka Springs*, 135 Fed. 566, holding where county clerk, under statute, attached his seal to county warrants they became specialties and different statutes of limitations applied.

Actions on county warrants.

Cited in *Ayres v. Thurston County*, 63 Neb. 96, 88 N. W. 178, holding action may be maintained against county on general fund warrant which county has refused to pay; *Stewart v. Custer County*, 14 S. D. 155, 84 N. W. 764, holding that the purchaser of a county warrant drawn on the general fund "not otherwise appropriated" cannot maintain an action and obtain judgment thereon immediately after its presentation, where there is no money in the treasury belonging to such fund, and sufficient time has not elapsed to permit the levy and collection of a sufficient amount to pay the same.

— Special fund warrants.

Cited in *Kane v. Hughes County*, 12 S. D. 438, 81 N. W. 894, holding that right of action against county exists on refusal of treasurer to pay when presented, county warrant purporting to be drawn on "county advertising fund;" *Custer County Bank v. Custer County*, 18 S. D. 274, 100 N. W. 424, holding county liable on road warrant although larger portion of original road district was by statute transferred to a town, but act did not make provision for apportioning indebtedness of such district; *Apache County v. Barth*, 6 Ariz. 13, 53 Pac. 187, holding when county board of supervisors audited and allowed accounts presented for road work and issued warrants on treasurer in payment thereof they were taken from

unliquidated accounts and placed in outstanding indebtedness and action thereon could be maintained thereon within five years.

County warrant as prima facie evidence.

Cited in *Rochford v. School Dist. No. 11*, 17 S. D. 542, 97 N. W. 747, holding order issued by a school district is prima facie evidence that valid claim against district has been lawfully presented and allowed.

Presumption of consideration from writing.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding written agreement presumptive evidence of sufficient consideration.

3 S. D. 170, PLYMOUTH COUNTY BANK v. GILMAN, 44 AM. ST. REP. 782, 52 N. W. 869, Affirmed on rehearing in 4 S. D. 265, 46 Am. St. Rep. 786, 56 N. W. 892, Later appeal in 9 S. D. 278, 62 Am. St. Rep. 868, 68 N. W. 735.

Admissibility of statements by agents.

Cited in *Klingaman v. Fish & H. Co.* 19 S. D. 139, 102 N. W. 601, holding statement by agent affecting liability of principal made after an alleged injury is inadmissible in evidence, in absence of showing of authority to make statement.

Cited in note in 131 Am. St. Rep. 332, on declarations and acts of agents.

"Law of the case."

Cited in *Cornelius v. Ferguson*, 23 S. D. 187, 121 N. W. 91, holding decision on appeal as to validity of tax deed conclusive on subsequent appeal; *Waterhouse v. Jos. Schlitz Brewing Co.* 16 S. D. 592, 94 N. W. 587, holding where former decision held complaint stated a cause of action, such decision is law of the case on a subsequent appeal thereon; *First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646, holding where record made at former trial in no way differs from that of subsequent trial, the question there decided became the law of the case; *Westfall v. Wait*, 165 Ind. 353, 73 N. E. 1089, 6 A. & E. Ann. Cas. 788, holding appellate court may look into record to ascertain what facts were before it on a former appeal and to what extent the decision there made is the law of the case.

—After transfer to state court from territorial court.

Cited in *Oklahoma City Electric, Gas & Power Co. v. Baumhoff*, 21 Okla. 503, 96 Pac. 758, holding a question decided by the territorial Supreme Court becomes the law of the case on a second appeal of the same case to the state Supreme Court.

3 S. D. 178, PIRIE v. HARKNESS, 52 N. W. 581:

Right to set off judgment as against attorney's lien.

Followed in *Sweeney v. Bailey*, 7 S. D. 404, 64 N. W. 188, holding proceedings irregularly instituted for setting off one judgment against another not defeated by subsequent notice by attorney of one party of claim for lien.

Cited in *Hroch v. Aultman & T. Co.* 3 S. D. 477, 54 N. W. 269, holding—*Dak. Rep.—44.*

ing attorneys establishing lien by notice in writing to judgment debtor before service of notice of application to set off the judgment, entitled to preference over the right of set-off; *Schuler v. Collins*, 63 Kan. 372, 65 Pac. 662, holding that every application for set-off of mutual judgments, either by motion or through a proceeding in equity, is to be determined upon equitable considerations.

Liability of sheriff for paying over proceeds of exempt property.

Cited in *Bostwick v. Benedict*, 4 S. D. 414, 57 N. W. 78, holding that a sheriff to whom money has been paid by one indebted to the judgment debtor cannot be amerced for paying such money over to the execution plaintiff, on the ground that the judgment debtor was entitled to claim the money as exempt.

3 S. D. 183, DALBKERMAYER v. SCHOLTES, 52 N. W. 871.

Right to costs on appeal.

Cited in *Swenson v. Christopherson*, 10 S. D. 342, 73 N. W. 96, refusing to allow costs to respondent for printing unnecessary matter in additional abstracts or extended quotations from text books and reports in his brief; *Ryan v. Maxey*, 17 Mont. 164, 42 Pac. 760, holding that the costs of printing a brief filed in the supreme court is a "necessary disbursement in the action," under Mont. Code Civ. Proc. § 494, to be allowed the prevailing party, as the rules of court require all briefs filed to be printed.

Review of acts of clerk of supreme court.

Cited in *Kelly v. Oksall*, 17 S. D. 392, 97 N. W. 11, holding Supreme Court has inherent power to review official acts of its clerk whenever attention is called to them by parties interested therein, and it is court's duty to correct clerk's errors regardless of manner in which they are presented for review.

Authority of attorney.

Cited in note in 132 Am. St. Rep. 149, on implied authority of attorney in conducting litigation.

3 S. D. 187, STATE EX REL. HITCHCOCK v. HEWITT, 16 L.R.A. 413, 44 AM. ST. REP. 788, 52 N. W. 875.

Removal of officers.

Cited in *Hagerty v. Crowley*, 75 N. H. 393, 74 Atl. 1055, holding member of board of public works entitled to notice and hearing before removal by mayor and aldermen; *State ex rel. Ayers v. Kipp*, 10 S. D. 495, 74 N. W. 440, holding provision of South Dakota constitution that "all officers" not liable to impeachment shall be subject to removal for specified causes inapplicable to state office created by legislature after adoption of constitution; *McCully v. State*, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134, holding that Tenn. Const. art. 6, § 6, providing that judges may be removed from office by the general assembly, and "the cause or causes of removal are to be entered upon the journals," and the judge against whom the legislature may be about to proceed "shall receive notice thereof, accompanied with copy of causes alleged for his removal, at least ten days before the

day on which either house of the general assembly shall act thereon,"—contemplates a charge, a trial, and a judgment of removal upon cause shown; *Pratt v. Police & Fire Comrs.* 15 Utah, 1, 49 Pac. 747, holding that the power conferred upon the board of police and fire commissioners by Utah Laws March 30, 1896, § 10, to dismiss the chief of police at any time for good cause, or "when the good of the service shall be subserved thereby," does not authorize his removal without an opportunity to be heard or charges filed, as the provision of § 7, that he is to retain his position during good behavior, and the provisions of §§ 11, 17, with reference to charges and the hearing thereof, clearly contemplate a hearing, even if the board acts on its own motion, and not on a complaint of a citizen; *State ex rel. Hamilton v. Grant*, 14 Wyo. 41, 1 L.R.A.(N.S.) 588, 116 Am. St. Rep. 982, 81 Pac. 795, holding a superintendent of a water division, being appointed by and removable by Governor, not within the class of state of officers removable only by impeachment.

Cited in note in 68 Am. St. Rep. 112, on removal of officers.

When mandamus lies.

Cited in *Snyder v. Emerson*, 19 Utah, 319, 57 Pac. 300, holding that mandamus will not be granted to compel the payment of an official salary to one who does not show that he is the de jure officer; *Pratt v. Police & Fire Comrs.* 15 Utah, 1, 49 Pac. 747, holding that mandamus is a proper remedy to secure a reinstatement to public office of one who clearly shows that he is entitled to the office de jure.

Original jurisdiction of supreme court.

Cited in *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234, holding that Attorney General's refusal to apply to Supreme Court for original writ of mandamus to compel superintendent of state hospital for insane removed from office, to turn over office to successor, does not prevent court from exercising its jurisdiction in behalf of public interests of state.

Cited in note in 58 L.R.A. 850, on original jurisdiction of court of last resort in mandamus case.

Nature of state institution.

Cited in note in 29 L.R.A. 384, on nature of incorporated institution belonging to state.

3 S. D. 199, **LINDSAY v. PETTIGREW**, 52 N. W. 873, Later appeals in 5 S. D. 500, 59 N. W. 726; 8 S. D. 244, 66 N. W. 321; 10 S. D. 228, 72 N. W. 574.

Argument of counsel as ground for new trial or reversal.

Cited in *State v. Kaufmann*, 22 S. D. 433, 118 N. W. 337, granting new trial, where prosecuting attorney in address to jury appealed to their passion and prejudice; *Shawnee v. Sparks*, 26 Okla. 665, — L.R.A.(N.S.) —, 110 Pac. 884, holding statement of plaintiff's counsel in argument, in personal injury action, that defendant will not lose by verdict as it has contract of indemnity, reversible error.

— Calling attention to failure of accused to testify.

Cited in *State v. Williams*, 11 S. D. 64, 75 N. W. 815, holding prosecuting attorney's calling attention to fact that defendant had not testified in his own behalf ground for new trial though court reprimanded counsel and instructed jury to disregard his remarks; *State v. Garrington*, 11 S. D. 178, 76 N. W. 326, holding remark by prosecuting attorney that defendant's failure to go on stand was not against him though he was not compelled to ground for new trial, although court stated at once that counsel should not comment on that subject.

3 S. D. 205, SOUTH BEND TOY MFG. CO. v. DAKOTA F. & M. INS. CO. 52 N. W. 866.

Who are general agents of insurer.

Cited in *Fosmark v. Equitable F. Asso.* 23 S. D. 102, 120 N. W. 777, holding agent authorized to solicit insurance and receive premiums, general agent of insurer; *Vesey v. Commercial Union Assur. Co.* 18 S. D. 632, 101 N. W. 1074, holding agents of an insurance company authorized to solicit applications for fire insurance, write and deliver policies on property situated in certain county and to do any and all acts proper and customary to be done by fire insurance agents were general agents; *Getchell & M. Lumber & Mfg. Co. v. Peterson*, 124 Iowa, 599, 100 N. W. 550, holding the resident assistant secretary and agent of foreign surety company who certified and approved bills for payment on building contracts, obtained assurance from parties that payments allowed were within contract limit, and acting for company assented to their being made, and who issued bonds, was a general agent.

Authority of insurance agent.

Cited in *Hardin v. Norwich Union F. Ins. Soc.* 10 S. D. 64, 71 N. W. 755, sustaining authority of general agent of insurance company to appoint a solicitor; *McCabe Bros v. Aetna Ins. Co.* 9 N. D. 19, 47 L.R.A. 641, 81 N. W. 426, sustaining power of insurance agent to enter into preliminary contract to renew policy.

Function of court.

Cited in *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687, holding that court may declare as matter of law effect of evidence on question of actual agency as distinguished from ostensible agency; *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding it duty of court to recognize existence of agency and to determine powers and limitations of agent, where facts are undisputed.

3 S. D. 213, RUST-OWEN LUMBER CO. v. FITCH, 52 N. W. 879.

Pleading in trover.

Cited in note in 9 N. D. 633, on pleading in actions for trover and conversion.

3 S. D. 218, GREELY v. McCOY, 52 N. W. 1050.**Recovery on school district warrants.**

Cited in Rochford v. School Dist. No. 6, 19 S. D. 435, 103 N. W. 763, holding there could be no recovery against guarantor of school district warrant until there had been a compliance with conditions of statute concerning presentment to treasurer of district for payment; Rochford v. School Dist. No. 11, 17 S. D. 542, 97 N. W. 747 (dissenting opinion), on recovery on school district warrants.

3 S. D. 223, STATE v. MITCHELL, 52 N. W. 1052.

Followed without special discussion in State v. Sasse, 6 S. D. 212, 55 Am. St. Rep. 834, 60 N. W. 853.

Procedure in contempt proceedings.

Cited in State v. Crum, 7 N. D. 299, 74 N. W. 992, holding immaterial omission of article "the" before words "state of North Dakota" in title of contempt proceeding; Freeman v. Huron, 8 S. D. 435, 66 N. W. 928, holding it not reversible error to entitle proceeding for contempt of order issued in civil action as in such action though institution of independent action in name of state would be better practice.

Right to jury trial in contempt proceedings.

Cited in State ex rel. Crow v. Shepherd, 177 Mo. 205, 99 Am. St. Rep. 624, 76 S. W. 79, holding a defendant in contempt proceedings does not have right to trial by jury.

Right to meet witnesses.

Cited in notes in 129 Am. St. Rep. 36, on constitutional right of accused to be confronted by witnesses; 2 L.R.A.(N.S.) 1008, on power of legislature to enact prima facie rules of evidence for criminal cases.

Affidavits to prove contempt.

Cited in Warner v. Martin, 124 Ga. 387, 52 S. E. 446, 4 A. & E. Ann. Cas. 180, holding in civil contempt for violation of temporary restraining order, the question of contempt may be decided on affidavits.

Person entitled to question validity of statute.

Cited in Re Watson, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321, holding where person is charged with violating a particular provision of statute as to occupation license, the statute will be considered only with reference to its effect on the particular business in which he was engaged.

3 S. D. 230, JOHNSON v. BURNSIDE, 52 N. W. 1057.

Followed without special discussion in Martin v. Graff, 10 S. D. 592, 74 N. W. 1040.

Objection to introduction of any evidence.

Cited in Sherwood v. Sioux Falls, 10 S. D. 405, 73 N. W. 913; De Luce v. Root, 12 S. D. 141, 80 N. W. 181,—holding overruling of objection to admission of evidence because complaint did not state a cause of action not ground for reversal; Jenkinson v. Vermillion, 3 S. D. 238, 52 N. W. 1066, holding that a plaintiff whose complaint is defective in failing

to allege demand before action should be permitted as against an objection to the admission of evidence because of such defect, to prove facts excusing such demand, where it does not appear that defendant would be prejudiced thereby; *Strait v. Eureka*, 17 S. D. 326, 96 N. W. 695, holding complaint in action against city for injuries on a sidewalk good as against objection to introduction of any evidence on ground that it does not state cause of action, where it alleged that sidewalk for long period had been in grossly defective condition, known to city, and that plaintiff without fault or negligence on his part stepped thereon and was injured; *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536, holding where legal sufficiency of alleged facts to constitute cause of action is first questioned by objection to introduction of any evidence, court did not err in sustaining complaint where cause of action is set out in fact; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, holding if on complaint most liberally construed plaintiff is entitled to any relief whatever, the court can properly overrule objection by defendant after trial is begun to introduction of any evidence on ground that complaint does not state cause of action; *Nerger v. Equitable Fire Asso.* 20 S. D. 419, 107 N. W. 531, holding party who answers on the merits is not in position to demand a reversal on the ground that his general objection to the introduction of any evidence was overruled by the trial court.

Time and mode of objection to sufficiency of complaint.

Cited in *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163, holding that a pleading must be given a liberal construction when objection to it is raised for the first time on the trial; *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915, holding that great latitude will be indulged to sustain complaint first assailed on trial as insufficient to permit introduction of evidence; *Anderson v. Alseth*, 3 S. D. 566, 62 S. W. 435, holding that more liberal construction will be given to complaint when assailed on trial for defective statement of necessary facts than when demurrer is interposed at proper time; *Green v. Hughitt School Twp.* 5 S. D. 452, 59 N. W. 224, holding sufficient as against objection first made a trial, answer alleging that county warrant set out in complaint had been fully paid and satisfied and that the indebtedness represented thereby was fully paid and satisfied and completely canceled; *Harshman v. Northern P. R. Co.* 14 N. D. 69, 103 N. W. 412, holding where complaint wholly fails to set out substantial cause of action and is incapable of being made good by amendment, the objection to its sufficiency may be taken first on appeal and on court's own motion; *Wright v. Sherman*, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093, holding that a defect in a complaint in failing to allege an essential fact pleaded only by way of exhibit cannot be first taken advantage of on appeal; *Loomis v. Le Cocq*, 12 S. D. 324, 81 N. W. 633, holding that objection to finding that defendants owned land at time of executing mortgage thereon is erroneous because of failure to allege such fact in complaint cannot be first raised on appeal; *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding objection that complaint is defective cannot be first urged on appeal, where party neither demurs nor objects to introduction of

evidence but stipulates as to fact as to which defect existed, and defect, if any, might have been cured by amendment.

Rescission of contract.

Cited in *Thompson v. Hardy*, 19 S. D. 91, 102 N. W. 299, holding under statutes equitable action for a rescission of a contract for exchange of land and reconveyance thereof may be maintained on offer to restore whatever plaintiff received under the contract, accompanied by tender in court.

Amendment on appeal.

Cited in *Seiberling v. Mortinson*, 10 S. D. 644, 75 N. W. 202, refusing on appeal to permit amendment of pleadings to conform to facts proved.

3 S. D. 238, JENKINSON v. VERMILLION, 52 N. W. 1066.

Followed without special discussion in *Martin v. Graff*, 10 S. D. 592, 74 N. W. 1040.

Presumption of legality of contract.

Cited in *Swenson v. Swenson*, 17 S. D. 558, 97 N. W. 845, holding where acceptance of a trust to be valid must have been in writing, it will be presumed to have been in writing.

Amendment of pleadings.

Cited in *Green v. Hughitt School Twp.* 5 S. D. 452, 59 N. W. 224, holding that the decision of the trial court in allowing an amendment of the pleadings will not be disturbed on appeal, in the absence of a manifest abuse of discretion; *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164, holding that the appellate court may order an amendment of the complaint in the court below to cure a mere formal defect which might have been cured by amendment on the trial; *De Luce v. Root*, 12 S. D. 141, 80 N. W. 181, holding it not reversible error to overrule an objection to the introduction of evidence on the ground of insufficiency of a complaint, the defects in which could be cured by amendment; *Anderson v. First Nat. Bank*, 5 N. D. 80, 64 N. W. 114, holding it an abuse of discretion to refuse to permit plaintiff to amend his complaint to conform to evidence; *Hardman v. Kelley*, 19 S. D. 608, 104 N. W. 272, holding where application is made for leave to amend by inserting an additional defense at a reasonable time before time of trial action, it should be allowed on such terms as the court may deem just.

Sufficiency and construction of pleadings.

Cited in *Calkins v. Seabury-Calkins Consol. Min. Co.* 5 S. D. 299, 58 N. W. 797, holding allegation that defendant "agreed" to pay plaintiff specified amount per day must be taken to mean agreement in valid and legal manner; *Sundback v. Gilbert*, 8 S. D. 359, 66 N. W. 941, holding that allegation in petition for specific performance of land contract that parties entered into a contract to convey land will be construed to mean contract in writing; *McCormick Harvesting Mach. Co. v. Faulkner*, 7 N. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163, holding that a pleading must be given a liberal construction when the objection to it is made for the first time at the trial; *Sherwood v. Sioux Falls*, 10 S. D. 405, 73 N. W. 913, holding that the failure of a complaint to allege certain facts es-

essential to the cause of action is no ground for reversal where the objection to the pleading was not made until after such facts had been proven on the trial; *Walker v. McCaull*, 13 S. D. 512, 83 N. W. 578, holding a complaint in an action for negligence as to a consignment of wheat, alleging generally damages from want of proper care, and that certain acts and omissions of defendant in the management and sale of the wheat were negligent, resulting in injury to plaintiff in a specified amount, sufficient in the absence of any formal motion to make more specific, or objection to the introduction of evidence on the ground of the insufficiency of the complaint; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, holding if plaintiff is entitled to any relief whatever on the complaint most liberally construed, an objection after trial begun to introduction of any evidence on ground complaint does not state cause of action is properly overruled; *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding objection that complaint is defective cannot be first urged on appeal where defect could have been cured by amendment, but party answers to the merits, does not raise objection to introduction of testimony on such ground, and stipulates regarding matter in claim to be defective.

3 S. D. 244, EVANS v. HUGHES COUNTY, 52 N. W. 1062.

Recovery of money paid under mistake of fact.

Cited in *Scott v. Ford*, 45 Or. 531, 68 L.R.A. 469, 78 Pac. 742, holding where executors of will pay money under the will to one not named therein under the belief such person would be entitled to such money without ascertaining from the will that such person was not so entitled, cannot recover such sum under claim of mistake of fact; *Thorsen v. Hooper*, 50 Or. 497, 93 Pac. 361, holding payment by administrator on garnishment of estate under mistake of fact as to the nature of an order of the court and erroneous advice of counsel, may be recovered; *Allen v. Peterson*, 21 S. D. 203, 111 N. W. 538, holding that satisfaction of judgment on void execution sale will not be canceled on voluntary payment by judgment creditor of judgment recovered by judgment debtor against sheriff.

Cited in note in 55 Am. St. Rep. 497, 517, on ignorance of one's rights as a ground of relief.

3 S. D. 255, PETERSON v. SIGLINGER, 52 N. W. 1060.

New trial for misconduct of jurors.

Distinguished in *State v. Church*, 6 S. D. 89, 60 N. W. 143, holding the refusal of a new trial in a criminal case, on the ground that after the case had been given to the jury two of the jurors, in the presence of the others and the bailiff, stopped and ordered goods sent to their homes, not ground for reversal.

Necessity for objections and exceptions.

Cited in *Douglass v. Byrnes*, 63 Fed. 16, holding that a party does not waive his right of complaining of the improper conduct of a commissioner in condemnation proceedings by not making the objection before the commissioners, when he then had no opportunity to object without preju-

dicing his case; *Landauer v. Sioux Falls Improv. Co.* 10 S. D. 205, 72 N. W. 467, holding objection to instruction that jury have no right arbitrarily to disbelieve a witness unless from all the evidence they have just cause to do so, not available on appeal in absence of exceptions.

3 S. D. 263, YETZER v. YOUNG, 52 N. W. 1054.

Right of intervention.

Cited in *McClurg v. State Bindery Co.* 3 S. D. 362, 44 Am. St. Rep. 799, 53 N. W. 428, denying right of assignee for creditors to intervene in purely personal action against assignor; *Bray v. Booker*, 6 N. D. 526, 72 N. W. 933, denying right of receiver of bank to which a vendee agreed to pay part of purchase price with assent of vendor who owed the bank such amount to intervene in action by vendor to enforce lien for unpaid purchase price.

Distinguished in *Faricy v. St. Paul Invest. & Sav. Soc.* 110 Minn. 311, 125 N. W. 676, holding in action for money judgment on bonds, a receiver of a loan association, alleging ownership of bonds, their possession by plaintiff through fraud, the insolvency of defendant and necessity for intervention as basis of action to recover stockholders' liability, was entitled to intervene.

Interest in litigation.

Cited in *Neustadter Bros. v. Doust*, 13 Idaho, 617, 92 Pac. 978, holding a creditor, to be entitled to an injunction against the sale of mortgaged personal property and to resist foreclosure thereof, must connect himself in some way with an interest in or claim upon the property about to be sold.

Amendment of pleadings.

Cited in *Anderson v. First Nat. Bank*, 5 N. D. 80, 64 N. W. 114, holding it an abuse of discretion to refuse to permit plaintiff to amend his complaint to conform to evidence, given without objection, by defendant's cashier showing defendant's liability on another theory than that alleged in the complaint, where defendant was responsible for the complaint being framed on a wrong theory; *Hardman v. Kelley*, 19 S. D. 608, 104 N. W. 272, holding it an abuse of discretion to refuse to allow an amendment by inserting a defense to action at a reasonable time before time of trial of action.

3 S. D. 272, COLE v. CUSTER COUNTY AGRI. MINERAL & STOCK ASSO. 52 N. W. 1086.

Sufficiency of description in mechanic's lien.

Cited in *Tulloch v. Rogers*, 52 Minn. 114, 53 N. W. 1063, holding that a description in a complaint to enforce a mechanic's lien is sufficient, if such property can be reasonably recognized from the description given, when the description correctly described the land except as to the exact quarter of the section named, and both the section specified and that whereon the lien is claimed belonged to defendant.

Proof of case on default.

Cited in *Sibley v. Weinberg*, 116 Wis. 1, 92 N. W. 427, holding court

did not err in action in replevin in compelling plaintiff to prove his case on failure of defendant to answer.

Necessity for findings of fact.

Cited in *Brown v. Brown*, 12 S. D. 506, 81 N. W. 883, holding that a judgment whose recitals show that there has been no trial of an issue of fact, and that all essential facts have been settled by stipulation, will not be disturbed on appeal because there was no finding of fact.

Presumption on appeal as to sufficiency of evidence.

Cited in *Stokes v. Green*, 10 S. D. 286, 73 N. W. 100, holding that lower court will be presumed on appeal to have had before it sufficient oral evidence to justify its construction of a written contract capable of explanation by parol.

Distinguished in *Hroch v. Aultman & T. Co.* 3 S. D. 477, 54 N. W. 269, holding that presumption of sufficiency of legal evidence to support the judgment will only be made when the judgment roll only is before the court on appeal or where the bill of exceptions does not purport to contain the evidence bearing on above point.

3 S. D. 281, WILLIS v. DE WITT, 52 N. W. 1090.

Sufficiency of pleading in replevin.

Cited in *Kierbow v. Young*, 20 S. D. 414, 8 L.R.A.(N.S.) 216, 107 N. W. 371, 11 A. & E. Ann. Cas. 1148, holding plaintiff in replevin must allege that he is the owner of the property or has some special property therein.

When replevin lies.

Cited in *McCormick Harvesting Mach. Co. v. Woulph*, 11 S. D. 252, 76 N. W. 939, holding claim and delivery maintainable with reference only to personal property in actual or constructive possession of defendant at commencement of the action; *Heidiman-Benoist Saddlery Co. v. Schott*, 59 Neb. 20, 80 N. W. 47, holding that replevin will not lie against one who has parted with the possession and control of the property; *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240, holding that a cause of action in claim and delivery is not established where the proofs show that defendant sold the property before suit was brought; *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355, holding that the fact that such an action has, as its secondary object, the recovery of the value of the property in case delivery cannot be had, does not change it into one for conversion, so as to entitle the plaintiff to proceed with the action upon its appearing that the defendant had parted with possession prior to the commencement of the action.

Cited in notes in 80 Am. St. Rep. 744, 745, as to when replevin or claim and delivery is sustainable; 18 L.R.A.(N.S.) 1266, 1267, on right to maintain action to recover property in specie against one not in possession.

Amendment of pleadings.

Cited in *J. I. Case Threshing Mach. Co. v. Eichinger*, 15 S. D. 530, 91 N. W. 82, holding it duty of courts to exercise powers liberally in

permitting amendments to pleadings in order that real issues may be fairly tried.

Cited in note in 51 Am. St. Rep. 430, on amendments which are not admissible because changed cause of action.

Evidence admissible under general denial.

Cited in *Plano Mfg. Co. v. Person*, 12 S. D. 448, 81 N. W. 897, holding evidence that chattel mortgagor could not read, and that plaintiff's agent read the mortgage to him, and read nothing about mortgaging the property sought to be recovered by mortgagee, admissible under general denial.

Presumption as to taking of property by officer.

Cited in *Pitts Agricultural Works v. Young*, 6 S. D. 557, 62 N. W. 432, holding that the presumption that property taken by an officer under process was taken from defendant's possession can only be overcome by evidence on defendant's part that he did not have such possession at the commencement of the action.

3 S. D. 290, WRIGHT v. SHERMAN, 17 L.R.A. 792, 52 N. W. 1093.

Objection to introduction of any testimony.

Cited in *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, holding where on all the allegations of the complaint, most liberally construed, plaintiff was entitled to any relief whatever, court properly overruled objection to introduction of any evidence, made after trial begun, on ground complaint did not state cause of action.

First raising objection on appeal.

Cited in *Loomis v. LeCocq*, 12 S. D. 324, 81 N. W. 633, holding that objection to finding that defendants owned land at time of executing mortgage thereon is erroneous because of failure to allege such fact in complaint cannot be first raised on appeal.

Priority of liens.

Cited in *Stone v. Kelley*, 59 Mo. App. 214, holding liveryman's lien not superior to prior chattel mortgage; *Beh v. Moore*, 124 Iowa, 565, 100 N. W. 502, holding lien of chattel mortgage paramount to that of agister, unless pasturage contract was authorized by mortgagee; *First Nat. Bank v. Scott*, 7 N. D. 312, 75 N. D. 254, holding lien of mortgage superior to agister's lien attaching after filing of mortgage; *Owen v. Burlington, C. R. & N. R. Co.* 11 S. D. 153, 74 Am. St. Rep. 786, 76 N. W. 302, holding the lien of a chattel mortgage properly filed prior to a carrier's lien for freight subsequently earned; *Woodward v. Myers*, 15 Ind. App. 42, 43 N. E. 573, holding that the lien of an agister for feeding and caring for a colt placed in his hands by the owner after the maturity of a debt secured by mortgage thereon is superior to the lien of the mortgage, where the mortgagee was notified that it had been placed in the agister's hands, and left it there for more than two years; *Corinth Engine & Boiler Works v. Mississippi C. R. Co.* 95 Miss. 817, 49 So. 261, holding that railroad cannot hold for freight as against conditional vendor property shipped by transferee of conditional vendee.

Cited in note in 12 L.R.A.(N.S.) 311, on priority as between chattel mortgage and lien for food or care furnished animals.

Distinguished in *Garr v. Clements*, 4 N. D. 559, 62 N. W. 640, holding lien for necessary repairs on threshing machine superior to lien of chattel mortgage.

Pleading in trover.

Cited in note in 9 N. D. 633, on pleading in actions for trover and conversion.

3 S. D. 300, BAIRD v. GLECKLER, 52 N. W. 1097.

Settlement of statement of case or bill of exceptions.

Cited in *Taylor v. Miller*, 10 N. D. 361, 87 N. W. 597, holding that statement of the case cannot be settled by appellate court unless the trial court has refused to settle same in accordance with the facts.

Distinguished in *Plano Mfg. Co. v. Person*, 11 S. D. 539, 79 N. W. 833, holding fact that trial judge has not settled a bill of exceptions precisely as proposed or in accordance with the facts, does not, in absence of proper objection constitute a refusal to "allow an exception in accordance with the facts" so as to authorize application to supreme court to prove same.

3 S. D. 302, McCORMICK HARVESTING MACH. CO. v. SNEDIGAR, 53 N. W. 83.

Who may appeal.

Cited in note in 119 Am. St. Rep. 755, on right to appeal as a party interested or injured.

3 S. D. 305, VAN ANTWERP v. DELL RAPIDS TWP. 53 N. W. 82.

Towns as municipalities.

Cited in *Del Rapids v. Irving*, 7 S. D. 310, 29 L.R.A. 861, 64 N. W. 149, holding that towns are not municipal corporations.

3 S. D. 309, HURON v. CAMPBELL, 53 N. W. 182.

Superintending control over inferior court.

Cited in *State ex rel. Whiteside v. First Judicial Dist. Ct.* 24 Mont. 539, 63 Pac. 395, holding that Mont. Const. art. 8, § 2, providing that the supreme court "shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general supervisory control over all inferior courts," contains a clear grant of supervisory control distinct and separate from the appellate jurisdiction.

Cited in note in 51 L.R.A. 67, on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

— By mandamus.

Cited in *Vine v. Jones*, 13 S. D. 54, 82 N. W. 82, holding that supreme court will grant mandamus compelling circuit court to take jurisdiction of probate proceeding where application showing disqualification of county

judge has been refused by it; *State ex rel. Null v. Circuit Ct.* 20 S. D. 122, 104 N. W. 1048, holding superior court will issue writ of mandamus to inferior court to certify copies of lost or stolen indictments where sufficient proof is given of their authenticity; *State v. Graves*, 66 Neb. 17, 92 N. W. 144, holding mandamus may issue to compel judge of district court to vacate an injunction granted without jurisdiction or authority.

— By prohibition.

Cited in *Gates v. McGee*, 15 S.D. 247, 88 N. W. 115, granting a writ of prohibition to restrain the circuit court of one county from declaring void receivership proceedings in another county.

When mandamus lies.

Cited in *State ex rel. Dakota Cent. Teleph. Co. v. Huron*, 23 S. D. 153, 120 N. W. 1008, denying mandamus to compel city to dismiss suit in circuit court enjoining relator from erecting poles, etc., in streets.

Cited in note in 98 Am. St. Rep. 892, on mandamus as proper remedy against public officers.

Employment of counsel by city.

Cited in *Bowling Green v. Gaines*, 123 Ky. 562, 96 S. W. 852, holding city council has no authority to delegate to city attorney authority to hire assistant counsel in proceedings for the collection of taxes, and create liability against city; *Knight v. Eureka*, 123 Cal. 192, 55 Pac. 768, holding that a municipal corporation cannot delegate to an attorney appointed to represent it in an action its power to choose an assistant to said attorney and fix his compensation.

Authority of city to create office of deputy.

Cited in note in 26 L.R.A.(N.S.) 661, on implied power of municipality to create office of deputy or assistant to one of its officers.

3 S. D. 322, MEUER v. CHICAGO, M. & ST. P. R. CO. 53 N. W. 187.

3 S. D. 324, SWEET v. MYERS, 53 N. W. 187.

Agreed statement of facts.

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding trial court erred in foreclosing plaintiff's proofs and accepting a partial statement of the facts as conclusive against his right of recovery, where neither stipulation nor statement contain recital that all facts are contained therein.

Rights of purchaser of fixture property of tenant.

Cited in *Bush v. Havird*, 12 Idaho, 352, 86 Pac. 529, 10 A. & E. Ann. Cas. 107, holding where tenant mortgages property and abandons right of removing same and loses right of possession and re-entry, mortgagee stands in same position and has no rights superior to tenant.

3 S. D. 330, STONE v. CHICAGO, M. & ST. P. R. CO. 53 N. W. 189, Later appeal in 8 S. D. 1, 65 N. W. 29.

Continuance for absence of witnesses.

Cited in *Adams v. Grand Island & W. C. R. Co.* 10 S. D. 239, 72 N. W. 577, holding the refusal of an application for a continuance because of absent witnesses an abuse of discretion, where the witnesses were in actual attendance on another court as witness and parties to a cause therein; *Hood v. Fay*, 15 S. D. 84, 87 N. W. 528, holding plaintiff not entitled to continuance to secure rebutting proofs where he must be presumed to have known from grounds stated for attachment that defendant would probably move for dissolution; *State v. Phillips*, 18 S. D. 1, 98 N. W. 171, 5 A. & E. Ann. Cas. 760, holding court did not abuse its discretion in refusing a continuance where affidavits of moving counsel did not show sufficient diligence to secure the attendance of witnesses at the trial or to procure their evidence; *Deere & W. Co. v. Hinckley*, 20 S. D. 359, 106 N. W. 138, holding court did not err in refusing continuance where affidavit contained no statement as to what efforts, if any, had been made to procuring attendance of witnesses, and no reason given why their depositions could not be taken, the affidavit merely stating as to diligence, that party had been unable to procure his witnesses to go to trial.

Burden of showing facts in mitigation.

Cited in *Stone v. Chicago, M. & St. P. R. Co.* 8 S. D. 1, 65 N. W. 29, holding that the burden of establishing facts in mitigation of damages is upon defendant.

Evidence and damages in trover.

Cited in notes in 9 N. D. 634, on evidence in trover and conversion; 9 N. D. 636, on damages in trover and conversion.

3 S. D. 338, STATE EX REL. AMERICAN EXP. CO. v. STATE BOARD, 53 N. W. 192.

Certiorari to review action of board of equalization.

Cited in *Ferguson v. Board of Review*, 119 Iowa, 338, 93 N. W. 352, holding where board of review for adjustment of taxes sought to compel a person to bring in his books for purpose of showing amount of credits on which they should be taxed, certiorari will not lie to secure annulment of action of board on ground it was illegal, where appeal is allowed by statute to district court.

3 S. D. 352, CARTER v. RINGSRUD, 53 N. W. 181.

3 S. D. 355, LUCAS v. RINGSRUD, 53 N. W. 426.

Sufficiency of petition for nomination.

Cited in *Harris v. King*, 21 S. D. 47, 109 N. W. 644, holding petition for nomination, insufficient where only 15 of the 24 signers added their residence; *Remster v. Sullivan*, 36 Ind. App. 385, 75 N. E. 860, holding where statute provides for petitions proposing candidates for school commissioner which shall designate terms for which candidates are to stand, the act of

election commissioners in designating terms for which candidates were to stand where all the petitions do not so designate, is improper and void.

Sufficiency of certificate of nomination.

Cited in *State ex rel. Anderson v. Falley*, 9 N. D. 464, 83 N. W. 913, holding invalid, certificate of nominations failing to state name of office for which the person named therein is nominated.

Distinguished in *Stackpole v. Hallahan*, 16 Mont. 58, 28 L.R.A. 502, 40 Pac. 40, holding that §§ 11 and 12 of the Montana Australian ballot law of March 13, 1889, requiring that a nomination certificate state the nominee's business address, will not be held mandatory after an election, the effect of which would be absolutely to disfranchise a plurality of the voters of the district.

Filing of certificate of nomination.

Cited in *State ex rel. Anderson v. Falley*, 9 N. D. 464, 83 N. W. 913, holding statutory provisions as to time of filing certificates of nomination, mandatory.

Improper placing of names on official ballot.

Distinguished in *Baker v. Scott*, 4 Idaho, 596, 43 Pac. 76, holding where official in charge of ballot fails to comply with statute as to placing names of candidates in preparation and printing of the official ballot and defeated candidate for office neglects to have correction made before election as provided by law, he cannot after election have votes thrown out because name of successful candidate was improperly placed on official ballot.

3 S. D. 362, McCLURG v. STATE BINDERY CO. 44 AM. ST. REP. 799, 53 N. W. 428.

Followed without discussion in *Latham v. State Bindery Co.* 3 S. D. 366, 53 N. W. 430.

Right of intervention.

Cited in *Wightman v. Evanston Yarnyan Co.* 217 Ill. 371, 108 Am. St. Rep. 258, 75 N. E. 502, 3 A. & E. Ann. Cas. 1089, holding in action to foreclose a trust deed by heating and lighting corporation to cover bonds, the court properly refused on intervention by persons holding contracts for heat and light and who show that receiver for company has refused to carry out contracts, and fraud and collusion are set up; *Bray v. Booker*, 6 N. D. 526, 72 N. W. 933, denying right of receiver of bank to which a vendee agreed to pay part of purchase price with assent of vendor who owed the bank such amount to intervene in action by vendor to enforce lien for unpaid purchase price.

Cited in note in 123 Am. St. Rep. 299, on intervention.

Distinguished in *Faricy v. St. Paul Invest. & Sav. Soc.* 110 Minn. 311, 125 N. W. 676, holding receiver of loan association could intervene in action for money judgment on bonds, where he alleges ownership of bonds in himself, possession by plaintiff by fraud, insolvency of defendant, and necessity of intervention as basis for suit to recover stockholder's liability.

3 S. D. 366, LATHAM v. STATE BINDERY CO. 53 N. W. 430.

3 S. D. 367, WRIGHT v. SHERMAN, 53 N. W. 425.

Authority to grant rehearing after remand.

Cited in *Re Seydel*, 14 S. D. 115, 84 N. W. 397, denying authority of circuit court to rehear decision reversing order of county court after case has been remanded to latter court.

Presumption of correctness of record.

Cited in *State v. Pearse*, 19 S. D. 75, 102 N. W. 222, holding the duly authenticated record and minutes of trial court cannot be contradicted in supreme court, and every material recital in a judgment of conviction imports absolute verity; *Boettcher v. Thompson*, 21 S. D. 169, 110 N. W. 108; *Wood v. State*, 4 Okla. Crim. Rep. 436, — L.R.A. (N.S.) —, 112 Pac. 11,— holding that appellate court takes record as made and certified by trial court as verity.

3 S. D. 369, BELDING v. BLACK HILLS & FT. P. R. CO. 53 N. W. 750.

Right of action for death by wrongful act.

Cited in *Stone v. Groten Bridge & Mfg. Co.* 77 Hun, 99, 28 N. Y. Supp. 446, holding where law of state where death was caused by wrongful act gives right of action therefor to wife, husband, parent and child, an administrator cannot maintain action in his own favor in another state although by laws of latter such administrator is given cause of action; *Haug v. Great Northern R. Co.* 8 N. D. 23, 42 L.R.A. 664, 73 Am. St. Rep. 727, 77 N. W. 97, holding a general allegation of damages in a complaint for the wrongful killing of plaintiff's husband insufficient without a specific allegation that the widow and children suffered pecuniary damages; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 585, 77 N. W. 748, 78 N. W. 771, holding that the cause of action for personal injuries, which, in addition to the cases which survive at common law, survives by force of Wis. Rev. Stat. § 4253, is separate and distinct from the cause of action in favor of surviving relatives under § 4255, providing that whenever the death of a person shall be caused by a wrongful act, neglect, or default for which the deceased would have had an action and could have recovered if death had not ensued, the one who would have been so liable shall be liable to an action for damages notwithstanding the death of the person injured; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 So. 881 (dissenting opinion), the majority holding that where a husband and father voluntarily settled with a wrongdoer and discharged the latter from all liability for damages from the latter's wrongful act, which later results in the former's death, an action is not maintainable under Ga. Civil Code, §§ 3828, 3829, providing that the widow or children may recover the full value of the life of the deceased, if his death resulted from criminal or other negligence; *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 329, 43 L.R.A. 568, 75 N. W. 1066 (dissenting opinion), which holds that under 2 How. Stat. §§ 8313, 8314, being substantially a re-enactment of Lord Campbell's act with the exception of the preamble and 3d section, and 3 How. Stat. § 7397, providing that, in addition to the actions which

survive by the common law, actions for negligent injuries to the person shall survive, two distinct actions are provided after the death of a person from injuries caused by another's negligence, who has not recovered damages in his lifetime; *Missouri P. R. Co. v. Bennett*, 5 Kan. App. 231, 47 Pac. 183 (affirmed in 58 Kan. 499, 49 Pac. 506), holding that an action for loss and suffering from personal injuries due to the negligence or wrongful act of another does not abate by the death of the plaintiff as a result of such injuries, but survives and may be prosecuted to final judgment in the name of the personal representative; *Satterberg v. Minneapolis, St. P. & S. Ste. M. R. Co.* 19 N. D. 38, 121 N. W. 70, holding that action may be brought by brothers or sisters when no parent, wife or child survives person killed.

Cited in notes in 70 Am. St. Rep. 678, on actions for death of human being; 8 L.R.A. (N.S.) 387, on several actions for wrongful death; 30 L.R.A. (N.S.) 78, on failure of beneficiary first entitled under death statute to bring action, as giving right to one next entitled.

Distinguished in *Strangeland v. Minneapolis, St. P. & S. Ste. M. R. Co.* 105 Minn. 224, 117 N. W. 386, holding, construing a North Dakota statute, that action could be maintained for father's benefit by personal representatives of decedent who left no widow nor children, under statute giving right of action for benefit of "heirs at law."

Disapproved in *Copeland v. Seattle*, 33 Wash. 415, 65 L.R.A. 333, 74 Pac. 582, holding under statute giving right of action for death by wrongful act to be prosecuted in favor of wife or children, an executor could maintain action with sanction of wife.

-Instantaneous death.

Cited in *Mahoning Valley R. Co. v. VanAlstine*, 77 Ohio St. 395, 14 L.R.A. (N.S.) 893, 83 N. E. 601, holding under statutes an administrator can maintain action for benefit of next of kin, based on negligent acts causing injury resulting in death, although the same administrator has prosecuted to final judgment and satisfaction a suit begun by deceased in her lifetime to recover judgment in the interest of her estate; *Dillon v. Great Northern R. Co.* 38 Mont. 485, 100 Pac. 960, holding where statute giving a cause of action for death by wrongful act gives such right as decedent would have had, if death was instantaneous administrator would have no cause of action.

Distinguished in *Perham v. Portland Electric Co.* 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14, holding that the personal representatives may recover for the wrongful taking away of the life itself, under Hill's Ann. (Or.) Laws, §§ 369, 371, providing that "when the death of a person is caused by the wrongful act or omission of another the personal representative of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission;" and it is immaterial whether or not the injured person was killed instantly.

Dak. Rep.—45.

3 S. D. 382, EVENSON v. WEBSTER, 44 AM. ST. REP. 802, 53 N. W. 747.

Necessity for motion for new trial.

Cited in *Miller v. Way*, 5 S. D. 468, 59 N. W. 467, holding errors of law in admission of evidence over objection reviewable on appeal without motion for new trial.

— To review sufficiency of evidence.

Cited in *Taylor v. Bank of Volga*, 9 S. D. 572, 70 N. W. 834, holding sufficiency of evidence to justify findings not reviewable on appeal from judgment alone; *Jones Lumber & M. Co. v. Faris*, 5 S. D. 348, 58 N. W. 813; *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466,—holding sufficiency of evidence to support verdict or finding not reviewable on appeal unless presented to court below by motion for new trial; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding sufficiency of evidence to sustain court's findings cannot be reviewed on appeal from judgment only entered before an order denying motion for new trial; *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal taken before entry of order denying new trial; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding insufficiency of evidence to justify court's decision in designated particulars can be considered only on appeal which presents for review an order denying motion for new trial.

Words to create grant.

Cited in *Leadville v. Coronado Min. Co.* 29 Colo. 17, 67 Pac. 289, holding words on plat "hereby dedicate and convey to said city, as public property," certain streets and alleys constituted a grant thereof and passed title to city; *Fritz v. Menges*, 179 Pa. 122, 27 Pittsb. L. J. N. S. 449, 36 Atl. 213, holding a present grant of land "one day after my and my wife's death," on conditions to be performed, passes fee title on performance of such conditions on death of grantor and wife.

Sale of expectancy.

Cited in note in 25 L.R.A.(N.S.) 438, on sale of expectancy by prospective heir.

3 S. D. 390, GRANT COUNTY v. COLONIAL & U. S. MORTG. CO. 53 N. W. 746.

Sufficiency of denial to warrant dissolution of injunction.

Cited in *Huron Waterworks Co. v. Huron*, 3 S. D. 610, 54 N. W. 652, holding that denial in answer must to warrant dissolution of injunction pendente lite be of same positive character as averments in complaint.

Distinguished in *Searle v. Lead*, 10 S. D. 312, 39 L.R.A. 345, 73 N. W. 101, holding that a mere denial by defendant that plaintiff would suffer any damage, without denying fully and specifically all the equities of the bill, will not justify the vacation of a preliminary injunction.

Right of junior mortgagee to attack prior chattel mortgage.

Cited in *Rosenbaum v. Foss*, 4 S. D. 184, 56 N. W. 114, holding that a junior chattel mortgagee may maintain an action under Dak. Comp. Laws, §§ 4644, 4645, to cancel the prior mortgage, where it is voidable as to him and there is reasonable apprehension that it may cause him serious injury by impairing the value of his security if left outstanding.

3 S. D. 394, HAUGEN v. CHICAGO, M. & ST. P. R. CO. 53 N. W. 769.

Formation of opinion as ground for disqualification.

Cited in *State v. Hall*, 16 S. D. 6, 65 L.R.A. 151, 91 N. W. 325, holding court did not err in overruling challenge to talesmen on ground of bias of officer who summoned them, where it appeared that officer had heard evidence on former trial, had formed an opinion but had never expressed it, and juror stated that if called as a juror he could try case impartially and render verdict in accordance with evidence given at trial.

Direction of verdict.

Cited in *McKeever v. Homestead Min. Co.* 10 S. D. 599, 74 N. W. 1053, holding verdict properly directed for defendant where evidence with all justifiable inferences is insufficient to support verdict for plaintiff; *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 112, holding that verdict may properly be directed against claimants of title under chattel mortgage when recitals on instrument in connection with evidence are insufficient to justify difference of opinion on part of jury; *Lockhart v. Hewitt*, 18 S. D. 522, 101 N. W. 355, holding it error to direct a verdict where facts were such that different impartial minds might reasonably draw different conclusions from them; *Howie v. Bartrud*, 14 S. D. 648, 86 N. W. 747, holding motion to direct verdict for defendant because evidence is "insufficient to show or constitute a cause of action," insufficient in failing to point out specifically the grounds relied on; *Roberts v. Ruh*, 22 S. D. 13, 114 N. W. 1097; *Aultman Engine & Thresher Co. v. Boyd*, 21 S. D. 303, 112 N. W. 151,—holding that case should be submitted to jury, where evidence is conflicting and susceptible of different constructions.

Sufficiency of evidence to sustain verdict.

Cited in *Coughran v. Western Elevator Co.* 22 S. D. 214, 116 N. W. 1122, sustaining verdict because different impartial minds might reasonably draw different conclusions from facts in evidence.

3 S. D. 409, HIMEBAUGH v. CROUCH, 53 N. W. 862.

3 S. D. 410, CITIZENS' BANK v. CROUCH, 53 N. W. 862.

Followed without discussion in *Himebaugh v. Coad*, 3 S. D. 411, 53 N. W. 863; *G. H. Hammond Co. v. Crouch*, 3 S. D. 412, 53 N. W. 863.

Dismissal of appeal for delay.

Cited in *Himebaugh v. Crouch*, 3 S. D. 409, 53 N. W. 862, holding that appeal will be dismissed on proper motion where record shows that appeal was taken more than six months before opening of term of court and appellant has taken no steps toward prosecuting the appeal; *Smith v. Chicago, M. & St. P. R. Co.* 4 S. D. 30, 54 N. W. 931, holding that an appeal

will be dismissed where more than a year has elapsed since its taking and no abstract or brief was served or filed for nearly a year and no explanation or excuse offered for the delay; *Brink v. Whisler*, 21 S. D. 126, 110 N. W. 94, dismissing appeal, where record is received too late to have cause assigned for argument and abstract is filed still later and no brief is filed.

3 S. D. 411, HIMEBAUGH v. COAD, 53 N. W. 863.

3 S. D. 412, G. H. HAMMOND CO. v. CROUCH, 53 N. W. 863.

3 S. D. 413, SEVERSON v. MILWAUKEE MECHANICS' MUT. INS. CO. 53 N. W. 860.

Settling of bill of exceptions.

Cited in *Juckett v. Fargo Mercantile Co.* 18 S. D. 347, 100 N. W. 742, holding exceptions may be settled after an appeal has been perfected; *Northwestern Port Huron Co. v. Zickrick*, 22 S. D. 89, 115 N. W. 525, holding that bill of exceptions cannot be settled by another judge, unless it appears that trial judge was absent or refused.

3 S. D. 416, BRACE v. DOBLE, 53 N. W. 859.

Variance between pleading and proof.

Cited in *North Star Boot & Shoe Co. v. Stebbins*, 3 S. D. 540, 54 N. W. 593, holding that the court may, in case of an immaterial variance between the allegations and evidence, direct the fact to be found according to the evidence, and order an immediate amendment of the pleading; *Rainsford v. Massengale*, 5 Wyo. 1, 35 Pac. 774, holding that any variance between the allegations of the plaintiff's petition and reply to defendant's answer is to be deemed immaterial in the absence of proof that defendant was actually misled to his prejudice, under Wyo. Rev. Stat. 1887, § 2643, providing for amendment in such case.

3 S. D. 421, CANNON v. DEMING, 53 N. W. 863.

Sufficiency of acknowledgment of conveyances.

Cited in *American Mortgage Co. v. Mouse River Live Stock Co.* 10 N. D. 290, 86 N. W. 965, holding defective notary's certificate of acknowledgment of mortgage executed by president of corporation which fails to state that the officer executing the instrument was in fact the president of the corporation or that he was known by the notary to be such; *Holt v. Metropolitan Trust Co.* 11 S. D. 456, 78 N. W. 947, holding certificate of acknowledgment to assignment of mortgage that the persons appearing before the notary are personally known to him to be the identical persons whose names are subscribed as president and secretary of the corporation, not a certification that they are known to be officers of such corporation; *Timber v. Desparois*, 18 S. D. 587, 101 N. W. 879, holding an acknowledgment of deed by married woman sufficient where it recites that woman on a separate examination apart from her husband acknowledged execution of

the deed of her own free will and without fear or compulsion of her husband, there being a substantial compliance with the statute; *Kenny v. McKenzie*, 23 S. D. 11, — L.R.A.(N.S.) —, 120 N. W. 781, holding acknowledgment to assignment of mortgage invalid.

Cited in note in 108 Am. St. Rep. 556, as to when defects in service of acknowledgment are fatal.

Necessity for recording instrument.

Cited in *Rosenbaum v. Foss*, 4 S. D. 184, 56 N. W. 114, holding that the original chattel mortgage on property situated in different counties must be filed in one of such counties, and a duly authenticated copy filed in each of the other counties, to impart constructive notice in the other counties; *Miller v. Waite*, 60 Neb. 431, 83 N. W. 355 (reversing 50 Neb. 319, 80 N. W. 907), holding Neb. Comp. Stat. chap. 6, § 6, requiring the recording in the county clerk's office of a deed of assignment for the benefit of creditors within twenty-four hours, mandatory, in view of § 1, providing that no such assignment hereafter made shall be valid unless in conformity with the terms of the act.

Review of conflicting evidence.

Cited in *Bennett v. Chicago, M. & St. P. R. Co.* 8 S. D. 394, 66 N. W. 934, holding that verdict for plaintiff in action for stock killed by railway train will not be disturbed on appeal where evidence as to circumstances of killing on which question of defendant's negligence depended is conflicting; *Charles E. Bryant & Co. v. Arnold*, 19 S. D. 106, 102 N. W. 303, holding an examination of conflicting evidence on appeal will extend no further than is necessary to determine the question whether there is probative evidence sufficient to sustain the verdict; *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646, holding in case tried to a jury the supreme court will not review the evidence with a view of determining its weight, but simply ascertain whether there is sufficient legal evidence to support the verdict, assuming it to be uncontradicted.

Validity of assignments for creditors.

Cited in note in 58 Am. St. Rep. 74, on fraudulent assignments for creditors.

3 S. D. 434, *ERICKSON v. BROOKINGS COUNTY*, 18 L.R.A. 347, 53 N. W. 857.

3 S. D. 440, *PINKERTON v. LE BEAU*, 54 N. W. 97.

Right to mechanics' liens.

Cited in *Kehoe v. Hansen*, 8 S. D. 198, 59 Am. St. Rep. 759, 65 N. W. 1075, holding that mechanic's lien law will be liberally construed as designed for protection of meritorious class of persons; *Charles Betcher Co. v. Cleveland*, 13 S. D. 347, 83 N. W. 366, holding mechanic's lien on land by married woman under contract for purchase not defeated by husband's joinder in notes secured by mortgage for the material used; *Rolewitch v. Harrington*, 20 S. D. 375, 6 L.R.A.(N.S.) 550, 107 N. W. 207, holding

one who drills and cases a well pursuant to contract with owner of land, entitled to a mechanic's lien.

Cited in note in 62 L.R.A. 381, on mechanics' liens upon buildings distinct from land.

— On purchaser's interest in land.

Cited in *Fuller v. Detroit L. & Bldg. Asso.* 119 Mich. 71, 77 N. W. 642, holding that a purchaser under a land contract which stipulated that he should be furnished money to complete a building on the premises does not stand in the position of an original contractor, so as to entitle another who has furnished labor and materials at his request, to a lien as a sub-contractor; *Salzer Lumber Co. v. Clafin*, 16 N. D. 601, 113 N. W. 1036, holding materialman who furnishes lumber for the erection of a house for occupant who is vendee under a contract to purchase, entitled to be subrogated to the vendee's interest; *L. Lamb Lumber Co. v. Roberts*, 23 S. D. 191, 121 N. W. 93, holding that seller of materials to purchaser under land contract cannot acquire lien as against fee owner.

Cited in note in 23 L.R.A. (N.S.) 610, on power of lessee or vendee to subject owner's interest to mechanics' liens.

Distinguished in *Janes v. Osborne*, 108 Iowa, 409, 79 N. W. 143, holding realty liable to mechanics' liens to the extent of \$1,500, where the vendee purchases it under a contract whereby the vendor is to have a mortgage for a portion of the purchase price, which is to be junior to a proposed mortgage to secure a five-year loan for not to exceed \$1,500, and the vendee agrees and proceeds to erect a specified house, the vendor knowing thereof and that the vendee would have to give a lien on the lot to be able to make the erection; *Southard v. Smith*, 8 S. D. 230, 66 N. W. 316, holding a verdict for plaintiff on all the issues of an action to foreclose a mechanic's lien, conclusive on one having a contract for the purchase of the land, who was made a defendant therein, and admitted an allegation of the complaint that she had or claimed to have some interest in the land, but had no claims superior to plaintiff's, and made no claims to any superior or paramount title.

— For improvements constructed by tenant.

Distinguished in *Tom Sweeney Hardware Co. v. Gardner*, 18 S. D. 166, 99 N. W. 1105, holding materialman entitled to lien for improvements ordered by one tenant with knowledge, assent and approval of cotenant, and made to preserve the common property.

3 S. D. 451, HULL v. CALDWELL, 54 N. W. 100.

3 S. D. 456, Re LIMITATION OF TAXATION, 54 N. W. 417.

Amount of tax.

Cited in *Re State Warrants*, 6 S. D. 518, 55 Am. St. Rep. 852, 62 N. W. 101, holding it duty of legislature to provide by annual tax sufficient revenue to meet estimated ordinary expenses of each year not exceeding two mills limit, with power to provide for levying further tax to pay deficiency in preceding year.

3 S. D. 462, LANDAUER v. CONKLIN, 54 N. W. 322.**Construction of statute or assignment for creditors.**

Cited in *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931, holding that if possible such construction will be given assignment for creditors as will render it legal and operative; *Ex parte Brown*, 21 S. D. 515, 114 N. W. 303, holding that words, in common use, in statutes must be construed in their natural and ordinary sense.

Validity of assignment for creditors.

Cited in *Keith v. Hamblin*, 7 Kan. App. 456, 53 Pac. 531, holding a recorded deed of assignment for creditors inoperative as against the holder of an unrecorded chattel mortgage, where the schedule of liabilities filed at the same time as the deed was not verified.

Sufficiency of inventory by assignor for creditors.

Cited in *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931, holding that inventory filed by assignor after creditors need not expressly state that it contains names of all creditors.

Liability of assigned property to attachment.

Disapproved in *Hockaday v. Drye*, 7 Okla. 288, 54 Pac. 475, holding that Okla. Laws 1893, chap. 5, § 8, providing that within twenty days after an assignment is made for the benefit of creditors the assignor must make and file a prescribed inventory, pertains to a condition subsequent, and not to a condition precedent to the vesting of the title of the assigned property in the assignee; and said property is not subject to attachment by the assignor's creditors during said twenty days.

3 S. D. 473, MARSHALL v. HARNEY PEAK TIN MIN. MILL. & MFG. CO. 54 N. W. 272.**3 S. D. 477, HROCH v. AULTMAN & T. CO. 54 N. W. 269.****Right to set off judgment as against lien of attorney.**

Cited in *Sweeney v. Bailey*, 7 S. D. 404, 64 N. W. 188, holding proceedings irregularly instituted for setting off one judgment against another not defeated by subsequent notice by attorney of one party of claim for lien; *Schuler v. Collins*, 63 Kan. 372, 65 Pac. 662, holding that every application for set-off of mutual judgments, either by motion or through a proceeding in equity, is to be determined upon equitable considerations, and will only be allowed when it will promote substantial justice.

Cited in note in 51 Am. St. Rep. 278, 279, on lien of attorneys.

Distinguished in *Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733, holding entry of notice of lien in judgment docket not notice to sheriff in appeal bond; *Lindsay v. Pettigrew*, 8 S. D. 244, 66 N. W. 321, sustaining right to set off judgment for costs against plaintiff pro tanto against similar judgment in plaintiff's favor without regard to lien of attorney.

Presumption on appeal.

Cited in *McKennett v. Barringer*, 8 S. D. 556, 67 N. W. 622, upholding presumption that a state of facts authorizing the rendition of a judgment

existed, if within the issues where the record does not purport to contain the evidence.

3 S. D. 486, SCOTT v. CLARK, 54 N. W. 538.

Commissions on sale of real estate not consummated.

Cited in *Eggland v. South*, 22 S. D. 467, 118 N. W. 719, holding real estate broker entitled to commissions on procuring purchaser at price specified, though mode of payment changed; *Mattes v. Engel*, 15 S. D. 330, 89 N. W. 651, holding agent employed to sell land, entitled to commission on procuring purchaser who has entered into valid contract of sale with owner, although not consummated, if without agent's fault; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747, denying right of agent employed to find purchaser to recover for services without showing that he found a purchaser ready, willing, and able to purchase on terms and conditions imposed by owner; *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 719, holding where contract listing land with broker provides for a fixed commission for procuring purchaser at price and on terms prescribed by owner, the broker is entitled to recover when he has procured a purchaser ready, willing and able to purchase on the terms and price stated; *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253, holding real estate broker, with whom land is listed for sale is entitled to commission when he procures a purchaser ready, willing and able to purchase on the terms named in the contract listing the land; *Huntemer v. Arent*, 16 S. D. 465, 93 N. W. 653, holding where failure to consummate a sale is fault of the owner, the broker may nevertheless recover his commission where he has procured purchaser ready, willing and able to buy on terms of contract; *Wood v. Wella*, 103 Mich. 320, 61 N. W. 503, holding that a real-estate agent or broker who notifies the owner of real estate that he has a purchaser therefor, and later communicates to him the offer and the name of the purchaser, cannot be deprived of his earned commissions by the vendor's acceptance of substantially the same offer, upon terms more favorable to the purchaser, although the sale is finally consummated by another.

Cited in note in 44 L.R.A. 603, on performance by a real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property.

Distinguished in *Kidman v. Howard*, 18 S. D. 161, 99 N. W. 1104, holding real-estate broker not entitled to a commission where agency was not exclusive and he did not produce purchaser under terms of contract before a sale was consummated by owner; *Baird v. Gleckler*, 11 S. D. 233, 76 N. W. 931, holding an irrelevant statement in the charge, that the evidence does not show such a sale as could have been enforced by the vendor against the purchaser, reversible error in an action by a broker to recover commissions for a sale of land, which it is alleged the vendor agreed to pay unconditionally, but which the latter asserts depends on final consummation of the sale as agreed.

3 S. D. 492, STATE v. HENNING, 54 N. W. 536.**Omission of venue on affidavit.**

Cited in *Meldrum v. United States*, 80 C. C. A. 545, 151 Fed. 177, 10 A. & E. Ann. Cas. 324, holding omission of a venue to affidavit, not a fatal defect, as presumption will be indulged that officer who took affidavit acted within his authority; *St. Louis & S. F. R. Co. v. Deane*, 60 Ark. 524, 31 S. W. 42, holding affidavit for appeal not fatally defective because it does not state the venue; *Ormsby v. Ottman*, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 492, holding affidavit for publication of a summons not so insufficient as to avoid a decree based thereon, in containing no venue, where it is entitled in a certain county court, and sworn to before the clerk of that court, who affixes his seal thereto, as it will be presumed that the clerk administered the oath within his jurisdiction; *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97, holding that an affidavit will be presumed to have been made within the town wherein the officer administering the oath was authorized to act; *Theison v. Brown*, 11 Okla. 118, 65 Pac. 925, on necessity of venue to validity of affidavit.

Affidavit for change of trial judge.

Cited in *State v. Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631, construing word "may" as "must" in statute providing that judge "may" call in other judge to preside where accused makes affidavit because of bias or prejudice of other judge; *State v. Palmer*, 4 S. D. 543, 57 N. W. 490, holding sufficient, affidavit stating that accused has reason to believe and does believe and therefore charges truth to be that he cannot have a fair trial before the presiding judge because of his bias and prejudice.

Distinguished in *Cox v. United States*, 5 Okla. 701, 50 Pac. 175, holding it not error for presiding judge to overrule motion for change of judge, supported by defendant's affidavit which merely states a conclusion as to prejudice and bias.

3 S. D. 497, HOLCOMB v. KELIHER, 54 N. W. 535.**3 S. D. 503, STATE v. SWEETLAND, 54 N. W. 415.****Right to criticize court.**

Cited in *State Law Examiners v. Hart*, 104 Minn. 88, 17 L.R.A.(N.S.) 585, 116 N. W. 212, 15 A. & E. Ann. Cas. 197, holding every citizen, including attorneys at law, have right to make fair criticism of rulings of court after litigation is ended; *State v. Edwards*, 15 S. D. 383, 89 N. W. 1011, holding publication pending criminal trial pointing out that trial judge, sheriff, defendant, and all the jurors were adherents of some combination of political parties and intimating that such selection was "rotten" not a contempt of court; *State ex rel. Atty. Gen. v. Eau Claire County Circuit Ct.* 97 Wis. 1, 38 L.R.A. 554, 65 Am. St. Rep. 90, 72 N. W. 193, holding that the writer or publisher of a newspaper who comments on decided cases is not liable for criminal contempt; *Hawes v. State*, 46 Neb. 149, 64 N. W. 699, holding insufficient an affidavit which

states that the defendant "in open court stated that he refused to appear as counsel in" a case "now pending in this court; that he would not appear in this court; that he could not be treated fair, and that this court was unfair;" *Percival v. State*, 45 Neb. 741, 50 Am. St. Rep. 568, 64 N. W. 221, holding that to constitute a contempt a publication must have reference to a matter then pending in court, and be of a character tending to the injury of said proceedings; *Burdick v. Marshall*, 8 S. D. 308, 66 N. W. 462, holding conviction for contempt of court not sustainable unless acts complained of constitute offense as the proceeding is essentially criminal in character.

Cited in notes in 50 Am. St. Rep. 582, on contempt of court by libelous newspaper publications; 68 L.R.A. 256, 263, on statement with respect to ended cause as contempt; 17 L.R.A.(N.S.) 575, on criticism of decision or opinion after case determined, as contempt or ground for disbarment.

Affidavits in contempt proceedings.

Cited in *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, holding an affidavit on information and belief is wholly insufficient upon which to base constructive criminal contempt proceedings; *Freeman v. Huron*, 8 S. D. 435, 66 N. W. 928, holding that violation of order must appear positively from affidavit made basis of contempt proceedings for such violation.

3 S. D. 509, STATE v. KNIGHT, 44 AM. ST. REP. 809, 54 N. W. 412, 9 Am. Crim. Rep. 221.

Civil and criminal contempts.

Cited in *Merchants' Stock & Grain Co. v. Board of Trade*, 187 Fed 398, holding that judgment that defendants pay fines, three-fourths to complainant and one-fourth to government, is for civil contempt; *Clay v. Waters*, 101 C. C. A. 645, 178 Fed. 385, holding where bankrupt after adjudication of bankruptcy knowingly takes his money and makes loans and buys real estate for purpose of concealing it from trustee and on suit by trustee to notes and real estate disposes of notes and real estate before court's decree, for purpose of defeating decree, he is guilty of criminal contempt; *State ex rel. Hammer v. Downing*, 40 Or. 309, 58 Pac. 863, 66 Pac. 917, holding that under Hill's (Or.) Ann. Laws, § 655, proceeding for civil contempt should be instituted in the name of the state upon the relation of a private party; *State v. Nathans*, 49 S. C. 199, 27 S. E. 52, holding that contempt proceedings for disobedience of an order appointing a receiver of a corporation and enjoining its creditors and stockholders from prosecuting actions against it are criminal in nature, and may proceed after the said civil cause has gone out of court; *Snow v. Snow*, 13 Utah, 15, 43 Pac. 620, holding that here is a clear distinction between criminal and civil contempts, the proceedings relating to the former being punitive, and to the latter being remedial; *Burdick v. Marshall*, 8 S. D. 308, 66 N. W. 462, holding conviction for contempt of court not sustainable unless acts complained of constitute offense as the proceeding is essentially criminal in character; *Freeman*

v. Huron, 8 S. D. 435, 66 N. W. 928, holding it not reversible error to entitle proceeding for contempt of order issued in civil action as in such action though institution of independent action in name of state would be better practice.

— Disobedience of orders.

Cited in *Re Nevitt*, 54 C. C. A. 622, 117 Fed. 448, holding the refusal of the judge of a county court to comply with mandamus directing a levy of tax to pay judgment against county, is a civil contempt, and commitment therein is remedial and coercive and not criminal; *Heinze v. Butte & B. Consol. Min. Co.* 63 C. C. A. 388, 129 Fed. 274, holding court may punish for contempt officers of a corporation who refuse to allow inspection of underground workings of mine after order of court directed to corporation allowing such inspection; *Wasserman v. United States*, 88 C. C. A. 582, 161 Fed. 722, holding where party in equity action is adjudged to pay a fine and to be committed until paid for contempt of court in violating preliminary injunction but dies before hearing on writ of error, the proceedings for contempt did not abate; *Gompers v. Buck's Stove & R. Co.* 33 App. D. C. 516, holding disobedience of a decree of injunction restraining a defendant from doing certain acts injurious to a complainant is a criminal contempt; *Burkhardt v. Georgia School Twp.* 9 S. D. 315, 69 N. W. 16, holding a contractor for the removal of a schoolhouse justified in failing to complete the contract after the issuance of an injunction against its removal, unless it is dissolved within such time as to enable him to resume work under his contract; *Freeman v. Huron*, 8 S. D. 435, 66 N. W. 928, holding service of order on party not necessary to put him in contempt for violating terms if he actually knows of its pendency and purport.

Cited in note in 13 L.R.A.(N.S.) 592, on character of contempt for violation of injunction to protect private right.

— Mode of review.

Cited in *Bessette v. W. B. Conkey Co.* 194 U. S. 324, 48 L. ed. 1002, 24 Sup. Ct. Rep. 665, holding the United States court of appeals can review an order of a district or circuit court holding one not a party to the proceedings guilty of contempt in violating restraining order of such court; *State ex rel. Chicago, B. & Q. R. Co. v. Bland*, 189 Mo. 197, 88 S. W. 28, 3 A. & E. Ann. Cas. 1044, holding order adjudging ticket brokers in contempt for violating injunction against the sale of return-trip portions of railroad ticket was a final judgment in a civil action and appeal lay therefrom; *State v. Markuson*, 5 N. D. 147, 64 N. W. 934, holding judgment of fine and imprisonment for contempt of court in violating injunction reviewable by writ of error; *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415, holding final judgment in proceedings for criminal contempt reviewable by writ of error; *Snow v. Snow*, 13 Utah, 15, 43 Pac. 620, holding that an appeal lies to the supreme court from a judgment of contempt for a refusal to pay alimony and costs ordered by the court, under Utah Comp. Laws 1888, §§ 3632, 3635, providing for appeals in civil actions.

Persons subject to punishment for violation of injunction.

Cited in *Hutchins v. Munn*, 28 App. D. C. 271, holding person properly subject to a restraining order is bound by an injunction, whether he be a party to the suit or not, where he has actual notice of it.

Power of courts to punish for contempt.

Cited in note in 15 Eng. Rul. Cas. 159, on power of courts to punish for contempt.

— Power of legislature to interfere with.

Cited in *Carter v. Com.* 96 Va. 791, 45 L.R.A. 310, 11 Am. Crim. Rep. 303, 32 S. E. 780, holding that the power of a court created by the Constitution to punish one who seeks to obtain a continuance of a cause by means of a statement as to his health, which he knows to be false, and which tends directly to impede and obstruct the administration of justice, cannot be rendered ineffectual by legislative enactment, as by a law providing for its exercise by a jury.

Cited in note in 36 L.R.A. 255, on legislative power to abridge the power of courts to punish for contempt.

**3 S. D. 518, LIGHTHOUSE v. CHICAGO, M. & ST. P. R. CO.
54 N. W. 320.****Credibility of witnesses as jury question.**

Cited in *Bennett v. Chicago, M. & St. P. R. Co.* 8 S. D. 394, 66 N. W. 934, sustaining right of jury to discredit positive testimony of engineer that he called for brakes on first seeing cow on track if they believed that other evidence establishes existence of circumstances making such testimony improbable; *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192, holding jury not required to believe evidence of railroad employees that calf for killing of which suit is brought came on track sixty rods in front of engine and that they tried to prevent the accident by whistling and stopping train as quickly as possible where rebutting evidence is introduced; *Borneman v. Chicago, St. P. M. & O. R. Co.* 19 S. D. 459, 104 N. W. 208, holding in action to recover for loss of horse through alleged negligent operation of a train, jury may believe engineer saw horse on track notwithstanding his positive statement to the contrary, where plaintiff's testimony tended to prove horse was within engineer's line of vision for over fifteen hundred feet and engineer testified he was looking ahead along track.

Distinguished in *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, with the statement that there was nothing to contradict the evidence of the witness in the citing case; *Miller v. Chicago & N. W. R. Co.* 21 S. D. 242, 111 N. W. 553, holding that jury cannot disregard uncontradicted testimony of conductor, engineer and fireman, that they did not see animals on track.

Negligent killing of animals.

Cited in *Harrison v. Chicago, M. & St. P. R. Co.* 6 S. D. 100, 60 N. W. 405, holding a railroad company not required to keep an outlook for trespassing animals at other places than public crossings, but only

bound to exercise care not to injure animals seen on track; *Sheldon v. Chicago, M. & St. P. R. Co.* 6 S. D. 606, 62 N. W. 955, holding the presumption of negligence in the killing of stock not so clearly overcome as to take the question from the jury, by undisputed evidence that the train was in good order and properly equipped, and the evidence of the engineer and fireman that it could not have been stopped after the stock was seen, in time to prevent the injury; *Crary v. Chicago, M. & St. P. R. Co.* 18 S. D. 237, 100 N. W. 18, holding where there is no conflict in the evidence and no evidence from which different minds might reasonably draw different conclusions, defendant railroad not liable for killing steer on track where engineer testified train was being properly operated and that steer stepped onto track from behind an embankment sixty to seventy feet in front of train and such testimony is not contradicted.

3 S. D. 523, ALDRICH v. WILMARTH, 54 N. W. 811, 1051.

Recovery on partial performance of contract.

Cited in *Norbeck & N. Co. v. Pease*, 21 S. D. 368, 112 N. W. 1136, on recovery by contractor on substantial compliance with contract; *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding where contractor intends in good faith to comply with contract and does so except as to certain defects and omissions caused by inadvertence which could be remedied at small cost, he could recover contract price less such cost.

Cited in notes in 134 Am. St. Rep. 679, 684, on right of building contractor to recover for substantial performance of his contract; 24 L.R.A. (N.S.) 338, on recovery upon substantial performance of building contract.

Distinguished in *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 509, holding recovery by builder on terms of contract prevented by substantial deviation from specifications; *Hulst v. Benevolent Hall Assn.* 9 S. D. 144, 68 N. W. 200, denying building contractor's right to recover in action on specific contract in absence of substantial compliance by him of acceptance by other party.

Principal's liability for agent's acts.

Cited in note in 88 Am. St. Rep. 783, on liability of principal for unauthorized acts of agent.

3 S. D. 531, BAILEY v. CHICAGO, M. & ST. P. R. CO. 19 L.R.A. 653, 54 N. W. 596.

Adopted without special discussion in *Uhe v. Chicago, M. & St. P. R. Co.* 3 S. D. 563, 54 N. W. 601.

Right of action for destruction of trees.

Cited in *Milltown Lumber Co. v. Carter*, 5 Ga. App. 344, 63 S. E. 270, holding owner whose standing timber has been cut and carried away by trespasser may sue for trespass to the personalty, or may maintain trover, or any action appropriate to gaining possession or damages for unlawful conversion, or he may waive the tort and sue on implied assumption.

— Planted trees.

Cited in *Louisville & N. R. Co. v. Beeler*, 126 Ky. 328, 11 L.R.A.(N.S.) 930, 128 Am. St. Rep. 291, 103 S. W. 300, 15 A. & E. Ann. Cas. 913, holding in action against a railroad for burning an orchard the measure of damage is the reasonable value of the trees destroyed and difference in value of those injured before and after the injury.

Measure of damages for destruction of trees.

Cited in *Anderson v. Besser*, 131 Mich. 481, 91 N. W. 737, holding where timber is cut by trespasser in good faith under belief of title under tax deeds, measure of damage was value of timber at time of conversion less amount which trespasser has added to its value, also citing note in 19 L.R.A. 653, on this point; *Cleveland School Dist. v. Great Northern R. Co.* 20 N. D. 124, 28 L.R.A.(N.S.) 757, 126 N. W. 995, holding that measure of damages for wrongful destruction of shade trees having no separable value is difference between value of land before and after destruction; *White v. Yawkey*, 108 Ala. 270, 32 L.R.A. 199, 54 Am. St. Rep. 159, 19 So. 360, holding that in an action of trover wherein plaintiff claims damages for the conversion of logs cut and carried away from plaintiff's land, the innocent purchaser of said logs from an inadvertent trespasser who cut and sold them may prove the value of the logs prior to their removal from the land, with a view of mitigating said damages by showing that the logs were worth materially more after than before said removal; *Chappell v. Puget Sound Reduction Co.* 27 Wash. 63, 91 Am. St. Rep. 820, 67 Pac. 391, holding that the market value taken as the measure of damages should be that of a local, and not a distant, market.

Cited in notes in 32 L.R.A. 424, on title by accession to crops, fruit, and timber wrongfully severed; 18 L.R.A.(N.S.) 244, 246, on measure of damages for wrongful cutting or destruction of standing timber; 28 L.R.A.(N.S.) 757, on measure of damages for injury or destruction of trees or shrubbery not valuable for timber or firewood.

Disapproved in *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653, 67 N. W. 602, holding that in an action for damages from negligently permitting fire to escape from a railroad right of way to plaintiff's land, whereby certain trees were burned, evidence of the owner's valuation of said trees as ornamental trees as adding to the value of the land is material and competent; *Missouri P. R. Co. v. Tipton*, 61 Neb. 49, 84 N. W. 416, holding that evidence as to the value of growing fruit trees, for the injury and destruction of which action was brought, immediately before and after the fire caused by defendant's negligence, is competent and admissible as the measure of damages sustained.

Measure of damages for trespass in removing soil products.

Cited in *Sandy River Cannel Coal Co. v. White House Cannel Coal Co.* 125 Ky. 278, 101 S. W. 319, holding where one coal land owner removes coal from another's land under honest mistake as to true ownership, the measure of damages is value of coal before it was disturbed in the mine.

Interest on unliquidated damages.

Cited in note in 28 L.R.A.(N.S.) 68, on interest on unliquidated damages.

Materiality of variance.

Cited in *Halloran v. Holmes*, 13 N. D. 411, 101 N. W. 310, holding, under statute, variance immaterial unless it is satisfactorily proved that variance has actually misled adverse party to his prejudice.

3 S. D. 540, NORTH STAR BOOT & SHOE CO. v. STEBBINS, 54 N. W. 593.

3 S. D. 548, RE CONSTRUCTION OF CONST. 19 L.R.A. 575, 54 N. W. 650.

Answers by court to questions by governor or legislature.

Cited in *Re Chapter 6, Session Laws of 1890*, 8 S. D. 274, 66 N. W. 810, holding that supreme court will not, in response to question by governor, give ex parte opinion as to time of expiration of terms of certain officers under given statute; *Re Public Lands & Buildings*, 37 Neb. 425, 55 N. W. 1092 (dissenting opinion), holding that the supreme court can have no jurisdiction to answer queries submitted to it, either by the legislature or by officers of the executive departments of the state government, where no such duty is imposed by the Constitution, which specifies the cases wherein the said court "shall have original jurisdiction;" *Re House Resolution No. 30*, 10 S. D. 249, 72 N. W. 892, holding that supreme court judges will not give ex parte decision on application of governor as to constitutionality of joint resolution of legislature and appropriation to carry same into operation.

Distinguished in *Re State Census*, 6 S. D. 540, 62 N. W. 129, giving opinion on request of legislature through governor as to imperativeness of constitutional provision for enumeration of inhabitants of state and apportionment of senators and representatives.

3 S. D. 553, STATE EX REL. MCGEE v. GARDNER, 54 N. W. 606.

Original jurisdiction of supreme court.

Cited in *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931; *State ex rel. Holmes v. Finnerud*, 7 S. D. 237, 64 N. W. 121,—with the statement that no question is raised as to the exercise of the original jurisdiction of the supreme court in the citing case.

"Next general election."

Cited in *People ex rel. Murphy v. Col*, 132 Cal. 334, 64 Pac. 477, holding that "the next general election" until which a vacancy in the office of county auditor may be filled by appointment under Cal. county government act 1897, § 25, subd. 19, is the next election at which it is provided by § 58 that a county auditor shall be elected; *People ex rel. Lynch v. Budd*, 114 Cal. 168, 34 L.R.A. 46, 45 Pac. 1060, holding that one appointed by a governor to the office of lieutenant governor after the death of

the original incumbent will hold for the remainder of the unexpired term, under Cal. Const. art. 5, § 15, providing that a lieutenant governor shall be elected at the same time, place, in the same manner, and for the same term as the governor, and § 8, providing that when any office shall become vacant the governor may fill such vacancy by granting a commission, to expire at the next election by the people; *State ex rel. Brown v. Spitz*, 127 Mo. 248, 29 S. W. 1011, holding that the term of office of a justice of the peace elected in 1892 to fill a vacancy ends in 1894, under Mo. Rev. Stat. 1889, § 6090, providing that a justice shall be elected "in 1890 and every four years thereafter," and shall hold his office for four years and until his successor is elected, and § 6096, which provides that when a vacancy occurs it may be filled until "the next general election;" *Wendorff v. Dill*, 83 Kan. 782, 112 Pac. 588, holding that next regular election, till which district judge is appointed, is election at which judges of district court are chosen for full term; *Wainwright v. Fore*, 22 Okla. 387, 97 Pac. 831; *State ex rel. Livesay v. Smith*, 35 Mont. 523, 90 Pac. 750, 10 A. & E. Ann. Cas. 1138,—holding one appointed to office until the next general election held until a general election for that particular office; *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (dissenting opinion), on construction of phrase "next regular election;" *State v. Howell*, 59 Wash. 492, — L.R.A.(N.S.) —, 110 Pac. 386, holding that vacancy in office of secretary of state lasts until next general election at which it is provided by law that such officer shall be elected.

Power of city council.

Cited in *Sioux Falls Electric Light & P. Co. v. Sioux Falls*, 21 S. D. 18, 108 N. W. 488, holding that city council cannot submit lighting contract to vote of electors, when statute gives such power to auditor only.

3 S. D. 563, UHE v. CHICAGO, M. & ST. P. R. CO. 54 N. W. 601.

Measure of damages for destruction of timber.

Cited in notes in 18 L.R.A.(N.S.) 246, on measure of damages for wrongful cutting or destruction of standing timber; 28 L.R.A.(N.S.) 68, on interest on unliquidated damages.

Interest on damages.

Distinguished in *Bailey v. Chicago, M. & St. P. R. Co.* 3 S. D. 531, 19 L.R.A. 653, 54 N. W. 596, holding the question of interest not removed from the discretion of the jury by an instruction that they cannot award greater damages than plaintiff claims in his complaint, "which is \$600 and interest on the same."

What constitute "proceedings."

Cited in *Monumental Brewing Co. v. Larrimore*, 109 Md. 682, 72 Atl. 596, holding "proceedings" in an action at law consist of the successive acts done and steps taken as parts of the suit during its progress, whether by court, counsel, clerk or jury.

Time for exceptions to charge.

Cited in *Mosteller v. Holborn*, 20 S. D. 545, 108 N. W. 13, holding ex-

ceptions to court's charge taken after final judgment come too late and cannot be considered on appeal.

Violation of injunction by entry of judgment.

Cited in *Willsie v. Rapid Valley Horse-Ranch Co.* 7 S. D. 114, 63 N. W. 546, holding the confession of a judgment by a corporation a violation of an injunction restraining it from in any manner encumbering its property.

3 S. D. 569, HEEGAARD v. DAKOTA LOAN & T. CO. 54 N. W. 656.

Appealable judgment.

Cited in *Little v. Atchison, T. & S. F. R. Co.* 2 Ind. Terr. 511, 53 S. W. 331, holding order of the United States court quashing an execution issued out of the commissioner's court is appealable.

Amendment to answer.

Cited in *Nerger v. Equitable Fire Asso.* 20 S. D. 419, 107 N. W. 531, holding it not an abuse of discretion to refuse to allow defendant to amend its answer by alleging noncompliance with law as to filing certificate of partnership as condition precedent to suit, where complaint and policy of insurance sued on allege plaintiffs are copartnership, and defendant answered on merits and waited until cause was about to be reached for trial before applying for leave to amend, and statute allowing removal of disability for failure to file certificate.

Subsequent compliance with law as to certificate of partnership.

Cited in *Bovee v. DeJong*, 22 S. D. 163, 116 N. W. 83, holding that compliance with law as to certificate by partnership under fictitious name removes all prior disability.

3 S. D. 577, STATE v. BUTTS, 19 L.R.A. 725, 54 N. W. 603.

Quarantine regulations.

Cited in note in 26 L.R.A. 489, on quarantine regulations by health authorities.

3 S. D. 580, EVANS v. HUGHES COUNTY, 54 N. W. 603.

Grant of ferry franchise.

Cited in *Nixon v. Reid*, 8 S. D. 507, 32 L.R.A. 315, 67 N. W. 57, holding matter of granting ferry leases left to board of county commissioners as agents of state.

3 S. D. 586, STATE EX REL. WALDO v. FYLPAA, 54 N. W. 599.

Redemption from judicial sales.

Cited in *State ex rel. National Bond & Secur. Co. v. Krahmer*, 105 Minn. 422, 21 L.R.A.(N.S.) 157, 117 N. W. 780, on effect of requirement of service of notice of expiration of redemption from sale; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780, holding that no relief can be granted to minor heirs after the expiration of the time for redemption from a
Dak. Rep.—46.

sale under a power contained in a real estate mortgage, in the absence of any statutory exception in their favor giving them further rights than those given by Dak. Comp. Laws, § 5421.

3 S. D. 590, NORTH AMERICAN LOAN & T. CO. v. COLONIAL & U. S. MORTG. CO. 54 N. W. 659.

Authority of state court after filing petition and bond for removal of cause.

Cited in *Richards v. Modern Woodmen of America*, 14 S. D. 440, 85 N. W. 999, holding that filing in office of clerk of state court of sufficient petition and bond for removal of cause to Federal court divests state court of further jurisdiction though no order transferring action is made.

Vacation of judgment on motion.

Cited in note in 60 Am. St. Rep. 643, on vacation of judgments on motion when not specially authorized by statute.

3 S. D. 610, HURON WATERWORKS CO. v. HURON, 54 N. W. 652, Later appeal in 7 S. D. 9, 30 L.R.A. 848, 58 Am. St. Rep. 817, 62 N. W. 775, which is denied rehearing in 8 S. D. 169, 30 L.R.A. 859, 65 N. W. 816.

Preliminary injunction.

Cited in *First Nat. Bank v. Crabtree*, 18 S. D. 355, 100 N. W. 744, holding the granting of a preliminary injunction pending an action is a matter of judicial discretion, and when the rights of a litigant are protected to the extent of excluding all possibility of injury he has no cause to complain.

— Dissolution.

Cited in *Ford v. Taylor*, 140 Fed. 356, holding preliminary injunction will not be dissolved where a dissolution would be practically a denial of the relief to which complainant might show himself entitled on final hearing.

3 S. D. 619, VERT v. VERT, 54 N. W. 655.

Appealable orders.

Cited in *Thompson & Sons Mfg. Co. v. Guenther*, 5 S. D. 504, 59 N. W. 727, holding rule that order refusing to set aside appealable order is not appealable, inapplicable where first order was plainly and obviously made without jurisdiction.

Distinguished in *Custer County Bank v. W. H. Walling Mercantile Co.* 16 S. D. 579, 94 N. W. 582, recognizing rule but adopting converse of it contained in cited case, and holding *ex parte* order by judge holding court in another's circuit, stated to be "by the court" and attested by clerk was in effect a chamber order and not appealable and a motion to vacate was properly made and appeal would lie from order denying such motion.

Change of alimony.

Cited in *Beard v. Beard*, 57 Neb. 754, 78 N. W. 255, holding that a

court granting a divorce decree had no authority to reduce the amount adjudged, upon the dissolution of the marriage at a prior term, to be paid by the husband as the wife's share of the common property, except for the causes and in the manner in which other judgments might be modified; *Grant v. Grant*, 5 S. D. 17, 57 N. W. 1130, holding that a motion on appeal for further alimony will be denied where the affidavits for and against the motion leave the court in doubt as to the husband's ability to pay more than has already been ordered.

3 S. D. 624, GREELEY v. McCOY, 54 N. W. 659.

Amendment of complaint.

Cited in *Andrews v. Wynn*, 4 S. D. 40, 54 N. W. 1047, as to allowing plaintiff to amend his complaint as he might be advised, within such time and on such terms as the court should deem just.

3 S. D. 625, McCORMICK HARVESTING MACH. CO. v. SNEDIGAR, 54 N. W. 814.

Authority to prosecute action or appeal.

Cited in *Hughes County v. Ward*, 81 Fed. 314, holding that a state's attorney in South Dakota has no authority to commence a suit on behalf of a county without the authorization of its board of county commissioners, as his authority in this regard is limited to prosecuting and defending suits already instituted by or against the county.

Distinguished in *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, holding in action to quiet title in which defendant claimed under tax title but before appeal sold the certificates, an appeal could be taken by such original defendant where purchaser had made no application for substitution.

3 S. D. 627, MILLER v. WAY, 54 N. W. 814.

3 S. D. 631, ALBRIGHT v. SMITH, 54 N. W. 816.

Right to lien.

Cited in *Hahn v. Sleepy Eye Mill Co.* 21 S. D. 324, 112 N. W. 843, holding act, giving threshers paramount lien, not invalid, as impairing right to contract.

— Right of subcontractor.

Cited in *Robertson Lumber Co. v. State Bank*, 14 N. D. 511, 105 N. W. 719, holding subcontractor has right to lien without regard to the state of the account between the contractor and owner; *Barrett v. Millikan*, 156 Ind. 510, 83 Am. St. Rep. 220, 60 N. E. 310, holding that Burns's (Ind.) Rev. Stat. 1894, §§ 7256-7259, in giving a subcontractor a mechanics' lien for materials furnished by him to the contractor, who has been paid in full, is not unconstitutional as depriving a person of his property without due process of law, or as impairing the obligation of contracts; *The Victorian*, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040, holding that a subcontractor's lien is not discharged by the payment to the contractor of an amount agreed by him and the owner to be in full of all claims of any

kind whatsoever, as the subcontractor alone can waive or discharge his lien; *Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846, as to effect of stipulation in building contract with original contractor that no lien should exist or be claimed by him or anyone employed by him.

Who may attack validity of lien.

Cited in *Aste v. Wilson*, 14 Colo. App. 323, 59 Pac. 846; *Jarvis v. State Bank*, 22 Colo. 309, 55 Am. St. Rep. 129, 45 Pac. 505,—holding that the purchaser at a sale under a trust deed containing a clause covering subsequently acquired property is in a position to question and attack the validity of statutory liens accruing after the recording of the trust deed.

Review of order denying new trial.

Cited in *Granger v. Roll*, 6 S. D. 611, 62 N. W. 970, holding order denying new trial reviewable on appeal from judgment subsequently entered; *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38, holding that appeal may be taken from a judgment and from an order overruling a motion for new trial in the same notice.

3 S. D. 637, LA RUE v. ST. ANTHONY & D. ELEVATOR CO.

54 N. W. 806, Later appeal in 17 S. D. 91, 95 N. W. 292.

Admissions by agent or servant.

Cited in *Wendt v. Chicago, St. P. M. & O. R. Co.* 3 S. D. 476, 57 N. W. 226, holding admission by section foreman defendant after spreading of fire from right of way that the fire originated at such a place as to make the company liable and was allowed by him to escape inadmissible; *Estey v. Birnbaum*, 9 S. D. 174, 68 N. W. 290, holding admissions by agent subsequent to performance of authorized act not binding on principal; *Klingaman v. Fish & H. Co.* 19 S. D. 139, 102 N. W. 601, holding admissions by servant as to ownership by principal of lumber alleged to have caused an injury made after injury received, are inadmissible against principal in absence of evidence of authority to bind principal by declarations; *Gillespie v. First Nat. Bank*, 20 Okla. 768, 95 Pac. 220, holding inadmissible statements by a cashier of a bank as to how bank acquired a note, where bank's interest was determined by a contract with a third person which had occurred long prior to statement, and statement was no part of the transaction; *First Nat. Bank v. Linn County Nat. Bank*, 30 Or. 296, 47 Pac. 614, holding that a letter written by the receiver of a bank relative to a transaction prior to his appointment, and of which he had no personal knowledge, is not competent evidence in an action against the bank, as it is not part of the *res gestæ*.

Cited in note in 131 Am. St. Rep. 319, on declarations and acts of agents.

3 S. D. 645, LAWRENCE v. PECK, 54 N. W. 808.

Inconsistent defenses.

Cited in *Mt. Terry Min. Co. v. White*, 10 S. D. 622, 74 N. W. 1060, holding it reversible error to send the pleadings to the jury where the allegations of the answer are apparently, if not actually, inconsistent with defendant's

contention on the trial; *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360, holding in action for balance of proceeds on sale by trustee of land conveyed to him for sale and from proceeds to deduct indebtedness due from grantor, a plea of statute of limitations is not inconsistent with denial of cause of action.

Cited in note in 48 L.R.A. 145, 189, 194, on right to plead inconsistent defenses.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 4 S. D.

4 S. D. 1, NELSON v. LADD, 54 N. W. 809.

Jurisdictional amount in justice court.

Cited in *Warder, B. & G. Co. v. Raymond*, 7 S. D. 451, 64 N. W. 525, holding that a justice has no jurisdiction of an action on a note where the amount claimed exceeds \$100, although part of such claim is for attorneys' fees stipulated for in the note; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695, holding a justice had no jurisdiction of a cause where the amount sought to be recovered with the penalty and interest exceeded the limit set by the code for the jurisdiction of the justice of the peace.

Judicial notice of jurisdiction.

Cited in *State v. Bunker*, 7 S. D. 639, 65 N. W. 33, holding that judicial notice will be taken of jurisdiction of inferior state courts; *Ayers, W. & R. Co. v. Sundback*, 5 S. D. 31, 58 N. W. 4, holding that presumption of validity and regularity of proceeding in county court arises only after jurisdiction is affirmatively shown.

4 S. D. 6, RE ASSESSMENT & COLLECTION OF TAXES, 54 N. W. 818.

Right to deduct debts from credits in listing for taxation.

Cited in *State v. Moffett*, 64 Minn. 292, 67 N. W. 68, holding that Minn. Gen. Stat. § 1526, by authorizing a person, when making up the amount of credits he is required to list for taxation, to deduct from the gross amount of such credits the amount of all his bona fide indebtedness, does not violate Minn. Const. art. 9, § 3, providing that laws shall be passed for the taxing of all moneys, "credits," etc.

Disapproved in *Stumpf v. Storz*, 156 Mich. 228, 23 L.R.A.(N.S.) 152, 132 Am. St. Rep. 521, 120 N. W. 618, holding a constitutional requirement of uniformity in taxation is not violated by the deduction of debts from credits in the listing of personalty for taxation.

4 S. D. 22, WILLIAMS v. HARRIS, 46 AM. ST. REP. 753, 54 N. W. 926.

Conveyances in fraud of creditors.

Cited in 33 L.R.A.(N.S.) 842, on degree of certainty necessary to establish fraud in civil action.

—To wife.

Cited in *First State Bank v. O'Leary*, 13 S. D. 204, 83 N. W. 45, holding that transfer of land to wife will not be defeated as fraudulent to creditors if wife had no knowledge of husband's fraudulent intent.

Cited in notes in 90 Am. St. Rep. 499, 500, 535, 537, on attacks by creditors on conveyance made by husbands to wives; 56 L.R.A. 824, 825, 840, on burden of proof of husband's debt to wife on account of property received from her.

4 S. D. 30, SMITH v. CHICAGO, M. & ST. P. R. CO. 54 N. W. 931.

4 S. D. 31, ELLIS v. WAIT, 54 N. W. 925.

4 S. D. 33, EVANS v. HUGHES COUNTY, 54 N. W. 1049.

4 S. D. 38, ALDRICH v. WILMARTH, 54 N. W. 1051.

Right to costs in appellate court.

Cited in *Swenson v. Christopherson*, 10 S. D. 342, 73 N. W. 96, refusing to allow costs to respondent for printing unnecessary matter in additional abstracts or extended quotations from text books and reports in his brief.

4 S. D. 40, ANDREWS v. WYNN, 54 N. W. 1047.

Judicial notice.

Cited in note in 124 Am. St. Rep. 48, on facts of which courts will take judicial notice.

Effect of description of party in same instrument by different Christian names.

Cited in *Vickery v. Burton*, 6 N. D. 245, 69 N. W. 193, holding that an indorsement on notes of the initials of the Christian name, and of the name of the payee whose name is stated in full in the notes, raises no presumption that the indorsement was by the payee.

Distinguished in *State v. Porter*, 18 S. D. 25, 99 N. W. 80, holding the recitals in a bail bond with the presumption that the officer taking the bond did his duty were sufficient evidence that "Charles Porter" and "C. M. Porter" were one and the same person.

4 S. D. 47, O'ROURKE v. SIOUX FALLS, 19 L.R.A. 789, 46 Am. St. Rep. 760, 54 N. W. 1044.

Liability of municipality.

Cited in *New Orleans v. Kerr*, 50 La. Ann. 413, 69 Am. St. Rep. 442, 23 So. 384, holding that a municipal corporation is liable for breach of a contract; *Nicholson v. Detroit*, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695, holding a city was not liable for the negligence of its officials in permitting a decedent to tear down a smallpox hospital without their taking any measures in the way of disinfection or giving warning of the danger; *Nicholson v. Detroit*, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695, holding a city not liable for the death of one of its employees from smallpox contracted in tearing down a smallpox hospital to make room for another on its property, of the danger from which he received no warning; *Gainfortone v. New Orleans*, 24 L.R.A. 592, 61 Fed. 64, holding municipal corporation not liable for its failure to protect life, unless made so by statute, and that La. act 1855, No. 51, providing that such corporations shall be liable for damages done to "property" by mobs or riotous assemblages in their respective limits, does not create such liability.

Cited in notes in 1 L.R.A.(N.S.) 667, on distinction between private and public functions of municipality with respect to liability for damages; 12 L.R.A.(N.S.) 538, on municipal liability for torts of police officers.

—Suffering defects in, or misuse of, streets.

Cited in *Landan v. New York*, 90 App. Div. 50, 85 N. Y. Supp. 616, holding a city was not liable for the death of a person on an explosion of fireworks during a political celebration although the city officials had suspended an ordinance prohibiting the use of fireworks.

Cited in notes in 108 Am. St. Rep. 154, as to what municipal corporations are answerable for injuries due to defects in streets and other public places; 13 L.R.A.(N.S.) 1168, on duty to light streets; 20 L.R.A.(N.S.) 532, 672, on liability of municipality for defects or obstructions in streets; 23 L.R.A.(N.S.) 644, on liability of municipality for failure to prevent improper conduct in or use of streets.

4 S. D. 54, PURDIN v. ARCHER, 54 N. W. 1043.

Rights of chattel mortgagee.

Cited in *People's Sav. Inst. v. Miles*, 22 C. C. A. 152, 40 U. S. App. 341, 76 Fed. 252, holding that mortgagee in possession of chattels after breach of condition cannot be deprived of possession until satisfaction of mortgage debt.

Cited in note in 96 Am. St. Rep. 688, on title and rights of holder of chattel mortgage after condition broken.

Presentation of secured claim against decedent's estate.

Cited in *Kelsey v. Welch*, 8 S. D. 255, 66 N. W. 390, holding creditors secured by mortgage on a decedent's land expressly relieved, except as to a claim for a deficiency, from the statutory provision requiring claims to be presented within a specified time; *Fish v. De Laray*, 8 S. D. 320,

59 Am. St. Rep. 764, 66 N. W. 465, holding a debt secured by a mechanic's lien not a claim which must be presented to an administrator for allowance or rejection.

4 S. D. 58, STATE v. CASSIDY, 54 N. W. 928, 4 AM. CRIM. REP. 563.

Formal requisites of an execution.

Cited in *Kipp v. Burton*, 29 Mont. 96, 63 L.R.A. 325, 101 Am. St. Rep. 544, 74 Pac. 85, holding the failure of the clerk to affix the seal of the court to an execution as required by statute rendered the execution voidable only.

Sufficiency of levy.

Distinguished in *Auby v. Rathbun*, 11 S. D. 474, 78 N. W. 952, holding levy insufficient where sheriff tells debtor that he came to levy on his sheep and gives him a written notice of alleged levy but leaves the sheep in debtor's possession and tells him that he probably never will come after them.

4 S. D. 67, McCORMICK v. VOLSACK, 55 N. W. 145.

4 S. D. 71, SMITH v. CHICAGO, M. & ST. P. R. CO. 55 N. W. 717.

Followed without discussion in *Kelley v. Anderson*, 15 S. D. 107, 87 N. W. 579.

Evidence of similar acts or facts.

Cited in *Chenoweth v. Southern P. Co.* 53 Or. 111, 99 Pac. 86, holding in an action for the negligent setting of a fire by defendant's engine evidence that the same engine subsequently set another fire some distance from the tracks was admissible on the question of the sufficiency of defendant's equipment and care.

Cited in note in 32 L.R.A.(N.S.) 1156, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.

Burden of proof as to contributory negligence.

Cited in *Cogdell v. Wilmington & W. R. Co.* 130 N. C. 313, 41 S. E. 541 (dissenting opinion), holding that, after having instructed the jury that the statute (N. C. Acts 1887, chap. 33) expressly imposes the burden of proof upon a defendant who sets up contributory negligence as a defense, it is not error to refuse to instruct "that the law presumes that a person found dead, and killed by the alleged negligence of another, has exercised due care himself."

Cited in note in 33 L.R.A.(N.S.) 1172, on burden of proof as to contributory negligence.

4 S. D. 83, EVANS v. BRADLEY, 55 N. W. 721.

Presumptions on appeal.

Cited in *Stokes v. Green*, 10 S. D. 286, 73 N. W. 100, holding that lower court will be presumed on appeal to have had before it sufficient oral

evidence to justify its construction of a written contract capable of explanation by parol.

Mandamus to compel county to issue warrant.

Cited in *State ex rel. Wiles v. Albright*, 11 N. D. 22, 88 N. W. 729, holding mandamus would not lie to a county auditor to compel him to issue a warrant for salary to another county officer who he believes has by misrepresentation procured more salary than he was lawfully entitled to; *Lawrence County v. Meade*, 6 S. D. 626, 62 N. W. 957, holding order dismissing action and awarding costs to defendant a final judgment for purpose of appeal.

Necessity for paying school orders.

Cited in *Hardy v. Purington*, 6 S. D. 382, 61 N. W. 158, holding a school treasurer not required to pay an order for services as a teacher by one who did not own a valid certificate.

4 S. D. 88, BANBURY v. SHERIN, 55 N. W. 723.

Sufficiency of exceptions to instructions.

Cited in *Comeau v. Hurley*, 22 S. D. 310, 117 N. W. 371, holding general exception to all instructions insufficient to preserve right to review; *People v. Hart*, 10 Utah, 204, 37 Pac. 330, holding that an exception to an entire charge is insufficient to present a case for review on appeal; dissenting opinion in *People v. Berlin*, 10 Utah, 39, 36 Pac. 199, but not passed upon in the majority opinion, which determined the case on other grounds.

4 S. D. 95, STATE v. THOMPSON, 55 N. W. 725.

Sufficiency of recitals of information or indictment.

Cited in *State v. Kerr*, 3 N. D. 523, 58 N. W. 27, holding prosecution in name and by authority of state sufficiently shown by indictment entitled "the state of North Dakota against" designated defendant and showing on face proper presentment by "grand jury of the state of North Dakota;" *Caples v. State*, 3 Okla. Crim. Rep. 72, 26 L.R.A.(N.S.) 1033, 104 Pac. 493, holding information not void because of omission of word "the" before "state of Oklahoma" in caption.

Cited in note in 26 L.R.A.(N.S.) 1034, 1036, on necessity that indictment or information show on face that prosecution carried on in name and by authority of state.

4 S. D. 102, HURON WATERWORKS CO. v. HURON, 55 N. W. 759.

4 S. D. 105, KIRBY v. WESTERN U. TELEG. CO. 30 L.R.A. 612, 46 AM. ST. REP. 765, 55 N. W. 759, Rehearing granted in 4 S. D. 439, 30 L.R.A. 620, 57 N. W. 199; Reversed on rehearing in 7 S. D. 623, 30 L.R.A. 621, 65 N. W. 37.

Validity of restrictions on carrier's liability.

Cited in *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L.R.A. 81,

40 Am. St. Rep. 898, 59 N. W. 945, sustaining carrier's right to limit liability by express contract signed by the parties except as to gross negligence, fraud or wilful wrong.

Cited in notes in 17 L.R.A.(N.S.) 634, on validity of stipulation requiring notice within specified time, as applied to loss due to carrier's negligence; 28 L.R.A.(N.S.) 641, on effect of shipping contract limiting common-law liability, signed under compulsion.

— Telegraph company.

Cited in *Broom v. Western U. Teleg. Co.* 71 S. C. 506, 51 S. E. 259, holding a stipulation by a telegraph company that claims for damages be presented within sixty days from the date of filing the message is invalid as contrary to public policy; *Kirby v. Western U. Teleg. Co.* 4 S. D. 463, 57 N. W. 202, holding that § 3910 is penal in its nature and must be strictly construed.

Cited in note in 56 L.R.A. 745, on contracts for telegrams not written on company's blanks.

Effect of failure to admonish jury on separation not to converse.

Cited in *McKnight v. United States*, 65 C. C. A. 37, 130 Fed. 659, holding the failure of the trial court to admonish the jury on allowing them to separate during a recess, not to converse with one another was not reversible error where he had so admonished them on various occasions and counsel made no objection when he failed to do so.

4 S. D. 119, EVANS v. FALL RIVER COUNTY, 55 N. W. 862.

Discretionary power of court to vacate a judgment.

Cited in *Kjetland v. Pederson*, 20 S. D. 58, 104 N. W. 677, sustaining order refusing to open a default judgment where no abuse of discretion affirmatively shown; *Corson v. Smith*, 22 S. D. 501, 118 N. W. 705, holding application to open default for mistake or oversight properly refused where only mistake or oversight was failure to inform attorneys of alleged settlement before their withdrawal from case; *Minnehaha Nat. Bank v. Hurley*, 13 S. D. 18, 82 N. W. 87, holding that a judgment for plaintiff on a note will not be vacated where defendant paid no further attention to the case after learning that a new trial had been granted from a prior judgment in his favor, although the attorney who originally appeared for him had been discharged, and there is a fatal variance between defendant's obligations and proofs; dissenting opinion in *D. S. Congdon Hardware Co. v. Consolidated Apex Min. Co.* 11 S. D. 376, 77 S. W. 1022, as to abuse of discretion in refusing to open default judgment against corporation on ground of surprise, where corporation had good defense and direction upon whom service was made failed to notify managing officer or attorney; *Minnekahta State Bank v. Fall River County*, 4 S. D. 124, 55 N. W. 863, refusing to disturb discretion of trial court in denying motion to vacate judgment and for leave to answer.

4 S. D. 124, MINNEKAHTA STATE BANK v. FALL RIVER COUNTY, 55 N. W. 863.

Discretionary power of court to vacate or set aside a judgment.

Cited in *Kjetland v. Pederson*, 20 S. D. 58, 104 N. W. 677, sustaining order refusing to open a default judgment where no abuse of discretion affirmatively shown.

4 S. D. 125, WILCOX v. SMITH, 55 N. W. 1107.

Sufficiency of evidence of sufficiency of grounds of an attachment.

Cited in *Dunn v. Claunch*, 13 Okla. 577, 76 Pac. 143, affirming that an affidavit setting forth the grounds of an attachment will be sustained without the showing of any further facts unless the defendant files an affidavit denying the allegations of the attachment affidavit; *Jones v. Meyer*, 7 S. D. 152, 63 N. W. 773, holding that attachment creditor has burden of proving by fair preponderance of evidence that some ground for attachment specified in the affidavit existed; *Trebilcock v. Big Missouri Min. Co.* 9 S. D. 206, 68 N. W. 330, holding that attachment on ground of disposition of property with intent to defraud creditors should be dissolved where plaintiff fails to prove that the transfers were made with such intent.

Cited in note in 123 Am. St. Rep. 1032, on proceedings to dissolve attachments.

Vacation of judgment by default.

Cited in *G. S. Congdon Hardware Co. v. Consolidated Apex Min. Co.* 11 S. D. 376, 77 N. W. 1022 (dissenting opinion), majority holding refusal to open judgment by default against corporation on ground of surprise an abuse of discretion where corporation has a good defense and the director who was served neglected to notify the managing officers although his reason was his belief that there was no meritorious defense.

4 S. D. 128, HUDSON v. ARCHER, 55 N. W. 1099.

Maintenance of action by trustee or assignee in his own name.

Followed in *State v. Newson*, 8 S. D. 327, 66 N. W. 468, sustaining right of state to bring action on forfeited bail bond executed to it.

Cited in *Brannon v. White Lake Twp.* 17 S. D. 83, 95 N. W. 284, holding an agent purchasing township warrants in his own name with funds belonging to his principal and taking an assignment in his own name may sue thereon.

— Of foreign corporation.

Cited in *Citizens' Bank v. Corkings*, 9 S. D. 614, 62 Am. St. Rep. 891, 70 N. W. 1059, holding right of absolute assignee of claim from nonresident corporation not complying with statutory requirements to maintain action not affected by his agreement to turn over proceeds less expense of collection to corporation.

Sufficiency of pleading.

Cited in *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W. 245, as to sufficiency of demurrer for defect of parties defendant without

naming particular party to be joined; *Johnson v. Gilmore*, 6 S. D. 276, 60 N. W. 1070, holding sufficient, complaint stating contract and alleging breach and damages directly resulting therefrom without showing particular manner in which damages occurred; *MacBride v. Hitchcock*, 11 S. D. 373, 77 N. W. 1021, holding cause of action for nominal damages at least set out by complaint alleging conspiracy by defendant's to destroy plaintiff's business as newspaper publisher and to compel him to give up his business, their unlawful entry into the printing office, taking therefrom printing press, material, files of newspaper and private property and burning or destroying same; *Bem v. Shoemaker*, 7 S. D. 510, 64 N. W. 544, holding complaint not demurrable on ground that plaintiffs have no "legal capacity to sue" unless it shows on its face that they are under some legal disability preventing them from suing in their own name; *Randall v. Johnstone*, 20 N. D. 493, 128 N. W. 687, to point that prayer for relief is no part of complaint.

— Mode of raising objection.

Cited in *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. 125, holding objection to admission of evidence for insufficiency of complaint not sustainable unless demurrer lies thereto; *Zipp v. Colchester Rubber Co.* 12 S. D. 218, 80 N. W. 367, holding an objection to the admission of evidence under a complaint alleging the breach of a mutual agreement on the ground that the complaint does not state sufficient facts to constitute a cause of action properly overruled; *Bush v. Froelich*, 8 S. D. 353, 66 N. W. 939, holding that question whether prayer for relief in complaint is proper cannot be reached by demurrer.

4 S. D. 138, *BEM v. BEM*, 55 N. W. 1102, Later phases of same case in 7 S. D. 510, 64 N. W. 544; 10 S. D. 453, 74 N. W. 239; 14 S. D. 346, 85 N. W. 598.

Waiver of defects in notice to take deposition.

Cited in *Babcock v. Ormsby*, 18 S. D. 358, 100 N. W. 759, holding the failure of a notice to take depositions to name the persons whose depositions were taken, is waived by the adverse party appearing and cross-examining the witness.

Presumption where conveyance is taken in name of wife.

Distinguished in *Watts v. Morrow*, 19 S. D. 317, 103 N. W. 45, where it was held that there was no presumption that property paid for by husband and conveyed to wife is an advancement to wife, it being denied that the husband paid the consideration and asserted that the wife did.

Necessity for bill of exceptions.

Cited in *Daley v. Forsythe*, 9 S. D. 34, 67 N. W. 948, holding no bill of exceptions necessary on appeal from denial of motion for order foreclosing it for making motion for new trial for newly discovered evidence.

Necessity for reciting exceptions in abstract.

Cited in *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 634, 67 N. W. 837, holding appellant not required to recite in his abstracts, exceptions to evidence reserved during the trial.

4 S. D. 152, W. W. KIMBALL CO. v. KIRBY, 55 N. W. 1110.**Construction of recording act.**

Explained in *Pierson v. Hickey*, 16 S. D. 46, 91 N. W. 339, holding the word "creditors" as used in the recording act was used generally and the word "subsequent" applied only to subsequent purchasers and encumbrancers.

Recording conditional sales and chattel mortgages.

Cited in *Noyes v. Brace*, 8 S. D. 190, 65 N. W. 1071, holding void, chattel mortgage executed and delivered but not properly deposited in office of register of deed; *Pringle v. Canfield*, 19 S. D. 506, 104 N. W. 223, holding act requiring the filing of contracts of conditional sales of personalty was not unconstitutional as a deprivation of property without due process of law; *Cardenas v. Miller*, 108 Cal. 250, 49 Am. St. Rep. 84, 41 Pac. 472, 39 Pac. 783, holding that an unfilled chattel mortgage is invalid as to subsequent creditors with notice under Cal. Code Civ. Proc. § 2957, making a mortgage of personal property void as against creditors unless it is filed; *Ruggles v. Cannedy*, 127 Cal. 290, 46 L.R.A. 371, 53 Pac. 911, 59 Pac. 827, holding that a chattel mortgage withheld for a time from record is void as against creditors whose claims arise between the dates of its execution and recordation, even if they have acquired no lien, under Cal. Civ. Code, § 2957, making the record a condition of the validity of such a mortgage as against creditors; *First Nat. Bank v. Sayler*, 4 Okla. 408, 50 Pac. 76, holding that under Okla. Stat. 1893, § 3270, declaring an unrecorded mortgage of personal property void as against creditors, the claim of a mortgagee under an unfilled chattel mortgage is not entitled to preference on the distribution of the proceeds of a sale of the mortgaged property made by an assignee for the benefit of creditors.

—Failure to renew.

Cited in *First Nat. Bank v. Ludvigsen*, 8 Wyo. 230, 80 Am. St. Rep. 928, 56 Pac. 994, 57 Pac. 934, holding that under Wyo. Laws 1890-91, chap. 7, § 11, providing that a mortgage not renewed as therein required ceases to be valid as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith, the notice which will subordinate a subsequent chattel mortgage to a prior one unfilled, is not applicable to general creditors.

4 S. D. 158, COLONIAL & U. S. MORTG. CO. v. BRADLEY, 55 N. W. 1108.**Findings of fact as part of judgment roll.**

Cited in *McMahon v. Polk*, 10 S. D. 296, 47 L.R.A. 830, 73 N. W. 77, holding that appeal from judgment alone brings up findings of fact; *Smith v. Commercial Nat. Bank*, 7 S. D. 465, 64 N. W. 529, holding that judgment roll includes findings of fact in the trial court as well as pleadings and judgment.

Liability of married woman on her contracts.

Cited in *Cooper v. Bank of Indian Territory*, 4 Okla. 632, 46 Pac. 475,

holding that under Okla. Laws 1893, § 2968, copied from Dak. Comp. Laws, § 2590, a wife is bound by her contract in joining her husband in making a promissory note for his own debt; *Granger v. Roll*, 6 S. D. 611, 62 N. W. 970, holding wife joining with husband in execution of note and mortgage personally liable for mortgage debt.

Distinguished in *Bank of Commerce v. Baldwin*, 14 Idaho, 75, 17 L.R.A. (N.S.) 676, 93 Pac. 504, holding a married woman was not liable on a promissory note in which she joined as co-maker where it was not for her benefit or that of her separate estate; *Bank of Commerce v. Baldwin*, 14 Idaho, 75, 17 L.R.A. (N.S.) 676, 93 Pac. 504, holding under a statute transferring to a wife the management, control and disposition of her separate property she cannot become the surety or guarantor for the debts of another where not essential to the enjoyment of her separate estate.

4 S. D. 163, DE SMET TWP. v. DOW, 56 N. W. 84.

Right to costs as dependent on jurisdiction.

Cited in *Laney v. Ingalls*, 5 S. D. 183, 58 N. W. 572, holding recovery of costs determined by amount recovered instead of amount claimed; *Grosso v. Lead*, 9 S. D. 165, 68 N. W. 310, sustaining plaintiff's right to costs in action in circuit court for trespassing on real estate where denial of an allegation of complaint would raise a question of title depriving justice of jurisdiction.

4 S. D. 166, BANBURY v. SHERIN, 56 N. W. 67.

General exception to charge.

Cited in *Calkins v. Seabury-Calkins Consol. Min. Co.* 5 S. D. 299, 58 N. W. 797, holding general exception to charge covering two points which fails to direct attention to the one in which error is alleged insufficient for consideration on appeal.

4 S. D. 168, WASHABAUGH v. HALL, 56 N. W. 82.

Validity of oral agreement.

Cited in *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding an oral agreement by the parties to a written contract for sinking an artesian well, with a provision for finishing with piping of a smaller size if necessary, in which case the contractor is to receive a smaller sum, by which the contractor is authorized to use other sizes than either of those originally specified and receive the full price originally agreed on, void.

Evidence to vary the terms of a written instrument.

Cited in *Western Pub. House v. Murdick*, 4 S. D. 207, 21 L.R.A. 671, 56 N. W. 120, holding parol evidence inadmissible that parties apparently liable individually on face of instrument intended to bind themselves as school directors only; *Strunk v. Smith*, 8 S. D. 407, 66 N. W. 926, holding parol evidence inadmissible to show that time was of essence of written contract not making it so in terms; *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536, holding in an action on a contract the terms

of which are unambiguous, evidence is not admissible of a contemporaneous transaction showing the relation of the defendant to be that of an agent of an undisclosed principal.

Distinguished in *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163, holding admissible, parol evidence of condition on which notes in suit were executed and delivered to plaintiff and of its nonfulfilment.

Control of guardian over ward's estate.

Cited in *Easterling v. Horning*, 30 App. D. C. 225, holding a pledge by guardian of the personalty of his ward without an order from the court was void in view of the existence of a statute prohibiting the encumbering or disposal of a ward's estate without such an order.

Cited in note in 89 Am. St. Rep. 312, on common law powers of guardians.

4 S. D. 173, SOUTH BEND TOY MFG. CO. v. PIERRE F. & M. INS. CO. 56 N. W. 98.

What is withdrawal of corporate assets.

Cited in note in 57 Am. St. Rep. 66, on what is a withdrawal of corporate assets.

Priority of creditors over stockholders in the payment of debts.

Cited in *Portland Consol. Min. Co. v. Rossiter*, 16 S. D. 633, 102 Am. St. Rep. 726, 94 N. W. 702, holding the sale on execution of the property of an insolvent corporation for the benefit of directors who were creditors of the corporation was fraudulent as to the other creditors of the corporation.

4 S. D. 184, ROSENBAUM v. FOSS, 56 N. W. 114, Reversed on rehearing in 7 S. D. 83, 63 N. W. 538.

4 S. D. 203, RUDOLPH v. HERMAN, 56 N. W. 122, Rehearing denied in 4 S. D. 430, 57 N. W. 65.

Right to file new or amended appeal bond where former one is deficient.

Distinguished in *Wasem v. Bellach*, 17 S. D. 506, 97 N. W. 718, holding where on appeal an undertaking is deficient the court on motion before a dismissal should have allowed the filing of a new undertaking.

— Termination of jurisdiction of court.

Cited in *Doering v. Jensen*, 16 S. D. 58, 91 N. W. 343, holding a circuit court dismissing an appeal cannot afterwards authorize the filing of an amended appeal bond without vacating the order of dismissal.

Effect of judgment of dismissal.

Cited in *Todd v. Todd*, 7 S. D. 174, 63 N. W. 777, holding that while a judgment of dismissal remains in effect no order can be made in the case except in relation to the vacation of such judgment.

Dak. Rep.—47.

4 S. D. 207, WESTERN PUB. HOUSE v. MURDICK, 21 L.R.A. 671, 56 N. W. 120.

Evidence as to capacity in which party made written instrument.

Cited in *Small v. Elliott*, 12 S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92, holding parol evidence admissible to explain capacity and character in which one signed guaranty on note where letters "Pt." followed signature; *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536, holding evidence of a contemporaneous agreement was not admissible to show that one of the parties to an unambiguous written contract was the agent of an undisclosed principal.

4 S. D. 213, JEWELL NURSERY CO. v. STATE, 56 N. W. 113.

Creation of state indebtedness.

Cited in *State ex rel. University & School lands v. McMillan*, 12 N. D. 280, 96 N. W. 310, holding an act authorizing the issuance of bonds for the purpose of erecting and maintaining buildings for a state normal school was void as creating a state debt in excess of the constitutional limitation set on state indebtedness.

Ratification of agent's act.

Cited in *State v. Hill*, 47 Neb. 456, 66 N. W. 541, holding that the legislature may ratify the unauthorized act of an outgoing state treasurer in turning over to his successor, as money, certificates of deposit issued by a bank.

Nature of state institutions.

Cited in note in 29 L.R.A. 382, on nature of incorporated state institutions.

4 S. D. 219, HODGES v. BIERLEIN, 57 N. W. 748.

Conclusiveness on appeal of grant of new trial.

Cited in *Thompson v. Ulrikson*, 8 S. D. 567, 67 N. W. 626, holding that courts are much more reluctant to reverse an order granting a new trial than one refusing to grant the same.

4 S. D. 221, CAWLEY v. DAY, 56 N. W. 749.

Right to subject wife's property to a mechanic's lien on husband's contract.

Distinguished in *Tom Sweeney Hardware Co. v. Gardner*, 18 S. D. 166, 99 N. W. 1105, where it was held that the interests of a tenant were subject to a mechanic's lien for repairs made at the instance of co-tenant where she knew that they were necessary and assented to their being made.

4 S. D. 226, MERCHANTS' NAT. BANK v. MCKINNEY, 55 N. W. 929.

Failure to find as prejudicial error.

Followed in *Naddy v. Dietze*, 15 S. D. 26, 86 N. W. 753, holding failure of court to make findings on alleged issue not ground for reversal where the additional findings if made must have been adverse to appellant.

Mode of bringing up evidence.

Cited in *Foley-Wadsworth Implement Co. v. Porteous*, 7 S. D. 34, 63 N. W. 155, holding that oral evidence introduced on motion to discharge an attachment can be brought up for review on appeal, only by means of a bill of exceptions settled by the trial judge.

4 S. D. 233, FISH v. WESTOVER, 46 AM. ST. REP. 780, 55 N. W. 961.

Privilege from service of civil process.

Cited in *Murray v. Wilcox*, 122 Iowa, 188, 64 L.R.A. 534, 101 Am. St. Rep. 263, 97 N. W. 1087, holding a person brought into the state on extradition proceedings was after acquittal and while returning home privileged from the service of civil process; *Linton v. Cooper*, 54 Neb. 438, 69 Am. St. Rep. 727, 74 N. W. 842, holding that the privilege or immunity of nonresident suitors and witnesses from service of civil process exists, not only while coming to, returning from, and in actual attendance upon, the court for the purpose of trial, but for a reasonable time after the hearing to prepare for departure.

Cited in note in 76 Am. St. Rep. 536, on exemption from service of civil process.

Distinguished in *Malloy v. Brewer*, 7 S. D. 587, 58 Am. St. Rep. 856, 64 N. W. 1120, holding nonresident attending court within state as a witness though not in obedience to a subpoena not liable to service with persons for commencement of civil action against him.

- Waiver of privilege.

Cited in *Reedy v. Howard*, 11 S. D. 160, 76 N. W. 304, holding objection to service of summons at a time when defendant was privileged not waived by asking for a dismissal of the action as well as quashing of the service.

4 S. D. 237, WRIGHT v. LEE, 55 N. W. 931.

Effect of failure of foreign corporation to comply with statutory requirements.

Cited in *Root v. Sweeney*, 12 S. D. 43, 80 N. W. 149, holding that foreign corporations has a vested right to maintain action on contract entered into while courts of state hold compliance with statutory provisions not essential validity of contract; *American Bldg. & L. Asso. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493, holding that Neb. Sess. Laws 1891, chap. 14, § 17, forbidding the transaction of business by foreign building and loan associations without a certain certificate, were not intended as a prohibition upon the powers of such foreign corporations to make valid contracts; *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736, holding that, in the absence of statutes showing a contrary intent or policy, foreign corporations will be permitted to do business and make contracts, which, under the doctrine of state comity, will be held valid and enforced by the courts; *Foster v. Charles Betcher Lumber Co.* 5 S. D. 57, 23 L.R.A. 490, 49 Am. St. Rep. 859, 58 N. W. 9, holding that the failure of a foreign corporation to

comply with the statute as to doing business within the state cannot be taken advantage of by such corporation to avoid service of summons upon a managing agent within the state; *Blackwell's Durham Tobacco Co. v. American Tobacco Co.* 145 N. C. 367, 59 S. E. 123, denying the right in an action by a foreign corporation to raise the objection that such corporation has not complied with the statutory requirements; *A. Booth & Co. v. Wiegand*, 30 Utah, 135, 10 L.R.A. (N.S.) 693, 83 Pac. 734, holding a foreign corporation by failing to comply with the statutory requirements was not prevented from maintaining an action on a contract entered into with a citizen of the state; *Reorganized Church of Jesus Christ of L. D. S. v. Church of Christ*, 60 Fed. 937, holding that a question as to whether or not the transactions of a foreign religious corporation are in violation of law will not be determined in a collateral proceeding by an individual.

Cited in note in 1 L.R.A. (N.S.) 1042, on validity of contracts of foreign corporations before getting permission to do business.

Disapproved in *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873, denying the right of a foreign corporation doing business in the state without having complied with the constitutional or statutory requirements to maintain an action on contracts entered into during such time.

Validity of assignment for creditors.

Cited in *Bradley v. Bailey*, 95 Iowa, 745, 64 N. W. 758, holding joinder of holders of deeds and mortgages alleged to constitute, in connection with a deed of assignment for creditors, a general assignment, not necessary to an adjudication, in favor of an attaching creditor, that the deed of assignment is fraudulent.

Cited in note in 58 Am. St. Rep. 96, on fraudulent assignments for creditors.

When property is in custody of law.

Cited in *State ex rel. Enderlin State Bank v. Rose*, 4 N. D. 319, 25 L.R.A. 593, 58 N. W. 514, holding property not placed in custody of law so as to prevent attachment by assignment for creditors.

4 S. D. 258, HODGES v. BIERLEIN, 56 N. W. 811.

Discretionary power of court with reference to new trial.

Cited in *Grant v. Grant*, 6 S. D. 147, 60 N. W. 743; *Finch v. Martin*, 13 S. D. 274, 83 N. W. 263,—refusing to disturb discretion of trial court in granting or refusing motion for new trial; *Morrow v. Letcher*, 10 S. D. 33, 71 N. W. 139; *Distad v. Shanklin*, 11 S. D. 1, 75 N. W. 205; *Thomas v. Fullerton*, 13 S. D. 199, 83 N. W. 45; *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589; *Troy Mining Co. v. Thomas*, 15 S. D. 238, 88 N. W. 106; *Jones v. Jones*, 17 S. D. 256, 96 N. W. 88,—refusing to disturb an order granting a new trial in the absence of evidence of a manifest abuse of discretion; *Eashom v. Watertown Hotel Co.* 7 S. D. 74, 63 N. W. 229, holding that discretion of trial court on motion for new trial will not be disturbed on appeal in absence of a manifest abuse of discretion; *Rochford v. Although*, 16 S. D. 628, 94 N. W. 701, holding the granting of a new trial on the grounds that the evidence did not sustain the verdict

is within the sound discretion of the trial court; *Alt v. Chicago & N. W. R. Co.* 5 S. D. 20, 57 N. W. 1126; *Grant v. Grant*, 6 S. D. 147, 60 N. W. 743; *Eashom v. Watertown Hotel Co.* 7 S. D. 74, 63 N. W. 229; *Thompson v. Ulrikson*, 8 S. D. 567, 67 N. W. 626,—holding that stronger case must be made to justify interposition of appellate court where new trial is granted than where it is refused; *Alt v. Chicago & N. W. R. Co.* 5 S. D. 20, 57 N. W. 1126, holding that order granting new trial will not be set aside on appeal though verdict is supported by the evidence and might even have been directed unless granted on the erroneous conception of the law.

4 S. D. 261, STATE v. CHICAGO, M. & ST. P. R. CO. 46 AM. ST. REP. 783, 56 N. W. 894.

Notice of corporate character from name.

Cited in *Rust-Owen Lumber Co. v. Wellman*, 10 S. D. 122, 72 N. W. 89, holding a seller of lumber to the “*Pierre & Ft. Pierre Pontoon Bridge Company*” not chargeable, as matter of law, with notice that the purchaser is a corporation.

Necessity for showing corporate capacity or capacity to sue.

Cited in *Citizens' Bank v. Corkings*, 9 S. D. 614, 62 Am. St. Rep. 891, 70 N. W. 1059, holding the court without jurisdiction to grant an attachment in favor of a bank, where the summons and affidavit for attachment merely denominated plaintiff as a bank without further showing its legal capacity to sue.

Distinguished in *Citizens' Bank v. Corkings*, 10 S. D. 98, 72 N. W. 99, holding that an attachment by a corporation whose name is an appropriate one for a corporation will not be discharged because the summons or affidavit does not show that it is a corporation although the complaint which states such fact was not served until after service of the summons and affidavit.

Sufficiency of allegation of corporate capacity.

Cited in *Fegtly v. Village Blacksmith Min. Co.* 18 Idaho, 536, 111 Pac. 129, holding reference in complaint to defendant as “a corporation” sufficient allegation of corporate capacity to withstand assault of general demurrer.

4 S. D. 265, PLYMOUTH COUNTY BANK v. GILMAN, 46 AM. ST. REP. 786, 56 N. W. 892, Later appeal in 9 S. D. 278, 62 Am. St. Rep. 868, 68 N. W. 735.

Followed without discussion in *Tanderup v. Hansen*, 8 S. D. 365, 66 N. W. 1073.

Admissibility of agents' statements.

Cited in *Wendt v. Chicago, St. P. M. & O. R. Co.* 4 S. D. 476, 57 N. W. 226, holding inadmissible statements made by a section foreman of a railroad the day after a fire occurred, tending to show that it resulted from his negligence; *Roberts v. Minneapolis Threshing Mach. Co.* 8 S. D. 579, 59 Am. St. Rep. 777, 67 N. W. 607, holding statements by secretary

of manufacturer of machinery to agent for sale in certain territory that he is satisfied of agent's right to benefit from certain sales by other agents and will see that half of the commissions thereon are turned over to him inadmissible unless shown to be within scope of his authority.

Cited in note in 131 Am. St. Rep. 332, on declarations and acts of agents.

Conclusiveness of prior decisions on subsequent appeal.

Followed in *Sherman v. Port Huron Engine & Thresher Co.* 13 S. D. 95, 82 N. W. 413; *State v. Ruth*, 14 S. D. 92, 84 N. W. 394,—holding that law announced on first appeal will even though erroneously stated, be adhered to on second appeal in same action; *La Crosee Boot & Shoe Mfg. Co. v. Mons Anderson Co.* 13 S. D. 301, 83 N. W. 331, holding that construction put on mortgage on appeal will be followed on later appeal.

Cited in *Wright v. Lee*, 10 S. D. 263, 72 N. W. 895, holding decision on appeal, law of the case on a second appeal; *Bem v. Shoemaker*, 10 S. D. 453, 74 N. W. 239, holding that point decided on appeal cannot be questioned in later appeal involving any branch of the case; *Parker v. Randolph*, 10 S. D. 402, 73 N. W. 906, holding that questions decided on appeal will not ordinarily be reversed on later appeal where facts are substantially the same; *St. Croix Lumber Co. v. Mitchell*, 4 S. D. 487, 57 N. W. 236, holding that question decided on appeal will not be reversed on a later appeal where the facts are substantially the same; *D. M. Osborne & Co. v. Stringham*, 4 S. D. 593, 57 N. W. 776, holding decision on former appeal on substantially similar state of facts law of the case on later appeal; *Meuer v. Chicago, M. & St. P. R. Co.* 11 S. D. 94, 74 Am. St. Rep. 774, 75 N. W. 823, with the statement that the rule was not questioned.

Cited in note in 34 L.R.A. 344, on conclusiveness of prior decisions on subsequent appeals.

Distinguished in *Peet v. Dakota F. & M. Ins. Co.* 7 S. D. 410, 64 N. W. 206, holding decision on appeal not conclusive on subsequent appeal as to questions not involved in or decided on former appeal.

4 S. D. 271, BUILDING & L. ASSO. v. CHAMBERLAIN, 56 N. W. 897.

Right to set up want of authority in corporation to maintain action.

Cited in *Deitch v. Staub*, 53 C. C. A. 137, 115 Fed. 309, holding that a mortgagor cannot object that the mortgagee is neither a corporation nor a building corporation, under Tenn. Acts 1875, chap. 142, in a suit to enforce the mortgage; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081, holding in an action to restrain a city from enforcing an ordinance limiting the rates the complainant might charge the city was not prevented from defending on the grounds that the complainant's franchise had expired; *Beach v. Co-operative Sav. & L. Asso.* 10 S. D. 549, 74 N. W. 889, holding enforceable, provision in by-laws of loan association for payment of the specific fee by withdrawing members.

4 S. D. 283, RUDOLPH v. HERMAN, 56 N. W. 901.

Who entitled to possession during period of redemption.

Cited in *Siems v. Pierre Sav. Bank*, 7 S. D. 338, 64 N. W. 167, holding mortgage foreclosure sales either by advertisement or action not within Dakota statute entitling purchaser to rents during redemption year; *Stocker v. Puckett*, 17 S. D. 267, 96 N. W. 91, on right of mortgagor to the possession of property during the period of redemption.

Right to receiver pending foreclosure.

Cited in *Roberts v. Parker*, 14 S. D. 323, 85 N. W. 591, holding that a receiver may be appointed in an action to foreclose a mortgage, the conditions of which have not been performed, where it appears that the property is probably insufficient to discharge the mortgage debt.

4 S. D. 297, D. M. OSBORNE & CO. v. MARTIN, 56 N. W. 905.**4 S. D. 305, BARDIN v. BARDIN, 46 AM. ST. REP. 791n, 56 N. W. 1069.**

Right to alimony pendente lite where marriage is denied.

Cited in *Banks v. Banks*, 42 Fla. 362, 29 So. 318, holding no right to alimony pendente lite exists where no proof of marriage is made and the husband denies the fact of marriage.

Cited in notes in 68 Am. St. Rep. 375, on compelling division of property accumulated during void marriage; 25 L.R.A.(N.S.) 390, on alimony pendente lite or counsel fees when marriage is denied.

Sufficiency of proof of marriage relation.

Cited in *Shaw v. Shaw*, 92 Iowa, 722, 61 N. W. 368, holding that a court in making allowance of temporary alimony is not bound by the allegations of the petition and the denials of the answer, if other proofs presented to it make out a fair presumption of the existence of the marriage relation.

4 S. D. 312, BLACK HILLS NAT. BANK v. KELLOGG, 56 N. W. 1071.

Right to impute knowledge of agent to principal.

Cited in notes in 2 L.R.A.(N.S.) 994, as to how far corporation charged with knowledge of managing officer engaged in illegal act; 29 L.R.A.(N.S.) 563, on imputation of knowledge of personally interested officers to bank.

— Of cashier to bank.

Cited in *Orme v. Baker*, 74 Ohio St. 337, 113 Am. St. Rep. 968, 78 N. E. 439, holding the act of a cashier in receiving a deposit with knowledge that the bank at the time was hopelessly insolvent was imputable to the bank so as to make the receipt of the deposit fraudulent on its part.

Distinguished in *National Bank of Commerce v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874, holding bank not chargeable with cashier's knowledge as to defenses to notes transferred to bank by firm of which he is a member where bank acts entirely through discount committee of which cashier is not a member.

Effect of failure to state cause of action against codefendant.

Cited in *Austin, T. & W. Mfg. Co. v. Heiser*, 6 S. D. 429, 61 N. W. 445, holding that the failure of a complaint to state a cause of action against one of two persons named as defendants does not constitute such a variance from the summons as entitles defendant against whom a cause of action is stated to a dismissal.

Right of purchaser to good title.

Cited in *Godfrey v. Rosenthal*, 17 S. D. 452, 97 N. W. 365, holding a purchaser of land is not liable in damages for refusing to accept a title to land on which there is a cloud.

Parol evidence as to writing.

Cited in *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding parol evidence of executory agreement inadmissible to vary terms of written contract.

Distinguished in *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163, holding admissible, parol evidence of condition on which notes in suit were executed and delivered to plaintiff and of its nonfulfilment.

4 S. D. 323, WINONA & ST. P. R. CO. v. WATERTOWN, 56 N. W. 1077.**Condemnation of land already appropriated to a public use.**

Cited in *Postal Teleg. Cable Co. v. Chicago, I. & L. R. Co.* 30 Ind. App. 654, 66 N. E. 919, holding a telegraph company might acquire a right of way over the right of way of a railroad company where such use will not interfere with the use of the railroad; *Northwestern Teleph. Exch. Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 334, 79 N. W. 315, holding that land devoted to a public use may be condemned for another consistent use; *Cincinnati, W. & M. R. Co. v. Anderson*, 139 Ind. 490, 47 Am. St. Rep. 185, 38 N. E. 167, holding that a municipal corporation cannot, without express legislative sanction require that railway terminal structures be removed from their fixed location, for the purpose of using their location as a street extension, upon the showing that they may be rebuilt and conveniently and practicably used for the same purposes on other land belonging to the railroad company near that so occupied; *Oregon Short Line R. Co. v. Postal Teleg. Cable Co.* 49 C. C. A. 663, 111 Fed. 842, holding that property dedicated to a public use cannot be taken for a second public use where the prior use will be destroyed or injured thereby; *Chicago & N. W. R. Co. v. Morrison*, 195 Ill. 271, 63 N. E. 96, holding that it is a question of fact whether the laying out and opening of a public street across the tracks and grounds of a railroad company would so materially interfere with the proper and necessary use of the same by the company as to be inconsistent with it, so that both uses could not coexist; *Re Milwaukee Southern R. Co.* 124 Wis. 490, 102 N. W. 401, denying right of railroad in the acquirement of a right of way to condemn land already opened as a public park where no express grant of such a right.

Cited in notes in 22 L.R.A.(N.S.) 8, 14, 15, 21, 88, 92,—on judicial power over eminent domain; 24 L.R.A.(N.S.) 1214, 1215, 1216, 1219, on power to lay out streets across railway property; 2 L.R.A.(N.S.) 227, on taking railroad lands for drainage district.

4 S. D. 333, GRACE v. BALLOU, 56 N. W. 1075.

Sufficiency of allegations of ownership.

Cited in *Lucas v. Whitacre*, 121 Iowa, 251, 96 N. W. 776, holding an allegation in a petition by widow for confirmation of title in lands of which her husband had been seized that she was the owner negated the loss of her rights by a judicial sale of the lands.

Judicial notice of court proceedings.

Cited in *Withaup v. United States*, 62 C. C. A. 328, 127 Fed. 530, holding a court in the trial of one case will not take judicial notice of proceedings had in other cases even though shown by its own records; *Thayer v. Honeywell*, 7 Kan. App. 548, 51 Pac. 929, holding that in a mortgage foreclosure proceedings a court cannot take judicial notice of an order made in injunction proceedings to restrain the sheriff from selling or disposing of the land.

Cited in note in 11 L.R.A.(N.S.) 616, on judicial notice of court's own records in other actions.

Effect of *lis pendens* as to those not parties.

Cited in *Gilman v. Carpenter*, 22 S. D. 123, 115 N. W. 659, holding one not bound by notice of *lis pendens* or proceeding in action to which neither he nor those through whom he claims were parties.

4 S. D. 337, RANDALL v. BURK TWP. 57 N. W. 4.

Review on appeal of the evidence before the trial court.

Cited in *Farwell v. Sturgis Water Co.* 10 S. D. 421, 73 N. W. 916, holding appellate court required to review evidence where findings of the court have been properly excepted to; *Parkison v. Thompson*, 164 Ind. 609, 73 N. E. 109, 3 A. & E. Ann. Cas. 677, holding a statutory provision that the appellate courts may if required weigh the evidence where cause tried by court does not change the presumption that the judgment of the trial court is correct and will not be reversed unless affirmatively shown not to be sustained by the evidence; *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6, holding where the conflict in the evidence on trial of cause by court is of a trifling nature the appellate court may examine the evidence and arrive at its own conclusions; *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14, holding it is the duty of the appellate court where the evidence properly presented on the question of its sufficiency to review it for the purpose of ascertaining whether there is a clear preponderance against the findings of the trial court.

—Necessity for motion for new trial.

Distinguished in *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466, holding sufficiency of evidence to justify findings not reviewable on appeal from judgment alone; *Northwestern Elevator Co. v. Lee*, 15 S. D. 114, 87 N.

W. 581, holding evidence not reviewable on appeal where no motion for new trial was made.

Presumptions on appeal.

Cited in *Krueger v. Dodge*, 15 S. D. 159, 87 N. W. 965, holding that findings of fact will be presumed on appeal to be sustained by weight of evidence; *Bell v. Thomas*, 7 S. D. 202, 64 N. W. 907, holding that appellant's abstract will be presumed to contain all the pleadings, files and evidence that were deemed essential to a proper determination of the questions presented in the absence of an amended or additional abstract; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47, holding that all the evidence regarded as essential to a determination of the questions presented will be presumed to be taken in the bill of exceptions or statement of the case in absence of additional or amended abstract.

Sufficiency of abstract on appeal.

Cited in *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 634, 67 N. W. 837, holding appellant not required to recite in his abstracts exceptions to evidence reserved during the trial.

Right to disturb the findings of the trial court on appeal.

Cited in *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454, holding that findings of fact by the court will not be disturbed on appeal in case of a substantial conflict in the evidence; *Seim v. Smith*, 13 S. D. 138, 82 N. W. 390, holding that findings by the court amply supported by the evidence will not be disturbed on appeal; *Reagan v. McKibben*, 11 S. D. 270, 76 N. W. 943, 19 Mor. Min. Rep. 556, holding that finding by court in case tried without a jury will be reversed on appeal only when against the clear preponderance of evidence; *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687, holding that special findings of jury in equity case will not be disturbed on appeal unless clear preponderance of evidence is against them; *Webster v. White*, 8 S. D. 479, 66 N. W. 1145; *McKenna v. Whittaker*, 9 S. D. 442, 69 N. W. 587; *Christ v. Garretson State Bank*, 13 S. D. 23, 82 N. W. 89; *Charles Betcher Co. v. Cleveland*, 13 S. D. 347, 83 N. W. 366; *Henderson v. Hughes County*, 13 S. D. 576, 83 N. W. 682; *Littlejohn v. County Line Creamery Co.* 14 S. D. 312, 85 N. W. 588; *Larson v. Dutiel*, 14 S. D. 476, 85 N. W. 1006,—holding that finding by court will not be disturbed on appeal unless clearly against the preponderance of evidence; *International Harvester Co. v. McKeever*, 21 S. D. 91, 109 N. W. 642; *Clark v. Else*, 21 S. D. 112, 110 N. W. 88; *Peever Mercantile Co. v. State Mut. F. Asso.* 23 S. D. 1, 119 N. W. 1108, 19 A. & E. Ann. Cas. 1236; *Empson v. Reliance Gold Min. Co.* 23 S. D. 412, 122 N. W. 346; *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960,—holding that findings of trial court on disputed questions of fact must stand unless evidence clearly preponderates against them; *Dowagiac Mfg. Co. v. Hellekson*, 13 N. D. 257, 100 N. W. 717; *Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641; *Clarke v. Connors*, 18 S. D. 600, 101 N. W. 883; *Morris v. Reigel*, 19 S. D. 26, 101 N. W. 1086; *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207; *Lee v. Dwyer*, 20 S. D. 464, 107 N. W. 674; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918,—holding on appeal it must be made to

appear that the preponderance of evidence is against the findings of the trial court before they will be disturbed; *Dodson v. Crocker*, 16 S. D. 481, 94 N. W. 391; *McGray v. Monarch Elevator Co.* 16 S. D. 109, 91 N. W. 457,—holding the findings of the trial court of the weight of the evidence would not be disturbed where there was not a clear preponderance of evidence against them; *Tom Sweeney Hardware Co. v. Gardner*, 18 S. D. 166, 99 N. W. 1105; *Mead v. Mellette*, 18 S. D. 523, 101 N. W. 355; *Godfrey v. Faust*, 18 S. D. 567, 101 N. W. 718; *Murphy v. Dafoe*, 18 S. D. 42, 99 N. W. 86,—refusing where the evidence was conflicting to disturb the findings of the trial court because unable to say there was a clear preponderance of evidence against it; *Hulst v. Benevolent Hall Asso.* 9 S. D. 144, 68 N. W. 200, holding that finding by referee against substantial compliance with building contract will not be disturbed on appeal unless against the preponderance of evidence; *Wood v. Saginaw Gold Min. & Mill. Co.* 20 S. D. 161, 105 N. W. 101, holding the findings of a referee would not be reversed unless it appeared that there was a clear preponderance of the evidence against them; *First State Bank v. O'Leary*, 13 S. D. 204, 83 N. W. 45, holding that finding that transfer to grantor's wife was not fraudulent will not be disturbed on appeal when not against clear preponderance of evidence; *Godfrey v. Faust*, 20 S. D. 203, 105 N. W. 460, holding the admission of incompetent testimony in a cause tried by the court is not grounds for reversal unless it appears after the elimination of the incompetent evidence that there is a clear preponderance of evidence against the findings; *Randall v. Burk Twp.* 9 S. D. 534, 70 N. W. 837, holding that judgment will not be reversed as unsustained by evidence where prior judgment for other party was reversed as unsustained and the evidence on the second trial was more convincing in favor of successful party; *Williams v. Williams*, 6 S. D. 284, 61 N. W. 38, holding that finding by court will when challenged be reviewed on appeal to ascertain whether there is a preponderance of evidence against it; *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, 58 N. W. 557, holding finding of fact by court not as conclusive as that of a jury; *Re McCellan*, 20 S. D. 498, 107 N. W. 681, affirming that the findings of the trial court on disputed questions of fact are presumptively correct; *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646, on the review on appeal of causes tried without a jury.

Conclusiveness of government surveys.

Cited in *Trinwith v. Smith*, 42 Or. 239, 70 Pac. 816, holding government surveys of public lands conclusive on persons taking with reference thereto; *Tyler v. Haggart*, 19 S. D. 167, 102 N. W. 682, holding the location of the corner as placed at the time of the original survey will when found control although it does not correspond with the field notes made no the original survey.

Establishment of boundary and section lines.

Cited in *Nystrom v. Lee*, 16 N. D. 561, 114 N. W. 478, on the nature of evidence competent to establish boundaries and section lines on a resurvey; *White v. Amrhien*, 14 S. D. 270, 85 N. W. 191, sustaining right to

use field notes giving courses and distances of original survey for locating lost corners in absence of original monuments; *Hanson v. Red Rock Twp.* 4 S. D. 358, 57 N. W. 11, holding it duty of surveyor making survey, to replace lost section of quarter section corners on line coinciding with town line run on street line between township corners in accordance with courses and distances indicated in government field notes.

Presumption as to construction of adopted statute.

Cited in *Kirby v. Ramsey*, 9 S. D. 197, 68 N. W. 328, to point that construction of statute is adopted with it; *Russell v. Whitcomb*, 14 S. D. 426, 85 N. W. 860, holding that construction of adopted statute by courts of own state will be presumed to have been adopted on adopting statute.

4 S. D. 358, HANSON v. RED ROCK TWP. 57 N. W. 11.

Determination of boundary generally.

Cited in *Webster v. White*, 8 S. D. 479, 66 N. W. 1145 (dissenting opinion), in which the majority hold that a county surveyor's location of a section line is only presumptively correct; *Hoffman v. Port Huron*, 102 Mich. 417, 60 N. W. 831, holding that the quantity of land conveyed is a material consideration on the question of boundary, where the starting point of one line is given, and there is material disagreement between surveyors as to the corners.

Cited in note in 129 Am. St. Rep. 1002, 1009, on location of boundaries.

Conflict between monuments and calls.

Cited in *Tyler v. Haggart*, 19 S. D. 167, 102 N. W. 682, holding the location of a mound as placed by the original survey will when found control although it does not correspond with the location as indicated by the field notes.

Cited in notes in 110 Am. St. Rep. 679, on conclusiveness of established boundaries.

Field notes as evidence of the location of monuments and boundary lines.

Cited in *United States v. McKee*, 128 Fed. 1002, holding where the original monuments have disappeared the court may look to the field notes of the original field notes in the determination of boundary lines; *Bock v. Porterfield*, 80 Neb. 523, 114 N. W. 597, on the weight to be given to field notes in the determination of boundaries; *White v. Amrhien*, 14 S. D. 270, 85 N. W. 191, sustaining right to use field notes giving courses and distances of original survey for locating lost corners in absence of original monuments.

— Finding of monuments and stakes at proper place.

Cited in *Nystrom v. Lee*, 16 N. D. 561, 114 N. W. 478, holding evidence of the finding of mounds and stakes at points where they should have been located is admissible to establish the correctness of a survey.

Necessity for offer to prove specific fact.

Cited in *Tootle v. Petrie*, 8 S. D. 19, 65 N. W. 43, holding objection to exclusion of question, relevancy of which was not apparent when asked,

not available unless counsel informed court of the purposes of the evidence or offered to prove specific facts showing relevancy.

4 S. D. 374, POLLOCK v. AIKENS, 57 N. W. 1.

4 S. D. 384, NORWEGIAN PLOW CO. v. BELLON, 57 N. W. 17.
Review on appeal from judgment of the sufficiency of the evidence to sustain the findings of the court.

Cited in *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466, holding sufficiency of evidence to support verdict or finding not reviewable on appeal unless presented to court below by motion for new trial; *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below; *Taylor v. Bank of Volga*, 9 S. D. 572, 70 N. W. 834, holding sufficiency of evidence to justify findings not reviewable on appeal from judgment alone; *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, holding sufficiency of evidence to justify verdict not reviewable on appeal after dismissal of appeal from order denying new trial because taken before such order was entered; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial entered after appeal was taken; *Northwestern Elevator Co. v. Lee*, 13 S. D. 450, 83 N. W. 565, holding sufficiency of evidence to establish plaintiff's ownership of wheat levied on not reviewable on appeal where issue of ownership was not brought to attention of trial court by motion for new trial; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, refusing on an appeal from a judgment to review the sufficiency of the evidence to sustain the findings where the judgment was entered before an order denying a motion for a new trial was made; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding the question of the sufficiency of the evidence to sustain the decision of the trial court can only be considered on an appeal which presents for review an order denying a motion for a new trial.

4 S. D. 387, BENEDICT v. JOHNSON, 57 N. W. 66.

Waiver by appearance of failure to obtain jurisdiction.

Cited in *Reedy v. Howard*, 11 S. D. 160, 76 N. W. 304, holding failure to appear specially on motion to quash service of summons not a general appearance so as to constitute a waiver of defective service; *Miner v. Francis*, 3 N. D. 549, 58 N. W. 343, holding an objection to the jurisdiction of a justice of the peace on the ground of the insufficiency of the summons not waived by appeal to the district court, and subsequently to the supreme court, for the sole purpose of reviewing the sufficiency of the summons; *Chandler v. Hill*, 13 S. D. 176, 82 N. W. 397, holding that an appeal from a justice's judgment will not be dismissed for lack of jurisdiction on the part of the justice, where defendant after denial of the motion to dismiss for lack of jurisdiction appeared generally without

saving any exception to the ruling; *Austin, T. & W. Mfg. Co. v. Heiter*, 6 S. D. 429, 61 N. W. 445, holding provisions of the South Dakota Civil Procedure act as to the change of place of trial inapplicable to actions brought in the county courts.

Cited in note in 16 L.R.A.(N.S.) 178, on contest on merits after special appearance, as waiver of objections to jurisdiction over person.

Distinguished in *Lower v. Wilson*, 9 S. D. 252, 62 Am. St. Rep. 865, 68 N. W. 545, holding defective service of summons and complaint waived by interposing counterclaim on which affirmative judgment is asked.

4 S. D. 394, BATES v. FREMONT, E. & M. VALLEY R. CO. 57 N. W. 72.

When direction of verdict proper.

Cited in *Weller v. Hilderbrandt*, 19 S. D. 45, 101 N. W. 1108, considering the right of the trial court to direct a verdict; *Hormann v. Sherin*, 6 S. D. 82, 60 N. W. 145, holding defendant entitled to direction of verdict where plaintiff fails to offer evidence on material averments essential to recovery; *Merchants Nat. Bank v. Stebbins*, 15 S. D. 280, 89 S. W. 674, holding that to authorize direction of verdict for either party evidence of opposite party must be considered as undisputed and given most favorable construction for him which it will properly bear.

Questions for court or jury.

Cited in *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163, holding it duty of court to declare legal effect of undisputed acts where different conclusions or inferences cannot be drawn therefrom; *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687, holding question one of fact where different minds may reasonably draw different inferences and arrive at different conclusions from undisputed facts; *Harrison v. Chicago, M. & St. P. R. Co.* 6 S. D. 100, 60 N. W. 405, holding that facts should be submitted to jury where they were in dispute or are such that, though undisputed, different impartial minds might fairly draw different conclusions therefrom; *Dischner v. Piqua Mut. Aid & Acci. Asso.* 14 S. D. 436, 85 N. W. 998, holding that question should be submitted to jury though evidence is undisputed where different minds might reasonably draw different conclusions therefrom; *Aultman Engine & Thresher Co. v. Boyd*, 21 S. D. 303, 112 N. W. 151, holding that evidence which is conflicting and from which different minds might draw different conclusions must be submitted to jury.

Distinguished in *Crary v. Chicago, M. & St. P. R. Co.* 18 S. D. 237, 100 N. W. 18, where in an action for the negligent killing of stock a verdict was directed for the defendant because the evidence of defendant that the stock came onto the track from behind an embankment and too close to the approaching train to prevent the accident was not materially contradicted.

— As to contributory negligence at railroad crossing.

Cited in *Brunick v. Ann Arbor R. Co.* 132 Mich. 219, 93 N. W. 433 (dissenting opinion), on whether the driving of stock across a track

without taking any precaution to see whether a train was coming amounted to contributory negligence as a matter of law.

Private action for violation of statute.

Cited in note in 9 L.R.A. (N.S.) 349, on private action for violation of statute not expressly conferring it.

4 S. D. 409, FIRST NAT. BANK v. NORTHWESTERN ELEVATOR CO. 57 N. W. 77.

Effect of failure to record chattel mortgage.

Cited in note in 137 Am. St. Rep. 475, on effect of failure to execute and record chattel mortgage as prescribed by statute.

4 S. D. 414, BOSTWICK v. BENEDICT, 57 N. W. 78.

Validity of execution issued on transcript of judgment.

Cited in *Lovelady v. Burgess*, 32 Or. 418, 52 Pac. 25, holding that neither Hill's Ann. (Or.) Laws, § 269, relative to the docketing of a transcript of judgment in other counties, in order to obtain a lien on defendant's property therein, or § 277, allowing executions to be issued at the same time to different counties authorize the issuance of an execution from a court other than the one in which the judgment was rendered; *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765, holding an execution issued on a filed transcript of a judgment in a different county than where the judgment was rendered is void.

On what judgment is a lien.

Cited in note in 117 Am. St. Rep. 787, on estates and interests to which judgment liens attach.

4 S. D. 420, MEYER v. SCHOOL DIST. NO. 31, 57 N. W. 68.

Denials and issues in pleadings.

Cited in *Scott v. Northwestern Port Huron Co.* 17 N. D. 91, 115 N. W. 192, holding a general denial in the reply of new matter contained in the answer is surplusage and does not affect the issues.

Presumption of validity of school district order.

Cited in *Rockford v. School Dist. No. 11*, 17 S. D. 542, 97 N. W. 747, holding a complaint setting out an order by a school district and a refusal to pay it is not demurrable.

Availability of defense of statute of limitations.

Cited in *State ex rel. Berge v. Patterson*, 18 S. D. 251, 100 N. W. 162, holding a personal immunity afforded by the statute of limitations is not available on demurrer; *Dielmann v. Citizens' Nat. Bank*, 8 S. D. 263, 66 N. W. 311, holding the burden of proving that a note is not barred devolves on the party claiming thereunder, where the statute of limitations is pleaded as a defense, and the note appears on its face to have been barred at the commencement of the suit; *Moore v. Persson*, 21 S. D. 290, 111 N. W. 633, holding that under code objection that complaint for damages by trespassing animals does not show action to have been com-

menced "within 60 days after infliction of damages" must be asserted by answer, not by demurrer.

Effect of officer's certificate.

Cited in *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687, holding an ex parte certificate of an officer evidence only when made so by statute or rule of court; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78, holding certificate of public officer not authorized to make same of no more effect than that of a private person; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78, holding certificates by mayor, auditor and city attorney, stating steps taken preliminary to issuing of bonds and as to city's financial condition, inadmissible to create estoppel against city's asserting that bonds were in excess of debt limitation.

4 S. D. 430, *RUDOLPH v. HERMAN*, 57 N. W. 65.

4 S. D. 433, *GATES v. CHICAGO, M. & ST. P. R. CO.* 57 N. W. 200.

Statutory liability of master.

Cited in *Hardesty v. Largey Lumber Co.* 34 Mont. 151, 86 Pac. 29, holding statutes providing when an employer must indemnify his employees against losses occurring in the business were applicable to an action for personal injuries received in the course of employment.

Presumptions from silence.

Cited in *Enos v. St. Paul Fire & M. Ins. Co.* 4 S. D. 639, 46 Am. St. Rep. 796n, 57 N. W. 919, holding silence of party when damaging facts are called out in evidence not equivalent to admission of their truthfulness; *Grigsby v. Western U. Teleg. Co.* 5 S. D. 561, 58 N. W. 734, holding that local agent's authority to rent building may be treated as proved in action for rent where all circumstances show his authority to make lease and principal made no attempt to disprove such authority.

4 S. D. 439, *KIRBY v. WESTERN U. TELEG. CO.* 30 L.R.A. 612, 57 N. Y. 199, Reversed on rehearing in 7 S. D. 623, 30 L.R.A. 621, 65 N. W. 37.

4 S. D. 441, *GRISWOLD v. SUNDBACK*, 57 N. W. 339.

Right of judgment creditor to attack validity of chattel mortgage.

Distinguished in *Noyes v. Brace*, 8 S. D. 190, 65 N. W. 1071, sustaining right of judgment creditor without obtaining lien by attachment or execution to maintain creditor's bill attacking validity of chattel mortgage of debtor's entire property.

4 S. D. 454, *ELLIS v. WAIT*, 57 N. W. 229, Appeal from taxation of costs in 4 S. D. 504, 57 N. W. 232.

Authority of agent to fill out blanks in instruments.

Cited in *Fargo v. Cravens*, 9 S. D. 646, 70 N. W. 1053, holding party

dealing with agent bound at his peril to ascertain fact and extent of agency; Kirby v. Western Wheeled Scraper Co. 9 S. D. 623, 70 N. W. 1052, holding that an agent authorized to sell goods on commission in a limited territory has no authority to employ counsel to represent his principal in all matters relating to its business.

Cited in note in 88 Am. St. Rep. 781, on liability of principal for unauthorized acts of agent.

Explained in Lund v. Thackery, 18 S. D. 113, 99 N. W. 856, holding an agent not authorized in writing could not insert the name of the grantee in a deed left blank with reference to the name of the grantee by the grantor who had executed and acknowledged it.

4 S. D. 463, KIRBY v. WESTERN U. TELEG. CO. 57 N. W. 202.

Penalty for telegraph company's failure to comply with statute.

Cited in Kirby v. Western U. Teleg. Co. 7 S. D. 623, 30 L.R.A. 621, 65 N. W. 37 (dissenting opinion), holding a telegraph company entitled to refuse to accept a message unless the sender consents to a stipulation requiring any claims for damages or penalties to be presented in writing within sixty days.

Construction of statute.

Cited in Jones v. Fidelity Loan & T. Co. 7 S. D. 122, 63 N. W. 553, holding that statutory provision that mortgagee failing to execute discharge immediately on judgment after satisfaction of mortgage becomes liable to mortgagor for damages and specified forfeiture must receive reasonable construction making it harmonious with other provisions of statute.

— Strict construction.

Cited in Western U. Teleg. Co. v. Coyle, 24 Okla. 740, 104 Pac. 367, holding that statute penal in its nature must be strictly construed; Minnehaha County v. Thorne, 6 S. D. 449, 61 N. W. 688, holding that provisions of statute for actions by county commissioners in name of county for removal of officers must be strictly construed; Butner v. Western U. Teleg. Co. 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087, holding that to recover the penalty provided in Okla. Stat. 1893, chap. 11, §§ 28, 30, relative to the transmission of telegraphic messages, one must state specifically every fact to bring himself strictly within all its terms.

4 S. D. 469, WYMAN v. HALLOCK, 57 N. W. 197.

Right of surety on bond for release of attachment to attack it.

Cited in note in 32 L.R.A.(N.S.) 403, on right of obligor in bond for release of attached property, to attack attachment.

Conclusiveness on surety of order releasing attachment.

Cited in Brady v. Onfroy, 37 Wash. 482, 79 Pac. 1004, holding order purporting to release surety because of irregularity of attachment not res judicata as to sureties' liability without regard to regularity of attachment.

Dak. Rep.—48.

4 S. D. 476, **WENDT v. CHICAGO, ST. P. M. & O. R. CO.** 57 N. W. 226.

Scope of cross-examination.

Cited in *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 64 C. C. A. 180, 129 Fed. 668, on when the cross-examination of witnesses is a right and when it is a privilege; *Harrold v. Oklahoma*, 94 C. C. A. 415, 169 Fed. 47, 17 A. & E. Ann. Cas. 868, on how far the cross examination of witnesses is discretionary with the court; *Connor v. Corson*, 13 S. D. 550, 83 N. W. 588, holding it discretionary with court to limit cross-examination to subject matter of examination in chief and require party wishing to go into other matters to make the witness his own; *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 112, holding that witness called by plaintiff to prove execution of contract in suit cannot be cross examined as to matters therein not touched on in examination in chief; *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847, holding the cross-examination of plaintiff's witness is permissible to the defendant before he has opened his case where it aims simply to disprove the case made by the witness himself; *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479, holding it discretionary with court to exclude on cross-examination of plaintiff in action against father-in-law for slander, question as to pendency of divorce suit between herself and husband at time of trial when not touched on in direct examination; *First Nat. Bank v. Smith*, 8 S. D. 101, 65 N. W. 439, holding that defendant cannot introduce affirmative defense on cross-examination to plaintiff's witness unless he testified in regard thereafter on examination in chief; *Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749, sustaining right to show on cross-examination by plaintiff in action for injury to building by excavation on adjoining land to show that the injury was caused by excavation made for plaintiff's wall instead of by excavation made by defendant as testified to by plaintiff.

Right to have answer of witness stricken out.

Cited in *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847, holding error of court in refusing to strike out evidence was not objectionable on appeal where the objections were not seasonably made; *State v. Hughes*, 8 S. D. 338, 66 N. W. 1076, holding that answer responsive to question not objected to will not ordinarily be stricken out; *Mosteller v. Holborn*, 20 S. D. 545, 108 N. W. 13, on its being too late after question is answered to object thereto; *La Rue v. St. Anthony & D. Elevator Co.* 17 S. D. 91, 95 N. W. 292, holding it was too late after an answer had been made to a question to ask that it be stricken out as it was not the best evidence; *Hebert v. Hebert*, 20 S. D. 87, 104 N. W. 911, holding it was too late after the question was answered to object to the question as being improper rebuttal evidence; *Townsend v. Kennedy*, 6 S. D. 47, 60 N. W. 164, holding that an irresponsive answer to a question asked stands as evidence in the case where no motion was made to strike it out; *Vermillion Artesian Well, Electric Light, Min. I. & Improv. Co. v. Vermillion*, 6 S. D. 466, 61 N. W. 802, holding an objection to a question of law too late when made after a responsive answer has been given under circumstances authorizing

the presumption that the objection was deferred to ascertain whether the response would be favorable; *Spiking v. Consolidated R. & Power Co.* 33 Utah, 313, 93 Pac. 838, holding court did not err in refusing to strike out an answer where it was apparent from the question that the answer would be incompetent.

Admissibility of statements or representations of agent against principal.

Cited in *Estey v. Birnbaum*, 9 S. D. 174, 68 N. W. 290, holding admissions by agent subsequent to performance of authorized act not binding on principal; *Klingaman v. Fish & H. Co.* 19 S. D. 139, 102 N. W. 601, holding in an action for personal injuries statements of defendant's servant after the accident that the obstruction in the street over which the plaintiff fell belonged to the defendant were inadmissible.

Cited in note in 131 Am. St. Rep. 317, on declarations and acts of agents.

4 S. D. 487, ST. CROIX LUMBER CO. v. MITCHELL, 57 N. W. 236.

Decision on appeal as law of the case.

Cited in *Wright v. Lee*, 10 S. D. 263, 72 N. W. 895, holding decision on appeal law of the case on a second appeal; *Dunn v. National Bank of Canton*, 15 S. D. 454, 90 N. W. 1045, holding that decision on former appeal determines law of the case at all subsequent stages where no new issues are introduced; *Tanderup v. Hansen*, 8 S. D. 365, 66 N. W. 1073, holding that points decided on appeal will not be reviewed on later appeal in same case presenting same state of facts; *First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646, holding that in as far as the record of the case on a former appeal in no way differs from that now before the court the questions there decided become the law of the case; *Waterhouse v. Jos. Schlitz Brewing Co.* 16 S. D. 592, 94 N. W. 587, refusing to question the sufficiency of a complaint where in a former appeal it had been held sufficient; *Bem v. Shoemaker*, 10 S. D. 453, 74 N. W. 239, holding decision on appeal from order sustaining demurrer binding on subsequent appeal as to all questions which might have been raised or considered in disposing of the demurrer; *Sherman v. Port Huron Engine & Thresher Co.* 13 S. D. 95, 82 N. W. 413; *State v. Ruth*, 14 S. D. 92, 84 N. W. 394,—holding that law announced on first appeal will even though erroneously stated be adhered to on second appeal in same action; *Meuer v. Chicago, M. & St. P. R. Co.* 11 S. D. 94, 74 Am. St. Rep. 774, 75 N. W. 823, with the statement that the rule is not in question.

Cited in note in 34 L.R.A. 331, on conclusiveness of prior decisions on subsequent appeals.

—On transfer from territorial to state courts.

Cited in *Oklahoma City Electric, Gas & Power Co. v. Baumhoff*, 21 Okla. 503, 96 Pac. 758, affirming the doctrine that the decision of the territorial supreme court on a former appeal becomes the law of the case in all its latter stages in the state supreme court.

4 S. D. 492, RAPP v. GIDDINGS, 57 N. W. 237.**Burden of proof that party knew of recital in instrument.**

Cited in *Newsom v. Woollacott*, 5 Cal. App. 722, 91 Pac. 347, holding where statute made the failure to deny by affidavit the genuineness of an instrument an admission of the same, it was for error for the court to instruct that it must be shown in an action on that the holder was aware at the time of a memorandum thereon.

Error in instruction assuming disputed fact.

Cited in *Grissel v. Bank of Woonsocket*, 12 S. D. 93, 80 N. W. 161, holding an instruction assuming a fact as to which the evidence is sharply conflicting reversible error.

4 S. D. 495, WALTER A. WOOD MOWING & REAPING MACH. CO. v. LEE, 57 N. W. 238.**Execution of chattel mortgage.**

Cited in *J. I. Case Threshing Machine Co. v. Olson*, 10 N. D. 170, 86 N. W. 432, holding witnesses to chattel mortgage unnecessary to validity as between the parties.

Cited in note in 137 Am. Stat. Rep. 476, on effect of failure to execute and record chattel mortgage as prescribed by statute.

— Witnessing.

Cited in *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 212, sustaining right of chattel mortgagees to act as a subscribing witness to execution of mortgage; *Peet v. Dakota F. & M. Ins. Co.* 7 S. D. 410, 64 N. W. 206, upholding chattel mortgage forming part of lease as between parties though not properly witnessed or filed.

Necessity for filing chattel mortgage.

Distinguished in *Campbell v. Richardson*, 6 Okla. 375, 51 Pac. 659, holding that the phrase, "in good faith for value," in Okla. Stat. 1893, § 3270, providing that "a mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and encumbrancers of property in good faith for value," unless it be filed as provided, applies only to subsequent purchasers and encumbrancers, and not to creditors.

Effect of actual notice of chattel mortgage.

Cited in *Strahorn-Hutton-Evans Com. Co. v. Florer*, 7 Okla. 499, 54 Pac. 710, holding that under Okla. Stat. §§ 3275, 3270, which are copied from the Code of South Dakota, a purchaser's actual notice of a chattel mortgage attains the full purpose of the recording act, and said mortgage is valid as to him.

Right to lien for rent.

Cited in *Murphey v. Brown*, 12 Ariz. 268, 100 Pac. 801, holding that landlord who has neither obtained nor sought specific performance to crystalize equitable relation of landlord and tenant into legal relation, can upon showing of facts entitling him thereto, have decree adjudicating existence of lien upon tenant's goods for rent.

Evidence in trover.

Cited in note in 9 N. D. 634, on evidence in action for trover and conversion.

4 S. D. 504, ELLIS v. WAIT, 57 N. W. 232.**Stenographer's fees as costs.**

Cited in Novotny v. Danforth, 9 S. D. 412, 69 N. W. 585, holding that sum actually expended by successful party for stenographer's minutes may be taxed as part of his costs when necessary to proper settlement of assignment of errors and bill of exceptions; Elfiring v. New Birdsall Co. 17 S. D. 350, 96 N. W. 703, holding by reason of change in statute stenographer's fees were not taxable as costs.

4 S. D. 505, UHE v. CHICAGO M. & ST. P. R. CO. 57 N. W. 484.**Necessity for exceptions to instructions.**

Cited in Palmer v. Hurst, 22 S. D. 68, 115 N. W. 516, holding exception to instruction necessary to consideration on appeal of assignment of error with reference thereto; South Dakota C. R. Co. v. Smith, 22 S. D. 210, 116 N. W. 1120, holding instruction purporting to state rights of parties not excepted to will be regarded as law of case on appeal.

Time for taking exception to rulings of court.

Cited in Winn v. Sanborn, 10 S. D. 642, 75 N. W. 201, holding instructions not reviewable on appeal where no exceptions were taken thereafter prior to judgment; Mosteller v. Holborn, 20 S. D. 545, 108 N. W. 13, holding under code exceptions taken after judgment to the giving of instructions came too late; Green v. Hughitt School Twp. 5 S. D. 452, 59 N. W. 224, in which the court states that they did not determine whether an exception to the refusal of an instruction was taken before judgment.

Time for entering judgment for costs.

Distinguished in Hammer v. Downing, 39 Or. 504, 64 Pac. 651, 67 Pac. 17, 990, 67 Pac. 30, holding that a judgment for costs entered before a petition for a rehearing has been filed will not be vacated as premature.

Interest on damages.

Cited in note in 28 L.R.A.(N.S.) 68, on interest on unliquidated damages.

4 S. D. 520, HURON PRINTING & BINDERY CO. v. KITTLESON, 57 N. W. 233.**Imputing knowledge of agent to principal.**

Cited in Lea v. Iron Belt Mercantile Co. 147 Ala. 421, 8 L.R.A.(N.S.) 279, 119 Am. St. Rep. 93, 42 So. 415, holding the knowledge of the manager of a corporation with reference to transactions with another corporation was the knowledge of the corporation where it appeared that the transactions were for the joint benefit of the corporation and himself; Chase v. Redfield Creamery Co. 12 S. D. 529, 81 N. W. 951, hold-

ing corporation chargeable with knowledge of president of agreement by him before organization that it should pay back rent from other corporation in consideration of being permitted to occupy premises previously occupied by latter.

Corporate agent's acts binding on corporation.

Cited in *Dedrick v. Ormsby Land & Mortg. Co.* 12 S. D. 59, 80 N. W. 153, holding corporation knowingly acquiescing in and receiving benefit of contract of its secretary by which it assumed liability for a mortgage debt bound thereby regardless of secretary's authority; *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509, holding that the representation of an officer of a land company, made for the purpose of securing a subscription to its stock, that the land cost the company a certain sum of money, is one of fact,—not of opinion,—and if false and relied on, is sufficient ground for rescinding the contract of subscription as against the company.

— Promoters.

Cited in *Alexander v. Winters*, 23 Nev. 475, 49 Pac. 116, holding that an irrigation corporation which has accepted the benefits of a reasonable agreement between its promoters and the riparian proprietor upon whose lands the reservoir must be located cannot repudiate the burdens of said agreement; *Wall v. Niagara Min. & Smelting Co.* 20 Utah, 474, 59 Pac. 399, holding that when the promoters of a mining and smelting corporation have contracted that, "in consideration of having added to said incorporation certain valuable mining claims," the corporation is to pay a certain portion of the proceeds of a sale of stock up to a certain amount, and the corporation retains the said claims, with the benefits accruing therefrom, for several years, it must pay the price agreed upon.

Implied ratification by corporation.

Cited in *Davis v. Brown County Coal Co.* 21 S. D. 173, 110 N. W. 113, holding that ratification by corporation of unauthorized contract may be implied from acquiescence.

4 S. D. 528, BARBER v. JOHNSON, 57 N. W. 225.

Effect of inadequacy of undertaking on appeal or failure of sureties to justify.

Cited in *McDonald v. Paris*, 9 S. D. 310, 68 N. W. 737, holding notice of justification essential to jurisdiction on appeal from justice's judgment; *Miller v. Lewis*, 17 S. D. 448, 97 N. W. 364, holding an objection that the circuit court was without jurisdiction to hear and determine a cause was well taken where the undertaking on the appeal from the justice to the circuit court made no provision for the payment of costs on appeal; *Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167, dismissing an appeal because of the failure of the sureties to justify.

Distinguished in *Wasem v. Bellach*, 17 S. D. 506, 97 N. W. 718, holding where an undertaking is deficient in that it contains no provision for costs, on a motion before the dismissal of the appeal a new undertaking might be permitted to be filed.

4 S. D. 532, RE SUPREME CT. VACANCY, 57 N. W. 495.

Who can fill vacancy in office.

Distinguished in *State ex rel. Holmes v. Finnerud*, 7 S. D. 237, 64 N. W. 121, holding that a vacancy in the Board of Regents of Education, for filling which for an unexpired term no provision is made, can be filled only by the governor.

4 S. D. 535, STATE v. WILSON, 57 N. W. 338.

Admissibility of opinion as to guilt of accused.

Cited in *State v. Davidson*, 9 S. D. 564, 70 N. W. 879, holding evidence of a statement of a brother-in-law of deceased after investigating the matter that he was convinced that defendant did the killing, inadmissible.

4 S. D. 536, HEBRON v. CHICAGO, M. & ST. P. R. CO. 57 N. W. 494.

Sufficiency of evidence of negligence in killing of stock on track.

Cited in *Harrison v. Chicago, M. & St. P. R. Co.* 6 S. D. 100, 60 N. W. 405, holding that evidence to support finding of negligence in killing stock on track need not be direct and positive but must be such as to justify reasonable men in finding negligence; *Lewis v. Fremont, E. & M. Valley R. Co.* 7 S. D. 183, 63 N. W. 781, holding statutory presumption of negligence from killing of horse by passing train rebutted by undisputed evidence that train could not have been stopped after it had jumped on the tracks; *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, holding prima facie evidence of negligence from killing horse by passing engine overcome by uncontroverted testimony of railroad employees showing that killing was unavoidable; *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029; *Keilbach v. Chicago, M. & St. P. R. Co.* 11 S. D. 468, 78 N. W. 951,—holding a railroad company not liable for the value of a trespassing animal killed on its track where its employees could not, by the exercise of reasonable care in managing a properly equipped train running at a proper rate of speed, have averted the accident after the animal was discovered.

Distinguished in *Sheldon v. Chicago, M. & St. P. R. Co.* 6 S. D. 606, 62 N. W. 955, holding prima facie case of negligence from killing of live stock on track not overcome by proof which is materially contradicted.

4 S. D. 543, STATE v. PALMER, 57 N. W. 490.

Change of trial judge.

Cited in *State v. Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631, holding that absolute duty of trial judge before whom felony case is pending to call in another judge to try case where accused presents affidavit of bias and prejudice of former judge; *Lincoln v. Territory*, 8 Okla. 546, 58 Pac. 730, holding that under Okla. Stat. § 5138, as amended by Okla. Laws 1895, p. 198, providing that "if it be shown to the court by the affidavit of the accused that he cannot have a fair and impartial trial, by reason of the bias and prejudice of the presiding judge, . . . a change of judge shall be ordered," said order must be made upon the

filing a defendant's affidavit, the state being mandatory; *State v. Finder*, 10 S. D. 103, 72 N. W. 97, holding the receipt of the verdict in a criminal case by the judge of a circuit court, after calling in the judge of another circuit to try the case, not reversible error.

Distinguished in *Cox v. United States*, 5 Okla. 701, 50 Pac. 175, holding that under Okla. Stat. 1893, § 5138, as amended by Okla. Laws 1895, p. 198, which provided that "if it be shown to the court by the affidavit of the accused that he cannot have a fair and impartial trial, by reason of the bias and prejudice of the presiding judge, . . . a change of judge shall be ordered," it is not reversible error for a judge to overrule a motion for said change, based upon an affidavit setting forth the statutory ground therefor, but not the facts to support that conclusion.

4 S. D. 548, STATE v. BURCHARD, 57 N. W. 491.

Sufficiency of indictment or information.

Distinguished in *State v. Cambron*, 20 S. D. 282, 105 N. W. 241, holding it was not necessary to jurisdiction in an indictment for keeping a house of ill fame to allege the particular location of the house, it being stated it was in the county.

— For sale of liquor.

Cited in *State v. Williams*, 20 S. D. 492, 107 N. W. 830, on the necessity of the name of the purchaser to the validity of an information for the illegal sale of intoxicating liquors.

Cited in note in 23 L.R.A.(N.S.) 582, as to whether indictment for information for unlawful liquor sale must state purchaser's name.

Distinguished in *State v. Williams*, 11 S. D. 64, 75 N. W. 815, holding that information for selling intoxicating liquors without paying in full for license need not state to whom the liquors were sold; *State v. Schell*, 22 S. D. 340, 117 N. W. 505, holding that indictment for keeping saloon open on Sunday must state day of month and year as well as day of week.

4 S. D. 555, RISDON v. DAVENPORT, 57 N. W. 482.

Denial on information and belief.

Cited in note in 30 L.R.A.(N.S.) 782, on denials upon information and belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge.

Prerequisites to cancelation of entry on public land.

Cited in *Parsons v. Venzke*, 4 N. D. 452, 50 Am. St. Rep. 669, 61 N. W. 1036, holding jurisdiction of commissioner of general land office of proceedings to cancel entry on public land not open to collateral attack for failure to serve summons personally or to make affidavit for publication where defendant appeared generally after overruling of special appearance to object to jurisdiction.

Cited in note in 75 Am. St. Rep. 881, on right of entryman to notice and hearing before cancelation of entry.

4 S. D. 566, GUILD v. FIRST NAT. BANK, 57 N. W. 499.**Rate of interest chargeable.**

Cited in *Daggs v. Phenix Nat. Bank*, 5 Ariz. 409, 53 Pac. 201, holding a national bank might charge any rate of interest agreed upon which was allowable to the state banks; *Rockwell v. Farmers' Nat. Bank*, 4 Colo. App. 562, 36 Pac. 905; *Wolverton v. Exchange Nat. Bank*, 11 Wash. 94, 39 Pac. 247,—holding that where the state or territorial laws establish a legal rate of interest, and also provide that parties may stipulate for any rate of interest, a national banking association has the same privilege as individuals for the recovery of stipulated interest; *Davey v. First Nat. Bank*, 10 S. D. 148, 72 N. W. 83, holding that a written contract for a loan of money at a time when any rate could be agreed on in writing between the parties need not express the rate.

Construction of words in statute.

Cited in *Gist v. Rackliffe-Gibson Constr. Co.* 224 Mo. 369, 123 S. W. 921, holding the word "fix" as used in a statute providing that ordinances shall fix the time within which the work shall be completed after being awarded, meant a rule by which the time was to be determined.

Powers of legislature.

Cited in *Nixon v. Reid*, 8 S. D. 507, 32 L.R.A. 315, 67 N. W. 57, holding the granting of ferry licenses peculiarly within the province of state or territorial legislation.

4 S. D. 584, ROSS v. WAIT, 57 N. W. 497.**4 S. D. 588, WOODWARD v. STARK, 57 N. W. 496.****4 S. D. 593, D. M. OSBORNE & CO. v. STRINGHAM, 57 N. W. 776.****Waiver of conditions of contract.**

Cited in *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, 71 N. E. 897, 2 A. & E. Ann. Cas. 275, holding the issuance of a policy and the retention of the premium by an insurance company amounted to a waiver of a condition against the encumbering of the policy where it had knowledge of the existence of a chattel mortgage on the policy.

Construction of ambiguous terms of a contract.

Cited in *Christian v. First Nat. Bank*, 84 C. C. A. 53, 155 Fed. 705, holding ambiguous terms of a written contract should be construed most strongly against the parties responsible for it.

Law of the case on second appeal.

Cited in *Cornelius v. Ferguson*, 23 S. D. 187, 121 N. W. 91, holding decision on appeal that tax deed is valid, law of case and conclusive as between parties in all subsequent proceedings in action.

Cited in note in 34 L.R.A. 322, on conclusiveness of prior decisions on subsequent appeals.

Parol evidence as to writing.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding contemporaneous contracts admissible to explain contract of guaranty; *Miller v. Way*, 5 S. D. 468, 59 N. E. 467, holding parol evidence admissible as between original parties to show true intent and meaning of persons entering into agreement when something on its face suggests doubt as to parties bound.

Cited in note in 56 Am. St. Rep. 669, on modification of written contract by subsequent parol agreement.

4 S. D. 599, ORMSBY v. CONRAD, 57 N. W. 778.**4 S. D. 604, REILLY v. PHILLIPS, 57 N. W. 780.****Powers coupled with interest.**

Cited in *Frank v. Colonial & U. S. Mortg. Co.* 86 Miss. 103, 70 L.R.A. 135, 38 So. 340, 4 A. & E. Ann. Cas. 54, holding the death of a grantor did not revoke a power of sale vested in a trustee, it being a power coupled with an interest; *Grandin v. Emmons*, 10 N. D. 223, 54 L.R.A. 610, 88 Am. St. Rep. 684, 86 N. W. 723, holding power of sale in mortgage exercisable against minor heirs of mortgagor.

Cited in notes in 92 Am. St. Rep. 576, on sales under powers in mortgages and trust deeds; 70 L.R.A. 135, 139, on power of sale in mortgage or deed of trust as conferring an interest preventing its revocation by death of mortgagor.

Distinguished in *Brown v. Skotland*, 12 N. D. 445, 97 N. W. 543, holding the appointment of an attorney in fact to execute a note and mortgage in case the principal did not do so was revoked by the death of the principal there being no power coupled with an interest.

Necessity for notice of foreclosure proceedings.

Cited in *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345, holding a foreclosure by advertisement was not invalidated because no personal notice given to the mortgagors of his grantees none being required by statute; *Elder v. Horseshoe Min. & Mill. Co.* 9 S. D. 636, 62 Am. St. Rep. 895, 70 N. W. 1060, holding the claims of all parties in a mine cut off by proper service of a notice of forfeiture by one of several owners to his co-owners in case of their failure to pay their shares of the expense of performing the work.

4 S. D. 615, FLETCHER v. ARNETT, 57 N. W. 915.**Divisibility of contract.**

Cited in note in 59 Am. St. Rep. 279, 282, on complete performance as essential to cause of action on entire contract.

Distinguished in *Aultman & T. Co. v. Lawson*, 100 Iowa, 569, 69 N. W. 865, holding that a contract for the sale of a separator and engine is divisible, and the purchaser cannot rescind it in its entirety for a breach of warranty as to the engine alone, where the warranties as to the engine

and the separator are separate, and the contract provides that the warranty as to one shall not apply to the other.

4 S. D. 628, KINGMAN v. O'CALLAGHAN, 57 N. W. 912.

Use of premises as homestead.

Cited in *Brown v. Edmonds*, 9 S. D. 273, 68 N. W. 734, holding the question whether or not realty sought to be subjected to the payment of a judgment was purchased for the purpose of using it as a homestead, a material one.

4 S. D. 639, ENOS v. ST. PAUL F. & M. INS. CO. 46 AM. ST. REP. 796, 57 N. W. 919.

Admissibility of letter in evidence.

Cited in *Armstrong v. Advance Thresher Co.* 5 S. D. 12, 57 N. W. 1131, holding letter received by due course of mail, purporting to be written by managing agent of corporation in reply to letter sent by mail to corporation admissible in evidence.

Waiver of defective proof of loss.

Cited in *Vesey v. Commercial Union Assur. Co.* 18 S. D. 632, 101 N. W. 1074, holding the failure of an insurer to return the proofs of loss or make any objections thereto on the ground that they did not contain matter required by the policy amounted to a waiver of any defects therein.

Competency to testify as to the value of property.

Cited in *Sylvester v. Ammons*, 126 Iowa, 140, 101 N. W. 782, holding the testimony of a person of years of experience in the trade as to his opinion as to what the original cost of goods must have been was competent on the question of the reliability of the costs marked on the goods; *Gleckler v. Slavens*, 5 S. D. 364, 59 N. W. 323, holding witness who has been in cattle business "off and on" for twenty years and for seven or eight previous years has made it his principal business, competent to give opinion as to value of beef cattle; *Johnson v. Gilmore*, 6 S. D. 276, 60 N. W. 1070, holding opinion of general dealer in fat cattle as to value of such cattle prima facie admissible; *Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161, holding attorney of twenty years practice competent to testify as to value of legal services with which he is familiar though performed in adjoining state; *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding insured's opinion as to value of destroyed property admissible where he testifies that he was familiar with stock, and able to recollect and call to mind greater part thereof; *Tucker v. Colonial F. Ins. Co.* 58 W. Va. 30, 51 S. E. 86, holding clerks in a store were competent witnesses on the question of the value of the stock.

Question for jury as to weight of opinion evidence.

Cited in *Bolte v. Equitable F. Asso.* 23 S. D. 240, 121 N. W. 773, holding weight of opinion evidence as to value for jury.

Presumption from failure to produce evidence.

Cited in dissenting opinion in *Western & A. R. Co. v. Morrison*, 102 Ga. 319, 40 L.R.A. 84, 66 Am. St. Rep. 173, 29 S. E. 104, the majority

holding that failure of a defendant to introduce as a witness its own employee who was present in court may be properly commented upon by plaintiff's counsel as a circumstance from which an unfavorable inference may be drawn.

Distinguished in *Rossiter v. Boley*, 13 S. D. 370, 83 N. W. 428, holding an instruction that a party failing to produce evidence in his possession as to the matter in controversy entitles the jury to assume that it would be damaging to him reversible error.

Scope of cross-examination.

Cited in *Connor v. Corson*, 13 S. D. 550, 83 N. W. 588, holding it discretionary with court to limit cross examination to subject matter of examination in chief and require party wishing to go into other matters to make the witness his own.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 5 S. D.

5 S. D. 1, GRANT v. GRANT, 57 N. W. 948.

Order for further alimony.

Cited in *Grant v. Grant*, 5 S. D. 17, 57 N. W. 1130, holding that motion for further alimony made on appeal in a divorce case in which reasonable temporary alimony was ordered by the trial court will be denied where the affidavits leave the court in doubt as to husband's ability to pay further alimony.

Husband's liability for expenses of wife's appeal in divorce suit.

Cited in *Pollock v. Pollock*, 7 S. D. 331, 64 N. W. 165, holding a husband who had obtained a decree dissolving the marriage liable to pay the expenses of the wife's appeal, exclusive of attorney's fees, on a showing that the appeal was taken in good faith, and that she had no means available, and that he was able to pay the same.

Reviewability of divorce decree.

Cited in *Greenleaf v. Greenleaf*, 6 S. D. 348, 61 N. W. 42, holding decision of trial court in divorce suit as to custody, care and education of children and allowance for their support, subject to review on appeal.

5 S. D. 4, HURON v. CARTER, 57 N. W. 947.

Nature of action to recover penalty under municipal ordinance.

Followed in *Yankton v. Dougless*, 8 S. D. 590, 67 N. W. 630, holding the rule as to costs on appeal in criminal cases in which the state is a party applicable on appeal from a conviction of a misdemeanor in a prosecution in which a city is a party; *Lead v. Klatt*, 11 S. D. 109, 75 N. W. 896, holding the rules of criminal pleading inapplicable in an action by a city for violation of a health ordinance; *Lead v. Klatt*, 13 S. D. 140, 82 N. W. 391, holding a prosecution for violating a city ordinance as to nuisances a civil

action, in which a judgment will not be arrested where the complaint states facts sufficient to show such violation; *Litchville v. Hanson*, 19 N. D. 672, 124 N. W. 1119, holding that city or village ordinances, though penal in character, are not criminal laws.

Cited in *Peterson v. State*, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306, holding that an action to recover a penalty for the commission of an act forbidden by a municipal ordinance but not criminal by the laws of the state, is a civil action requiring only a preponderance of evidence.

Cited in note in 4 L.R.A.(N.S.) 782, on character of proceeding for violation of ordinance as civil or criminal.

— **Right to appeal.**

Distinguished in *Mannie v. Hatfield*, 22 S. D. 475, 118 N. W. 817, holding that appeal lies from conviction by jury of violating ordinance of Huron, in keeping house of ill fame.

— **Modes of review.**

Followed in *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156, holding appeal and not writ of error proper mode of review in action for penalty under criminal ordinance where the act is not made criminal by general law of the state.

Cited in *Madison v. Horner*, 15 S. D. 359, 89 N. W. 474, holding that judgments rendered for violation of city ordinances in name of the city must in all cases be brought to the supreme court by appeal and not by writ of error.

Right of accused to jury trial.

Cited in *Belatti v. Pierce*, 8 S. D. 456, 66 N. W. 1088, holding void, provision in state charter for trial of violation of city ordinances by police justice without jury except where appointment is imprisonment exceeding ten days and denying appeal unless judgment is for imprisonment exceeding ten days or fine exceeding \$20.00.

Number and agreement of jurors.

Cited in note in 43 L.R.A. 67, on number and agreement of jurors necessary to constitute a valid verdict.

5 S. D. 9, McCORMICK HARVESTING MACH. CO. v. WATSON, 51 N. W. 945.

Implied warranties of sale.

Cited in *Issenhuth v. Riegel*, 20 S. D. 322, 106 N. W. 58, holding that in a sale of shares of stock there is no implied warranty that the property of the corporation should exceed the par value of the stock or that the inventory which was taken was correct.

5 S. D. 12, ARMSTRONG v. ADVANCE THRESHER CO. 57 N. W. 1121.

Admissibility of letters in evidence without proof of authority.

Cited in *Raleigh & G. R. Co. v. Pullman Co.* 122 Ga. 700, 50 S. E. 1008, holding that a letter written in behalf of a corporation and signed by a

person admitted to be its manager is admissible in evidence to bind the corporation by the contract contained therein without showing that the person had authority to bind the corporation; *St. Louis S. R. Co. v. McIntyre*, 36 Tex. Civ. App. 399, 82 S. W. 346, holding that a letter written on the letter heads of the defendant corporation and signed by its managing agent as such are admissible in evidence without showing that they came from a person connected with the defendant company in the alleged capacity.

Admissibility of answer without proof of authorship.

Cited in *City Nat. Bank v. Jordan*, 139 Iowa, 499, 117 N. W. 758, holding that letters received through the mails purporting to be signed by the party to the suit and in relation to matters in controversy, and in answer to inquiries made, are admissible without further proof of their authorship; *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084, holding by analogy that where an answer was received by telegraph to a telegram sent to the party purporting to answer, the answer was admissible in evidence where the telegraph company had destroyed the original telegrams, without showing that the party had sent the telegrams; *Edwards Bros. v. Erwin*, 148 N. C. 429, 62 S. E. 545, 16 A. & E. Ann. Cas. 393, holding that telegrams sent in answer to other telegrams are admissible in evidence without proof that they were sent by the original addressee; *Western Twine Co. v. Wright*, 11 S. D. 521, 44 L.R.A. 438, 78 N. W. 942, holding telegram received from telegraph operator purporting to be in reply to one previously deposited with operator by recipient admissible against person purporting to have sent it.

Cited in note in 17 L.R.A.(N.S.) 230, on necessity for proof of genuineness of reply letter.

5 S. D. 17, GRANT v. GRANT, 57 N. W. 1130.

Allowance of alimony by supreme court.

Cited in *Mosher v. Mosher*, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99, holding that on appeal the supreme court has jurisdiction to consider and allow in proper cases, applications for temporary alimony in actions for divorce; *Duxstad v. Duxstad*, 16 Wyo. 396, 94 Pac. 463, 15 A. & E. Ann. Cas. 228, holding that alimony and suit money, pending appeal, may be granted by appellate court.

Cited in note in 27 L.R.A.(N.S.) 715, on jurisdiction to award temporary alimony, suit money, and counsel fees pending appeal.

5 S. D. 20, ALT v. CHICAGO & N. W. R. Co. 57 N. W. 1126.

Review of order granting new trial.

Cited in *Grant v. Grant*, 6 S. D. 147, 60 N. W. 743; *Finch v. Martin*, 13 S. D. 274, 83 N. W. 263,—refusing to disturb discretion of trial court in granting or refusing motion for new trial; *Eashom v. Watertown Hotel Co.* 7 S. D. 74, 63 N. W. 229, holding that discretion of trial court on motion for new trial will not be disturbed on appeal in absence of a manifest abuse of discretion; *Gotzian v. McCollum*, 8 S. D. 186, 65 N. W. 1068, holding

decision of court on application for continuance or new trial on ground of surprise reviewable only in case of manifest abuse of discretion; *State v. Crowley*, 20 S. D. 611, 108 N. W. 491; *Jones v. Jones*, 17 S. D. 256, 96 N. W. 88,—holding order granting a new trial is within discretion of trial court and will not be disturbed unless there has been an abuse of such discretion; *Gotzian v. McCollum*, 8 S. D. 186, 65 N. W. 1068; *Thompson v. Ulrikson*, 8 S. D. 567, 67 N. W. 626; *Morrow v. Letcher*, 10 S. D. 33, 71 N. W. 139,—holding that stronger case must be made to justify interposition of appellate court where new trial is granted than where it is refused.

—For insufficiency of evidence.

Cited in *Morrow v. Letcher*, 10 S. D. 33, 71 N. W. 139; *Distad v. Shanklin*, 11 S. D. 1, 75 N. W. 205; *Thomas v. Fullerton*, 13 S. D. 199, 83 N. W. 45; *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589; *Troy Mining Co. v. Thomas*, 15 S. D. 238, 88 N. W. 106,—holding that order granting new trial for the insufficiency of the evidence will be disturbed only for the manifest abuse of discretion; *Rochford v. Albaugh*, 16 S. D. 628, 94 N. W. 701, holding that the supreme court will not reverse an order of the trial court granting a new trial because of the insufficiency of the evidence to support the verdict unless there has been an abuse of discretion.

Sufficiency of motion to direct verdict.

Cited in *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747, holding a motion to direct a verdict for defendant because the evidence is “insufficient to show or constitute a cause of action” insufficient.

5 S. D. 31, AYERS, W. & R. CO. v. SUNDBACK, 58 N. W. 4, Re-hearing denied in 5 S. D. 362, 58 N. W. 929.

Conferring jurisdiction by consent.

Cited in *Bright v. Juhl*, 16 S. D. 440, 93 N. W. 648, holding that the county court had no jurisdiction to grant a new trial, such jurisdiction could not be conferred by stipulation of counsel.

Mortgages covering after acquired property.

Cited in *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872, holding that where the intention of the parties appears to be that the mortgage should cover after acquired property, such intention will be given effect.

Validity of provision for mortgagor keeping stock of goods up to present value.

Cited in *Jewett v. Sundback*, 5 S. D. 111, 58 N. W. 20, holding mortgage on stock of goods not presumptively fraudulent because of provision for keeping it up to its value at time mortgage was given.

Validation of invalid chattel mortgage by taking possession.

Distinguished in *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872, holding that the fact that the mortgagee takes possession of the mortgaged property and forecloses the mortgage which is invalid as to creditors, does not affect the rights of creditors.

5 S. D. 39, STATE v. SIOUX FALLS BREWING CO. 26 L.R.A. 138, 58 N. W. 1, Rehearing denied in 5 S. D. 360, 26 L.R.A. 141, 58 N. W. 928.

Beer as an intoxicating liquor.

Cited in *Cassens v. State*, 48 Tex. Crim. Rep. 186, 88 S. W. 229, holding that to support a conviction for selling intoxicating liquor, there must be proof that the beer sold was an intoxicating beverage; *Potts v. State*, 50 Tex. Crim. Rep. 368, 7 L.R.A.(N.S.) 194, 123 Am. St. Rep. 847, 97 S. W. 477, holding that a conviction for violation of the local option law could not be sustained without proof that the beer sold was intoxicating.

Cited in note in 25 L.R.A.(N.S.) 447, on proof of sale of "beer" as sustaining conviction under statutes prohibiting sale of vinous, malt, fermented, or intoxicating liquors.

5 S. D. 49, FALL RIVER COUNTY v. POWELL, 58 N. W. 7.

Selection of county seat.

Cited in *Grove v. Haskell*, 24 Okla. 707, 104 Pac. 56, holding place selected as county seat of Dover county "place" within meaning of constitution; *Coleman v. People ex rel. Donelson*, 7 Colo. App. 243, 42 Pac. 1041, holding that those who voted for "International Camp" as a county seat of a sparsely settled county voted for the same place as those who voted for "Hahn's Beak" and placed that name on their ballots, as that was the purpose and intention of the voters, the two places being within 3 miles of each other, at the base of a well-known mountain.

5 S. D. 53, CLEVELAND v. EVANS, 58 N. W. 8.

5 S. D. 57, FOSTER v. CHARLES BETCHER LUMBER CO. 23 L.R.A. 490, 49 AM. ST. REP. 859, 58 N. W. 9.

Actions against foreign corporation.

Cited in *Central R. Co. v. Eichberg*, 107 Md. 363, 14 L.R.A.(N.S.) 389, 68 Atl. 690, on the right to sue a corporation in personam outside of the boundaries of the state in which it was created.

Cited in note in 85 Am. St. Rep. 930, 931, 932, 937, on jurisdiction of foreign corporations.

— Upon whom process may be served.

Cited in *Ord Hardware Co. v. Case Threshing Mach. Co.* 77 Neb. 847, 8 L.R.A.(N.S.) 770, 110 N. W. 551, holding that service upon an agent who is required to exercise judgment in the discharge of his duties and who has control of the business of the principal within the district assigned to him is a managing agent for the purpose of service of process upon a foreign corporation; *Brown v. Chicago, M. & St. P. R. Co.* 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, holding that a station agent of a foreign railroad corporation is a managing agent within the meaning of the statute providing for the service of process upon foreign corporations; *Whitehurst v. Kerr*, 163 N. C. 76, 68 S. E. 913, holding one who has charge of funds of foreign construction company "local agent" upon whom process on foreign Dak. Rep.—49.

corporation may be served; *Mars v. Oro Fino Min. Co.* 7 S. D. 605, 65 N. W. 19, holding that "managing agent" of foreign corporation on whom service of summons may be made must be one having charge of and managing ordinary business corporation within particular locality and possessing general powers calling for exercise of judgment and discretion; *Denver & R. G. R. Co.* 49 Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738, holding that a managing agent in charge of the business office of a railroad company of another state for the purpose of soliciting business in transporting passengers and freight over its road situated in another state is a "managing or business agent," within the meaning of Cal Code Civ. Proc. § 411, authorizing the service of summons on such agents of foreign corporations.

Annotation cited in *Modern Woodman v. Noyes*, 158 Ind. 503, 64 N. E. 21, holding that the service upon the consul and clerk of a local camp was sufficient where the association had not filed its consent that service might be made by service of process upon the state auditor.

Cited in note in 4 L.R.A.(N.S.) 461, 462, as to who is managing agent of foreign corporation for purposes of service of process.

Distinguished in *Lubrano v. Imperial Council of the O. of U. F.* 20 R. I. 27, 38 L.R.A. 546, 37 Atl. 345, holding that jurisdiction of a foreign insurance company doing business in the state without complying with the statute which requires it before doing business to appoint the insurance commissioner as attorney on whom process may be served cannot be acquired by service on such commissioner, where the facts appear from the plaintiff's own showing and the defendant has not appeared to plead to the jurisdiction, and is not shown to have received notice, either actual or constructive.

Defense that foreign corporation has not complied with statutes.

Cited in *Barricklow v. Stewart*, 31 Ind. App. 446, 68 N. E. 316, holding that a foreign corporation cannot do business within the state without complying with the provisions of the statutes and then escape liability upon its contract.

5 S. D. 72, ORMSBY v. PHENIX INS. CO. 58 N. W. 301.

Rights of mortgagee under policy payable to him as his interest may appear.

Cited in *Collinsville Sav. Soc. v. Boston Ins. Co.* 77 Conn. 676, 69 L.R.A. 924, 60 Atl. 647, on the rights of a mortgagee under an insurance policy indorsed "Loss if any payable to C. as mortgagee as his mortgage interest may appear;" *Syndicate Ins. Co. v. Bohn*, 27 L.R.A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165, holding that a mortgage clause declaring that the mortgagee's interest shall not be invalidated by any act or neglect of the mortgagor, or by any change in title or possession without the mortgagee's knowledge, makes a new contract between the insurer and mortgagee which is unaffected by false statements of the mortgagor as to his title or ownership of the property, of which the mortgagee is ignorant, whereby the insurance never became valid as to the mortgagor.

Cited in notes in 135 Am. St. Rep. 754, 759, on fire insurance as security for mortgagee or other lien holder; 18 L.R.A.(N.S.) 205, on effect of breach of insurance policy by mortgagor on rights of mortgagee.

Distinguished in *Baldwin v. German Ins. Co.* 105 Iowa, 379, 75 N. W. 326, holding that attaching a clause for the benefit of a mortgagee to a void policy of fire insurance, does not revive or create a valid contract, when the new contract is made without consideration.

5 S. D. 84, BILLINGHURST v. SPINK COUNTY, 58 N. W. 272.

Property subject to taxation.

Cited in *Schmidt v. Failey*, 148 Ind. 150, 37 L.R.A. 442, 47 N. E. 326, holding that a claim of nonresidents to distributive shares of the property on final settlement will not prevent the taxation of funds in the hands of a receiver of a mutual benefit assessment society organized under the laws of the state as property within the jurisdiction of the state, under *Burns's* (Ind.) Rev. Stat. 1894, § 8410, although the funds had been collected in other states in which the company also did business, and turned over by orders of the courts to the Indiana receiver, with the understanding that all holders of certificates in the different states should be ratably paid on final settlement; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110, holding that moneys collected as interest and principal of notes, mortgages, and other securities kept within the state for use or reinvestment, though the owner is domiciled in another state, and the moneys are deposited in a bank to his credit, are subject to taxation under La. Acts 1890, chap. 1061, providing for taxation of credits arising from business done in the state, at the business domicil of a nonresident owner, his agent, or representative; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576, holding that a state may tax any moneys and credits owned by nonresidents, the custody of which has really been intrusted by their owners to resident agents.

Situs of property for taxation.

Cited in notes in 62 Am. St. Rep. 464, on situs of personal property for purposes of taxation; 2 L.R.A.(N.S.) 638, on situs of debt for taxation, apart from creditor's domicil; 44 L. ed. U. S. 175, on situs for taxation of debts evidenced by notes or mortgages held by agent residing in different state from principal.

Necessity for notice of tax.

Cited in *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447, holding the provision for notice to property owners before a special tax becomes a fixed charge, sufficient where the duty of providing by ordinance for such notice is imposed by necessary implication and as an incident to lawful procedure.

Curing invalid tax.

Cited in *Evans v. Fall River County*, 9 S. D. 130, 68 N. W. 195, holding that a statute attempting to cure the invalidity of previous tax assessments resulting from the failure of the board of equalization to meet at the time

and place and in the manner required by law is a taking of property without due process of law.

Right to replace property on assessment list.

Cited in *Grigsby v. Minnehaha County*, 6 S. D. 492, 62 N. W. 105, sustaining right of county board of equalization without referring to city assessor for valuation to replace on assessment list unexempt property stricken without authority by such board of equalization from assessment rolls as returned by such assessor.

5 S. D. 99, NATIONAL BANK v. TAYLOR, 58 N. W. 297.

Right to rely on representations made.

Cited in *Roberts v. Holliday*, 10 S. D. 576, 74 N. W. 1034, sustaining right of purchaser of land to rely on representations of owner's agent as to boundaries; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47, sustaining partner's right to recover from copartner knowingly procuring money from him by misrepresenting the price of property to purchase which the firm formed though inquiry might have shown falsity of representations; *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032, sustaining right of one with slight knowledge of character and condition of property and with no means of acquiring further information, to rely upon representations of one having full knowledge.

Cited in note in 37 L.R.A. 594, on right to rely upon representations made to effect contract as a basis for a charge of fraud.

Negligence as defense to fraud.

Cited in *Calkins v. Worth*, 117 Ill. App. 478, holding that the agent who has defrauded his principal can not rely upon the negligence of the principal as a defense to his fraud.

Imputing president's knowledge to corporation.

Cited in *Chase v. Redfield Creamery Co.* 12 S. D. 529, 81 N. W. 951, holding a corporation chargeable with knowledge possessed by its president of an agreement made by him before the corporation was organized.

Rights of transferee of person guilty of fraud.

Cited in *Taylor v. National Bank*, 6 S. D. 511, 62 N. W. 99, sustaining right of one induced to purchase bank stock from president by false representations as to value to recover purchase money notes from the bank to which they were made payable, and which with knowledge of the fraud accepted them in exchange for notes of president.

5 S. D. 111, JEWETT v. SUNDBACK, 58 N. W. 20.

Presumptions as to jurisdiction and proceedings of inferior courts.

Cited in *Kuker v. Beindorff*, 63 Neb. 91, 88 N. W. 190, holding that the jurisdiction of inferior courts will not be presumed but where the jurisdiction is once shown as attached, the presumption is that it continues unless the contrary is shown; *Rhyne v. Manchester Assur. Co.* 14 Okla. 555, 78 Pac. 558, holding that the court of the justice of the peace being an inferior court, no presumption will be indulged in to sustain its jurisdiction and the records must show affirmatively the jurisdiction, but where

jurisdiction has attached, the same presumptions in favor of the regularity of the proceedings as indulged in as in case of superior courts; *State v. Carlisle*, 22 S. D. 529, 118 N. W. 1033, holding that justice of peace will be presumed to have proceeded in statutory manner.

Duty of sheriff in foreclosing mortgage, after issuance of execution.

Distinguished in *Blumaur-Frank Drug Co. v. Branstetter*, 4 Idaho, 557, 95 Am. St. Rep. 151, 43 Pac. 575, holding that the affidavit and notice for the foreclosure of a chattel mortgage under the statute are process so as to protect the sheriff in the execution thereof, and the issuance of an execution against the property does not affect his duty to the mortgagee.

Necessity for filing chattel mortgage.

Cited in *Campbell v. Richardson*, 6 Okla. 375, 51 Pac. 659, holding that under Okla. Stat. 1893, § 3270 (adopted from the South Dakota Code), providing that "a mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and encumbrancers of property in good faith for value," unless filed, a chattel mortgage not filed is void as to both antecedent and subsequent creditors.

Necessity for tender of amount by one levying on mortgaged property.

Cited in *Joas v. Jordan*, 21 S. D. 379, 113 N. W. 73, holding that property conveyed by trust deed could not be levied upon without payment of or tender of amount due creditors assenting to deed.

Right of attaching creditor to have chattel mortgage canceled.

Cited in *Clark v. Patton*, 92 Iowa, 247, 60 N. W. 533, holding that the creditor of a mortgagor, who questions the validity of the mortgage, may make a levy of attachment upon the mortgaged property and then proceed to cancel the mortgage and have his levy established as a lien upon the property, without complying with Iowa Acts, 21st Gen. Assem. chap. 117, containing provisions similar to Dak. Comp. Laws, § 4389.

Parol evidence as to conditions.

Distinguished in *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163, holding admissible, parol evidence of condition of which notes in suit were executed and delivered to plaintiff and of its nonfulfilment.

Collateral attack on judgment.

Cited in *Green v. Sabin*, 12 S. D. 496, 81 N. W. 904, holding a judgment of a circuit court on appeal, on questions of both law and fact, from an order of the county court allowing a special administrator's final report, not subject to collateral attack because it remanded the cause to the county court, with special directions as to the allowances to be made.

5 S. D. 125, SANDWICH MFG. CO. v. MAX, 24 L.R.A. 524, 58 N. W. 14.

Followed without discussion in *Jewett v. Downs*, 6 S. D. 319, 60 N. W. 76; *Sprague v. Ryan*, 11 S. D. 54, 75 N. W. 390.

Preference in fraud of creditors.

Cited in *Cutter v. Pollock*, 4 N. D. 205, 25 L.R.A. 377, 50 Am. St. Rep. 644, 59 N. W. 1062, holding that an insolvent debtor may prefer one creditor as against another except where he makes an assignment for benefit of creditors; *Adams & W. Co. v. Deyette*, 8 S. D. 119, 31 L.R.A. 497, 59 Am. St. Rep. 751, 65 N. W. 471 (dissenting opinion), the majority holding that an insolvent corporation has no authority to prefer creditors; *Jones v. Cullen*, 100 Tenn. 1, 42 S. W. 873, holding that a trust deed executed in good faith to secure a bona fide indebtedness, although made in contemplation of a general assignment which is made within three months thereafter, is not invalidated by such assignment, where the same is void; *Pollock v. Sykes*, 74 Miss. 700, 21 So. 780, holding that when an insolvent debtor gives a deed of trust to a few of his debtors, and subsequently resolves upon and makes a general assignment, the two instruments are distinct, and the former is not within a prohibition of preferences in such assignments; *Wylly-Gabbett Co. v. Williams*, 53 Fla. 872, 42 So. 910, holding that a mortgage upon the greater part of the property of an insolvent debtor to secure a preference in favor of certain creditors is not void if intended only as a security for the debt and with no intention of releasing control of the property or the ownership thereof to the creditors; *Gardner v. Haines*, 19 S. D. 514, 104 N. W. 244, holding that the creation of a corporation and the transfer of all the property of an insolvent debtor to it, and the issuance of stock in payment therefor, which stock was transferred to a creditor in payment of his debt, was not void as a preference where there was no intent to defraud; *Joas v. Jordan*, 21 S. D. 379, 113 N. W. 73, holding preference of creditors who assented to deed of trust, valid, where such deed did not constitute a general assignment; *Hall v. Feeney*, 22 S. D. 541, 21 L.R.A.(N.S.) 513, 118 N. W. 1038, holding debtor's transfer of property to son, without consideration and authorizing him to pay such creditors as he deemed proper, invalid.

Cited in note in 58 Am. St. Rep. 87, on fraudulent assignments for creditors.

Distinguished in *Hall v. Feeney*, 22 S. D. 541, 21 L.R.A.(N.S.) 513, 118 N. W. 1038, holding that a transfer of all the property of an insolvent debtor to a third person to be sold and he to pay such creditors as he saw fit, was invalid as defrauding the other creditors.

What is an assignment for creditors.

Cited in *Cutter v. Pollock*, 4 N. D. 205, 25 L.R.A. 377, 50 Am. St. Rep. 644, 59 N. W. 1062, holding chattel mortgages of substantially all of mortgagor's property to secure portion only of his debts, not assignment for creditors; *Smith v. Baker*, 5 Okla. 326, 49 Pac. 61, holding mortgages of all insolvent's personalty executed contemporaneously, in good faith, in payment of bona fide debts to portion only of creditors not a voluntary assignment for creditors; *Noyes v. Brace*, 9 S. D. 603, 70 N. W. 846, holding evidence that defendant possessed no property subject to levy, other than that included in a mortgage attacked as fraudulent by plaintiff, who was a judgment creditor of the mortgagor, inadmissible to show that the mortgage should be regarded as a general assignment.

Cited in note in 37 L.R.A. 341, as to whether preference by mortgage or sale is an assignment for creditors.

5 S. D. 143, NATIONAL CASH REGISTER CO. v. PFISTER, 58 N. W. 270.

Specifications as to insufficiency of evidence to support verdict.

Cited in *Gagnier v. Fargo*, 12 N. D. 219, 96 N. W. 841, holding that the insufficiency of the evidence to support the verdict will not be considered where the particulars wherein such evidence is insufficient are not specified; *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687, holding that the trial court may properly deny a motion for a new trial asked for on the ground of the insufficiency of evidence and errors of law at the trial, where such insufficiency and errors are not set out in the notice of intention.

Parol evidence as to intent.

Cited in *Miller v. Way*, 5 S. D. 468, 59 N. W. 467, holding parol evidence admissible as between original parties to show true intent and meaning of persons entering into agreement when something on its face suggests doubt as to parties bound.

5 S. D. 148, LEWIS v. ST. PAUL M. & M. R. CO. 58 N. W. 580.

Parol evidence as to writing.

Cited in *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding parol evidence of executory agreement inadmissible to vary terms of written contract; *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536, holding that evidence of a contemporaneous transaction between the parties for the purposes of showing that they acted as agents for an undisclosed principal, is inadmissible where the unambiguous terms of the written contract do not indicate such relationship.

5 S. D. 164, TENDERUP v. HANSEN, 58 N. W. 578.

5 S. D. 169, GOLDBERG v. KIDD, 58 N. W. 574.

Equitable defenses in actions at law.

Cited in *Smith v. Love*, 49 Fla. 230, 38 So. 376, holding that a plea upon equitable grounds in an action of ejectment as provided for by statute, does not entitle the defendant if sustained, to the same full relief as he would be entitled to in an equitable action, but defeats the claim of the plaintiff to the possession; *Gorder v. Hilliboe*, 17 N. D. 281, 115 N. W. 843, holding that in an action for the conversion of grain it is property to set up the equitable defense that the grain was mortgaged to the defendant and that the mortgage by mistake was made to cover the crop of another year.

Patentee of public lands as trustee for occupant.

Cited in *Smith v. Love*, 49 Fla. 230, 38 So. 376, holding that where by fraud the plaintiff secured the land homesteaded by the defendant by fraudulently securing the issuance of the patent to him, and telling the

defendant that everything was all right, the plaintiff will be deemed in equity to hold the land in trust for the defendant.

— Entry of townsite.

Cited in *Scully v. Squier*, 13 Idaho, 417, 90 Pac. 573, 30 L.R.A.(N.S.) 183, holding that where the mayor entered the townsite of the city in trust for the benefit of the occupants, he held the title in trust for such occupants and he could not by his acts affect their title.

5 S. D. 183, LANEY v. INGALLS, 58 N. W. 572.

Right to set up counterclaim for conversion of mortgaged chattels.

Cited in *McHard v. Williams*, 8 S. D. 381, 59 Am. St. Rep. 766, 66 N. W. 930, holding cause of action for wrongful conversion of chattels under color of foreclosure of mortgage fraudulently altered, available as counterclaim in action to foreclose real estate mortgage given to secure same debt; *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 14, 133 Am. St. Rep. 920, 117 N. W. 372, holding counterclaim for wrongful conversion of property by invalid foreclosure, proper in action on purchase money notes.

Effect of admission on burden of proof.

Cited in note in 61 L.R.A. 516, 519, on effect of admission to change burden of proof and right to open and close.

5 S. D. 191, MATSON v. SWENSON, 58 N. W. 570.

Presumptions on collateral attack on judgment.

Cited in *Stearns v. Wright*, 13 S. D. 544, 83 N. W. 587, holding that judgment of court of general jurisdiction will not on collateral attack be presumed invalid because record does not affirmatively show service, waiver or appearance.

Power of courts to punish contempt.

Cited in *Re Taber*, 13 S. D. 62, 82 N. W. 398, holding that the county court has inherent power to punish a criminal contempt of a special administrator in refusing to comply with its order requiring him to deliver the assets and papers in his possession to the administrator.

5 S. D. 197, JOHN A. TOLLMAN CO. v. BOWERMAN, 58 N. W. 568.

Debts within contracts of guaranty.

Cited in *John A. Tolman Co. v. Butt*, 116 Wis. 597, 93 N. W. 548, holding that where the contract between the plaintiff and its salesman called for a guaranty to them, which guaranty provided that it was to continue for one year from date and might be extended from year to year, and was to cover all money due upon contract or otherwise, it covered the full term of his employment and not only the first year.

Books of account as evidence.

Cited in note in 52 L.R.A. 599, on a party's books of account as evidence in his own favor.

5 S. D. 203, RYAN v. DAVENPORT, 58 N. W. 568.

Appealability of order for dismissal of appeal.

Cited in *Re Weber*, 4 N. D. 119, 28 L.R.A. 621, 59 N. W. 523, holding order of district court directing dismissal of appeal from justice court not a final judgment for purpose of appeal.

5 S. D. 205, BARNARD & L. MFG. CO. v. GALLOWAY, 58 N. W. 565.

Altering written contracts.

Cited in *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 191, holding parol evidence of executory agreement inadmissible to vary terms of written contract.

Distinguished in *Fransen v. Regents of Education*, 66 C. C. A. 174, 133 Fed. 24, holding that the provisions of the statute that a written contract may be altered only by a written contract or an executed oral contract, does not prevent the application of the doctrine of equitable estoppel where such doctrines are applicable.

Motion for new trial as essential to review on appeal.

Cited in *Miller v. Way*, 5 S. D. 468, 59 N. W. 467, holding errors of law in admission of evidence over objection reviewable on appeal without motion for new trial; *Aultman, M. & Co. v. Becker*, 10 S. D. 58, 71 N. W. 753, holding that appeal from a judgment only does not bring up for review errors occurring after the judgment.

— To review sufficiency of evidence.

Cited in *Taylor v. Bank of Volga*, 9 S. D. 572, 70 N. W. 834, holding sufficiency of evidence to justify findings not reviewable on appeal from judgment alone; *Northwestern Elevator Co. v. Lee*, 13 S. D. 450, 83 N. W. 565, holding sufficiency of evidence to establish plaintiff's ownership of wheat levied on not reviewable on appeal where issue of ownership was not brought to attention of trial court by motion for new trial; *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466, holding sufficiency of evidence to support verdict or finding not reviewable on appeal unless presented to court below by motion for new trial; *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below; *Parriah v. Mahany*, 10 S. D. 276, 66 Am. St. Rep. 715, 73 N. W. 97, holding sufficiency of evidence to justify referee's findings not reviewable on appeal from judgment alone; *Carroll v. Nisbet*, 9 S. D. 497, 70 N. W. 634, holding that sufficiency of evidence to sustain verdict will not be considered on appeal where refusal of motion for new trial is not assigned as error.

Review of order for new trial upon appeal from judgment alone.

Cited in *Ross v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding that if the order granting or refusing a new trial is made after judgment in an action, an appeal from the judgment does not bring up for review such order made after judgment.

Presumption on appeal that evidence sustains findings.

Cited in *Adams & W. Co. v. Deyette*, 5 S. D. 418, 49 Am. St. Rep. 887, 59 N. W. 214, holding that findings of fact by a referee will be presumed on appeal to accord with and be sustained by the evidence where the evidence on which such findings are based is not preserved in the record and the insufficiency of the evidence is not assigned as error.

5 S. D. 216, ALLISON v. ALLISON, 58 N. W. 563.**5 S. D. 221, KIMMEL v. DICKSON, 25 L.R.A. 309, 49 AM. ST. REP. 869, 58 N. W. 561.****Title to deposits in bank generally.**

Cited in note in 86 Am. St. Rep. 780, on title of bank to money deposited with or collected by it.

Distinguished in *McCormick H. M. Co. v. Yankton S. Bank*, 15 S. D. 196, 87 N. W. 974, holding that relation of debtor and creditor exists where notes for various amounts are sent to bank and the money when collected is credited to the party or its general agent and remittances made from time to time in accordance with usual course of business between the parties.

Trust in bank deposits.

Cited in *State v. Foster*, 5 Wyo. 199, 29 L.R.A. 226, 63 Am. St. Rep. 47, 38 Pac. 926, holding that commercial loans outstanding at the time a trustee banker becomes insolvent are presumed to have been made from the moneys of the trustee, and are not impressed with the trust; *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21, holding that money in possession of bank at time of its insolvency will be ratably divided among different persons for whom it has collected money intermingling same with its own notes.

Cited in notes in 86 Am. St. Rep. 804, on right to recover money deposited with or collected by bank upon its insolvency; 15 L.R.A.(N.S.) 1101, on lien on commercial paper purchased by bank after mingling trust money with own funds.

Special deposits.

Cited in *State v. Thum*, 6 Idaho, 323, 55 Pac. 858, holding that public moneys deposited in a bank by a public officer does not become a part of the estate of the bank in which the creditors are entitled to share, but must be treated by the receiver as a separate trust estate, the property of the true owner; *Hoskins v. Dougherty*, 29 Tex. Civ. App. 318, 69 S. W. 103, holding that where the terms of a contract for the sale of lands provided that the purchaser deposit a certain amount of money in a certain bank as a part of the purchase price or to be forfeited upon a breach of the contract, such a deposit was a special one.

— As assets of bank.

Cited in *Shopert v. Indiana Nat. Bank*, 41 Ind. App. 474, 83 N. E. 515, holding that where money was placed in a bank upon special deposit and without the knowledge of the depositor, placed with the general funds of

the bank, such funds became impressed with a trust in favor of the depositor, and he could follow the trust funds into the hands of the receiver.

5 S. D. 227, HARKINS v. COOLEY, 58 N. W. 560.

5 S. D. 232, MILLER v. PURCHASE, 58 N. W. 556.

5 S. D. 233, SCHEFFER v. CORSON, 58 N. W. 555.

New trial for newly discovered evidence.

Followed in *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462, holding that new trial will not ordinarily be granted for newly discovered evidence which merely tends to discredit or impeach a witness or which is merely cumulative.

Cited in *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding denial of new trial for newly discovered evidence which only goes to discredit or impeach witness, proper; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150, denial of new trial for newly discovered evidence which tended simply to discredit or impeach witness and would not have produced different result, proper; *Kellogg v. Finn*, 22 S. D. 578, 133 Am. St. Rep. 945, 119 N. W. 545, 18 A. & E. Ann. Cas. 363, holding testimony of government surveyor, who made survey, such newly discovered evidence as entitled new trial of action in which location of quarter section corner of government surveyor is in dispute.

Liability of innkeepers.

Cited in note in 99 Am. St. Rep. 591, on liability of innkeepers for injury to, or loss of, guest's property.

5 S. D. 237, WAY v. JOHNSON, 58 N. W. 552.

Motion to strike out testimony.

Cited in *Spiking v. Consolidated R. & Power Co.* 33 Utah, 313, 93 Pac. 838, holding that where the objection to testimony is apparent, the same will not be stricken out where the motion to strike was not preceded by an objection to the question; *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847, holding that where an objection to testimony is not seasonably made, though the grounds of objection were apparent, the testimony will not thereafter be stricken out.

Breach of contract as justification for refusal to perform.

Cited in *Lavin v. Grand Lodge, A. O. U. W.* 112 Mo. App. 1, 86 S. W. 600, holding that where a member of a benefit association defaulted in his payments and afterward tendered the same which were refused by the local officer through mistake, such refusal did not justify the member in failing to again make a tender, so that his certificate was forfeited.

Cited in note in 30 L.R.A. 61, on right to rescind or abandon contract because of other party's default.

Contract providing for forfeiture.

Cited in *Barnes v. Clement*, 12 S. D. 270, 81 N. W. 301, holding that contract for sale of land providing for purchaser's taking possession and pay-

ing therefor in stipulated annual installments and for vendor's retention as rent of all payments made, in case of default in payment of any installment provides for forfeiture.

5 S. D. 246, BLACK HILLS MERCANTILE CO. v. GARDINER, 58 N. W. 557.

Followed without discussion in *Sprague v. Gardiner*, 5 S. D. 256, 58 N. W. 559; *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 256, 58 N. W. 559.

Necessity that plaintiff sign attachment bond.

Cited in *Storz v. Finklestein*, 48 Neb. 27, 66 N. W. 1020, holding that as Neb. Code, § 200, does not require an attaching creditor to sign the attachment bond, said bond is sufficient if signed by the surety alone; *Shakman v. Koch*, 93 Wis. 595, 67 N. W. 925, holding that the plaintiff is not a necessary party to the instrument required by Wis. Rev. Stat. § 2732, providing that before a writ of attachment shall be executed "a written undertaking on the part of the plaintiff, with sufficient surety," shall be delivered to the officer.

Validity of chattel mortgage allowing mortgagor to sell property.

Cited in *Egan State Bank v. Rice*, 56 C. C. A. 157, 119 Fed. 107, on the validity of a chattel mortgage upon a stock of goods to remain in the possession of the mortgagor for the purposes of sale; *First Nat. Bank v. Calkins*, 12 S. D. 41, 81 N. W. 832, holding chattel mortgage not necessarily void as to creditors by fact that mortgagee permits mortgagor to sell and appropriate to his own use part of mortgaged property.

Disapproved in *Bank of Perry, v. Cooke*, 3 Okla. 534, 41 Pac. 628, holding that where the chattel mortgagor is allowed to remain in possession of the mortgaged property, to sell and dispose of the same in the ordinary course of trade, and apply the proceeds to his own use, the mortgage is void as to creditors.

Effect of delay in filing chattel mortgage.

Cited in *Forrester v. Kearney Nat. Bank*, 49 Neb. 655, 68 N. W. 1059, holding that the lien of a chattel mortgage, the filing of which has been delayed without any intention to defraud, is good as against a creditor, who causes the property to be seized on attachment or execution after such mortgage is filed, or after the mortgagee has obtained actual possession, under Neb. Comp. Stat. chap. 32, § 14, providing that every chattel mortgage not accompanied by an immediate delivery and followed by an actual and continued change of possession shall be absolutely void as against the mortgagor's creditors, unless the mortgage or a copy thereof is filed.

Validity of mortgage on excessive security.

Cited in *Mercantile Exch. Bank v. Taylor*, 51 Fla. 473, 41 So. 22, holding that a large discrepancy between the value of the property and the face of the mortgage is not of itself conclusive evidence of fraud; *Farmers' & M. Bank v. Orme*, 5 Ariz. 304, 52 Pac. 473, holding that where a stock of the value of six thousand dollars was mortgaged for one thousand, and

the mortgagee took possession till the sales amounted to the face of the mortgage, the excessiveness of the value over the mortgage did not render the mortgage invalid.

5 S. D. 256, SPRAGUE v. GARDINER, 58 N. W. 559.

5 S. D. 256, BLACK HILLS MERCANTILE CO. v. GARDINER, 58 N. W. 559.

5 S. D. 257, JACKSON v. BELL, 58 N. W. 671.

Advice of counsel as affecting presumption of malice in action for malicious prosecution.

Cited in *Wuest v. American Tobacco Co.* 10 S. D. 394, 73 N. W. 903, holding that defendant in an action for malicious prosecution, who relies upon having acted on advice of counsel, must show that after making a fair and full disclosure he acted in good faith pursuant to the advice given; *Krause v. Bishop*, 18 S. D. 298, 100 N. W. 434, holding that in the absence of proof of actual malice, in an action for malicious prosecution, the mere proof of acquittal will not raise a presumption of malice, where the accuser acted upon the advice of counsel, after a full disclosure of the facts to the latter.

Cited in note in 18 L.R.A.(N.S.) 57, 59, 63, 65, on advice of counsel as defense to action for malicious prosecution.

Question for jury as to good faith.

Cited in *Richardson v. Dybedahl*, 14 S. D. 126, 84 N. W. 486, holding belief of township supervisors as to existence of legal highway unlawfully obstructed by fence which road overseer was attempting to remove question for jury in action for wrongful arrest while interfering with such overseer.

Right to recover for injury to feelings.

Cited in *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479, permitting a recovery for injury to feelings in an action for slander, the evidence having been admitted without objection.

5 S. D. 266, EVENSON v. WEBSTER, 58 N. W. 669.

Conclusiveness of findings.

Cited in *Ricker v. Stott*, 13 S. D. 208, 83 N. W. 47, holding that findings of fact will be presumed on appeal to be fully sustained until the contrary clearly appears from competent evidence; *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462; *Charles Betcher Co. v. Cleveland*, 13 S. D. 347, 83 N. W. 366,—holding that finding by court will not be disturbed on appeal unless clearly against the preponderance of evidence.

5 S. D. 272, RE HELWIG, 58 N. W. 674.

5 S. D. 274, COATES v. ARTHUR, 58 N. W. 675.

Attachment on cause of action for damages.

Cited in *Sonnesyn v. Akin*, 12 N. D. 227, 97 N. W. 557, holding action

for damages for deceit not such a debt as to justify the issuance of an attachment under the statute providing for the same in case of a debt incurred for property secured by false pretenses; *Pearsons v. Peters*, 19 S. D. 162, 102 N. W. 606, holding attachment properly dissolved in action for damages for partial failure of the defendant to convey land, where the complaint did not allege false pretenses and evidence of the same would have been inadmissible under the complaint.

Sufficiency of affidavit for attachment.

Cited in *Narregang v. Muscatine Mortg. & T. Co.* 7 S. D. 574, 64 N. W. 1129, holding failure of affidavit to enumerate acts of omissions constituting actionable detriment or to state grounds for fixing amount of damages for vacating attachment.

Distinguished in *Hemmi v. Grover*, 18 N. D. 578, 120 N. W. 561, holding affidavit for attachment setting forth one or more grounds of attachment enumerated in code, sufficient.

5 S. D. 295, DAVIS v. IVERSON, 58 N. W. 796.

Right to substitute one article for another under a warranty.

Cited in *J. I. Case Threshing Mach. Co. v. Hall*, 32 Tex. Civ. App. 214, 73 S. W. 835, holding that while the acceptance and retention of goods will not necessarily be conclusive against the buyer's right to rely upon the warranty, the parties may stipulate that if the article does not conform to the warranty it may be returned and another substituted in its place.

5 S. D. 299, CALKINS v. SEABURY-CALKINS CONSOL. MIN. CO. 58 N. W. 797.

Curing defect in pleading by later pleading.

Cited in *Commercial Bank v. Jackson*, 9 S. D. 605, 70 N. W. 846, denying right to consider admission or averment in answer to establish material fact omitted from complaint.

Presumption as to legality of actions.

Cited in *Swenson v. Swenson*, 17 S. D. 558, 97 N. W. 845, holding on demurrer that where there was no allegation as to the method of accepting a trust it will be presumed that the acceptance was made in the legal manner.

Discretion of court as to reopening case.

Cited in *Johnson v. Gilmore*, 6 S. D. 276, 60 N. W. 1070, holding it discretionary with trial court to allow plaintiff, after resting to introduce further evidence to prove omitted fact.

General exceptions to charge.

Cited in *Pease v. Magill*, 17 N. D. 166, 115 N. W. 260, holding that an exception to a charge is not available where the exception covers several distinct paragraphs and subjects and does not specify the particular portion claimed erroneous; *Comeau v. Hurley*, 22 S. D. 310, 117 N. W. 371, holding general exceptions to instructions insufficient for review of particular instructions.

5 S. D. 307, MORRIS v. NYSWANGER, 58 N. W. 800.

5 S. D. 321, SOMERS v. STATE, 58 N. W. 804.

Changing salary during term of office.

Cited in Harrold v. Barnum, 8 Cal. App. 21, 96 Pac. 104, holding that the phrase, term of office, applies only to public officers who have a definite fixed term, so that the constitutional inhibition against increasing salaries during a term of office does not apply to appointive officers holding only during the pleasure of the appointing power; Lexington v. Rennick, 105 Ky. 779, 49 S. W. 787, 50 S. W. 1106, holding that a similar provision in Ky. Const. § 161, did not prevent the reduction of the salary of police officers, who, under Ky. Stat. § 3138, are removable at pleasure, with or without cause.

Reference to legislative journals to ascertain validity of statute.

Cited in Portland v. Vick, 44 Or. 439, 102 Am. St. Rep. 633, 75 Pac. 706, holding that the courts will refer to the legislative journals to ascertain whether the mandatory provisions of the Constitution have been complied with, and unless it does appear that some such requirement has not been complied with, the law will not be declared invalid.

5 S. D. 325, SEARLS v. KNAPP, 49 AM. ST. REP. 873, 58 N. W. 807.

Pleading statute of limitations.

Cited in Omaha Sav. Bank v. Simeral, 61 Neb. 741, 86 N. W. 470, holding that an averment in an answer that the cause of action set forth in the cross petition filed by one of the defendants "did not accrue against this defendant within five years next before the filing" thereof is a good plea of the five years' statute of limitations; Bank of Miller v. Moore, 81 Neb. 566, 116 N. W. 167, holding that an allegation in an answer "that the complainant's cause of action did not accrue within the four years next before the commencement of the action," was sufficient to withstand a general demurrer; Kammann v. Barton, 23 S. D. 442, 125 N. W. 416, holding that facts showing holding of limitations must be shown by one relying thereon; McConnell v. Spicker, 15 S. D. 98, 87 N. W. 574, sustaining answer in action on note alleging that cause of action contained in plaintiff's complaint did not accrue within six months before commencement of action; Saxton v. Musselman, 17 S. D. 35, 95 N. W. 201, holding that an answer alleging that the "cause of action stated in the complaint did not accrue within six years prior to the commencement of this action, and is therefore barred by the statute of limitations which is hereby pleaded as a defense," is sufficient on demurrer.

Judicial notice of record in same cause.

Cited in Stewart v. Rosengren, 66 Neb. 445, 92 N. W. 586, holding that a court will take judicial notice of its record in a cause then before it, and the process and return by which it acquired jurisdiction need not be put in evidence; Withaup v. United States, 62 C. C. A. 328, 127 Fed. 530, holding that the judicial knowledge of the court extends to the record and pro-

ceedings of the case on trial, but not to the record or proceedings in former or other cases; *McClain v. Williams*, 10 S. D. 332, 43 L.R.A. 287, 73 N. W. 72, holding that supreme court will take judicial notice that appeal is still pending undisposed of therein; *State v. Evans*, 12 S. D. 473, 81 N. W. 893, holding that supreme court will take judicial notice of issuance of writ of error out of such court.

Distinguished in *Thayer v. Honeywell*, 7 Kan. App. 548, 51 Pac. 929, holding that a district court cannot in one action take judicial notice of an order made in a separate action to restrain the sheriff from selling or disposing of the land in controversy.

Presumption on appeal in favor of judgment.

Cited in *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399, holding it proper for appellate court to assume that material fact was brought to jury's attention in some permissible way.

5 S. D. 328, QUINN v. QUINN, 49 AM. ST. REP. 875, 58 N. W. 808.

Specific performance of contract to devise property.

Cited in *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667, holding that where the testatrix's husband died and the children conveyed their interest in the property left by him, to the wife under an agreement that she should receive the income for life and invest it and bequeath the property to them equally at her death, the statute of frauds was not defense to an action to compel specific performance of the contract to will; *Waters v. Cline*, 121 Ky. 611, 123 Am. St. Rep. 215, 85 S. W. 209, holding that where a girl went to live with her uncle and aunt under a parol agreement to devise to her a certain farm upon which improvements should be made, she could recover the value of the farm together with the improvements upon the death of the uncle without devising to her the farm as agreed, though the contract was unenforceable; *Starnes v. Hatcher*, 121 Tenn. 330, 117 S. W. 219, holding that a contract in writing whereby a person agreed to adopt certain children and accept them as his heirs and they went and lived with him as his children until his death, the contract to devise to them, his property would be enforced though he had failed to adopt them.

Cited in note in 20 L.R.A.(N.S.) 1155, on gift as fraud on contract to will property.

—Of contracts for adoption.

Cited in *Chehak v. Battles*, 133 Iowa, 107, 8 L.R.A.(N.S.) 1130, 110 N. W. 330, 12 A. & E. Ann. Cas. 140, holding that specific performance of a contract for adoption will be granted as to property rights involved, whether the contract is oral or written.

Evidence of adoption as heir.

Cited in *Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526, holding that the heirship of an adopted child is conclusively established by the judgment of adoption, where the court has jurisdiction of the persons and the subject matter required to render the judgment; *Henry v. Taylor*, 16 S. D.

424, 93 N. W. 641, holding that the best evidence of adoption is the order of the court made in the proceedings for adoption and in the absence of anything to show that the required legal steps were taken or the record thereof has been lost, the statement of a witness that he was adopted is a mere conclusion without probative force.

Oral contract for sale of land.

Cited in note in 102 Am. St. Rep. 241, on contract for sale of land within statute of frauds.

5 S. D. 337, PEART v. CHICAGO, M. & ST. P. R. CO. 58 N. W. 806.

5 S. D. 341, DAKOTA LOAN & T. CO. v. PARMALEE, 58 N. W. 811.

Removal of house from freehold as affecting rights under a mechanic's lien.

Cited in Sanford v. Kunkel, 30 Utah, 379, 85 Pac. 363, holding that by removal of a building from its original location, it was not relieved from a mechanic's lien, but if the land upon which it originally stood was insufficient to satisfy the lien the house would be subject to the lien, in its new location.

5 S. D. 348, JONES LUMBER & MERCANTILE CO. v. FARVIS, 58 N. W. 813.

Presumption as to abstract on appeal.

Cited in Searles v. Christensen, 5 S. D. 650, 60 N. W. 29, holding that order made in open court, set up in the abstract, will be presumed to have been entered by the clerk in the absence of a denial; Harrison v. Chicago, M. & St. P. R. Co. 6 S. D. 572, 62 N. W. 376, holding that abstract will be presumed on appeal to have been made from a bill or statement duly settled by the trial judge in absence of any showing to the contrary; Weeks v. Crammer, 17 S. D. 173, 95 N. W. 875, holding that where the respondent has filed no additional abstract, he cannot be heard to say that all the evidence is not contained in the abstract as filed.

What abstracts should show.

Cited in Kehoe v. Hanson, 6 S. D. 322, 60 N. W. 31, holding that original papers sent up by clerk of the court below will be examined by appeal in settlement of a dispute raised by the abstracts as to whether the bill of exceptions was settled in the court below; Peart v. Chicago, M. & St. P. R. Co. 8 S. D. 634, 67 N. W. 837, holding that objection by appellee after reversal to taxation of costs for printing of so much of appellant's abstract as contains the evidence on the ground that the bill of exceptions contained no specifications of errors relied on or particulars in which the evidence was insufficient cannot be considered unless the omission is shown by appellant's abstract or by an additional abstract filed by appellee.

Motion for new trial as essential to review on appeal.

Cited in Baird v. Gleckler, 7 S. D. 284, 64 N. W. 118, holding that ap-Dak. Rep.—50.

peal from judgment only entered before application for new trial presents for review only errors of law occurring at the trial and brought up by proper bill of exceptions; *Jones Lumber & Mercantile Co. v. Faria*, 6 S. D. 112, 55 Am. St. Rep. 814, 60 N. W. 403; *Carroll v. Nisbet*, 9 S. D. 497, 70 N. W. 634,—holding motion for new trial not necessary to secure review of ruling on motion to direct verdict; *Le Claire v. Wells*, 7 S. D. 426, 64 N. W. 519, holding motion for new trial unnecessary to review question as to legal effect of ballots to be gathered from such ballots alone; *Miller v. Way*, 5 S. D. 468, 59 N. W. 467, holding errors of law in admission of evidence over objection reviewable on appeal without motion for new trial; *Roberts v. Ruh*, 22 S. D. 13, 114 N. W. 1097, holding that assignment of error predicated upon refusal to direct verdict may be reviewed though no assignment of error is predicated upon denial of motion for new trial; *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029 (dissenting opinion), majority holding the question of the sufficiency of the evidence to justify the verdict not reviewable on appeal, where an appeal from an order denying a new trial was dismissed because taken before such order was entered.

5 S. D. 352, DAVIS v. JEFFRIS, 58 N. W. 815.

Followed without discussion in *Davis v. Jeffris*, 5 S. D. 363, 58 N. W. 928.

Dependent conditions.

Distinguished in *Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965, holding that where one person agreed to deliver one hundred inches of water to the other's land, and if he obtained it from one source he was to receive a certain amount and the rest in instalments, but if he obtained it from another source he was to receive less, the conditions were not concurrent condition, but the water was to be supplied first; *Tronson v. Colby University*, 9 N. D. 559, 84 N. W. 474, holding failure of mortgagor to perform his agreement made in consideration of the mortgage, not ground for canceling the latter, as they constitute independent contracts; *First Nat. Bank v. Spear*, 12 S. D. 108, 80 N. W. 166, holding that the holder of a series of non-negotiable notes given in consideration of specified property to be delivered on full payment of the notes cannot, without a delivery of the property, recover in an action on any of them after all have matured.

5 S. D. 360, STATE v. SIOUX FALLS BREWING CO. 26 L.R.A. 141, 58 N. W. 928.

5 S. D. 362, AYERS, W. & R. CO. v. SUNDBACK, 58 N. W. 929.

Right to file new abstract.

Cited in *Merchants Nat. Bank v. McKinney*, 6 S. D. 58, 60 N. W. 162, holding that additional or amended abstract cannot ordinarily be filed after the case has been submitted and decided; *Harrison v. Chicago, M. & St. P. R. Co.* 6 S. D. 572, 62 N. W. 376, holding that application to reargue on new abstract to be presented will be denied unless circumstances

are very exceptional where case had previously been submitted and decided on abstract to which no objection was made.

5 S. D. 363, DAVIS v. JEFFRIS, 58 N. W. 928.

5 S. D. 364, GLECKLER v. SLAVENS, 59 N. W. 323.

Expert testimony as to value.

Cited in *Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161, holding attorney of twenty years practice competent to testify as to value of legal services with which he is familiar though performed in adjoining state.

— Of cattle.

Cited in *Johnson v. Gilmore*, 6 S. D. 276, 60 N. W. 1070, holding opinion of general dealer in fat cattle as to value of such cattle prima facie admissible; *State v. Montgomery*, 17 S. D. 500, 97 N. W. 716, holding that a witness who stated that he had purchased hogs for some time and had had experience in valuing hogs, was competent to testify as to the value of hogs which the defendant was accused of stealing.

Evidence as to intent.

Cited in note in 23 L.R.A.(N.S.) 386, on right of one to testify as to his intent.

5 S. D. 393, BAILEY v. LAWRENCE COUNTY, 49 AM. ST. REP. 881, 59 N. W. 219.

Liability of county or township.

Cited in *Vail v. Amenias*, 4 N. D. 239, 59 N. W. 1092, holding township not liable for negligence of officers in maintaining and repairing bridges; *Jasper County v. Allman*, 142 Ind. 573, 39 L.R.A. 58, 42 N. E. 206, holding county not liable by implication for damages caused by negligence of its officers in respect to keeping bridges in repair, where the county commissioners have no power to appropriate county funds for that purpose, except when and so far as the road district is unable to make the repairs, and there is no statute giving a right of action against the county for its negligence or that of its commissioners, or authorizing the use of county funds to pay damages caused thereby; *Freel v. School City of Crawfordsville*, 142 Ind. 27, 37 L.R.A. 301, 41 N. E. 312, holding that a school corporation organized solely for public benefit is not liable for injuries caused by the negligence of its officers or agents, unless expressly made so by statute, or unless it is given authority to raise money from its taxpayers to pay such claims; *Dell Rapids v. Irving*, 7 S. D. 310, 29 L.R.A. 861, 64 N. W. 149, holding the provision of the Dakota Compiled Laws as to assessment of damages in laying out town roads not repealed by S. D. Acts, 1891, chap. 94, providing for assessment of damages for property taken by "municipal or other corporations;" and townships organized under the laws of the state are not included therein.

Cited in note in 39 L.R.A. 35, on liabilities of counties in actions for torts and negligence.

5 S. D. 402, CARLSON v. SIOUX FALLS WATER CO. 59 N. W. 217.

5 S. D. 410, AMERICAN INVEST. CO. v. BEADLE COUNTY, 59 N. W. 212.

Recovery of money paid under void tax sale.

Cited in *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570, holding doctrine of caveat emptor applicable to purchasers at tax sales; *Minnesota Loan & Invest. Co. v. Beadle County*, 18 S. D. 431, 101 N. W. 29, holding that money paid for taxes upon land purchased at a tax sale could not be recovered where there was error in the description in the tax certificate.

Cited in note in 31 L.R.A.(N.S.) 1142, on right of purchaser at invalid tax sale, in absence of statute, to be reimbursed for purchase price, or subsequent taxes.

Priority of lien for taxes.

Cited in *Iowa Land Co. v. Douglas County*, 8 S. D. 491, 67 N. E. 52, holding that owner taking mortgage on land does not gain a lien superior to that of personalty taxes for preceding years which were a record lien thereon by a subsequent change in the law relating to taxes.

Retroactive operation of statute.

Cited in *American Invest. Co. v. Thayer*, 7 S. D. 72, 63 N. W. 233, holding that retroactive effect will not be given South Dakota statute directing county treasurers to refund to holder and owner of tax sale certificates for real property not liable for taxes.

5 S. D. 418, ADAMS & W. CO. v. DEYETTE, 49 AM. ST. REP. 887, 59 N. W. 214.

Ultra vires contracts of corporations.

Cited in note in 70 Am. St. Rep. 165, on ultra vires contracts of private corporation.

Distinguished in *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142, holding that a corporation may acquire its stock in consideration of its surrender of an overdue note, when it has arranged to dispose of said stock at twice the amount of said note.

Fraudulent preference of creditors by corporation.

Cited in *Portland Consol. Min. Co. v. Rossiter*, 16 S. D. 633, 102 Am. St. Rep. 726, 94 N. W. 702, holding that where the directors of a corporation owned two thirds interest in certain causes of action and transferred the same to a third person who brought suit and a default judgment was permitted to be entered against the corporation, such judgment was void as to the creditors of the corporation; *Furber v. Williams-Flower Co.* 21 S. D. 228, 8 L.R.A.(N.S.) 1259, 111 N. W. 548, 15 A. & E. Ann. Cas. 1216, holding insolvent corporation's transfer of its assets to one person for purpose of preferring certain creditors, void.

Distinguished in *Trebilcock v. Big Missouri Min. Co.* 9 S. D. 206, 68 N. W. 330, holding the execution of a mortgage on substantially all its prop-

erty, by an insolvent corporation to its president, not evidence of such a fraudulent intent as to support an attachment.

Withdrawal of corporate assets.

Cited in note in 57 Am. St. Rep. 77, on what is a withdrawal of corporate assets.

5 S. D. 427, STATE EX REL. VAN NICE v. WHEALEY, 59 N. W. 211.

Adultery between married and unmarried persons.

Cited in note in 18 L.R.A.(N.S.) 581, on crime of adultery as affected by fact that but one party is married.

5 S. D. 432, BEDOW v. TONKIN, 59 N. W. 222

Review of evidence upon appeal.

Cited in Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762, holding that an appellate court will not reverse the action of the trial court in denying a motion for a new trial based on the insufficiency of the evidence to sustain the verdict where there is substantial evidence in support of the verdict; Charles E. Bryant & Co. v. Arnold, 19 S. D. 6, 102 N. W. 303, holding that conflicting evidence upon which the verdict rests will not be weighed and its examination upon appeal extends no further than is necessary to determine the question whether there is probative evidence sufficient to sustain the verdict; Stolle v. Stuart, 21 S. D. 643, 114 N. W. 1007, holding that appellate court will consider conflicting evidence no further than to determine whether it is sufficient to sustain verdict.

Substantial compliance with contract for personal services.

Cited in Woodford v. Kelley, 18 S. D. 615, 101 N. W. 1069, holding that substantial compliance with the terms of a contract for personal services entitles the person to a reasonable amount for the services, though he could not maintain an action upon the contract itself.

5 S. D. 438, HOLCOMB v. KELIHER, 59 N. W. 227.

Situs of property for tax purposes.

Cited in note in 62 Am. St. Rep. 465, on situs of personal property for purposes of taxation.

Distinguished in Prairie Cattle Co. v. Williamson, 5 Okla. 488, 49 Pac. 937, holding that cattle owned in an adjoining state, but which range and graze within a township of Oklahoma throughout the year, although against the will and consent of the owner, have acquired a situs in such township and are liable to taxation therein.

What is a cattle range.

Cited in State v. Cunningham, 35 Mont. 547, 90 Pac. 755, for the definition of a cattle range.

5 S. D. 447, VAN ANTWERP v. DELL RAPIDS TWP. 59 N. W. 209.**Ultra vires contracts with public officials.**

Cited in *F. C. Austin Mfg. Co. v. Twin Brooks Twp.* 16 S. D. 126, 91 N. W. 470, holding that there could be no recovery for a road machine which involved the township in debt beyond the statutory limit, though the purchase had been made by the supervisors and ratified by the town meeting; *Hanson v. Red Rock Twp.* 7 S. D. 38, 63 N. W. 156, holding the question whether a resurvey locating the boundary line as claimed by one of the parties was made under an authorized contract immaterial on the issue as to its location.

Right to open up road on section line.

Cited in *Keen v. Fairview Twp.* 8 S. D. 558, 67 N. W. 623, sustaining right of township board to open up road entirely within township on section line.

5 S. D. 452, GREEN v. HUGHITT SCHOOL TWP. 59 N. W. 224.**Sham pleadings.**

Cited in *King v. Waite*, 10 S. D. 1, 70 N. W. 1056, holding that verified answer denying material allegations of complaint in action at law cannot be stricken out as sham though defendant makes admissions in affidavit on motion inconsistent with answer.

Cited in note in 113 Am. St. Rep. 645, 648, on sham pleadings.

Inconsistent defenses.

Cited in *Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180, holding that the inconsistent defenses could not be stricken out or the party made to elect upon which he would proceed, under the code; *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1060, holding it reversible error to send the pleadings out with the jury, where the allegations of the answer as to a settlement, all evidence of which is excluded, are apparently, if not actually, inconsistent with defendant's contention.

Cited in note in 48 L.R.A. 185, on right to plead inconsistent defenses.

Objections to pleadings after trial has commenced.

Cited in *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, holding that though the complaint may be inartistic, indefinite, and uncertain, reversible error cannot be predicated upon the overruling of the defendant's objection first raised after the trial began, the case having been heard upon the merits without apparent prejudice to defendant's rights.

Time for objection to question.

Cited in *Vermillion Artesian Well, Electric Light, Min. I. & Improv. Co. v. Vermillion*, 6 S. D. 466, 61 N. W. 802, holding objection to question after answer thereto unavailable on appeal.

Refusal of instruction substantially covered by those given.

Cited in *State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 A. & E. Ann. Cas. 87, holding refusal of requested instructions substantially covered by those given, not reversible error.

Curing error in excluding evidence.

Cited in *Halbert v. Rosenbalm*, 49 Neb. 498, 68 N. W. 622, holding that the erroneous exclusion of evidence is not reversible error, where evidence of a like character and to the same effect as that excluded was admitted both prior and subsequent to the erroneous exclusion.

5 S. D. 461, STATE v. BOUGHNER, 59 N. W. 736.

Followed without special discussion in *State v. Church*, 6 S. D. 89, 60 N. W. 143.

Witness whose name has been omitted from indictment.

Cited in *State v. Reddington*, 7 S. D. 368, 64 N. W. 170, holding it discretionary in trial court to allow the state to use witnesses as names are not indorsed on indictment; *State v. Cambron*, 20 S. D. 282, 105 N. W. 241, holding that the admissibility of the testimony of a witness upon a prosecution for a felony, whose name had been omitted from the indictment, depended upon the intentional withholding of the name from the defense.

Sufficiency of indictment for selling liquor.

Cited in *State v. Williams*, 11 S. D. 64, 75 N. W. 815, holding that information for selling intoxicating liquors without paying in full for license need not state to whom the liquors were sold.

Cited in note in 23 L.R.A.(N.S.) 584, as to whether indictment or information for unlawful liquor sale must state purchaser's name.

Motion for new trial as essential to review on appeal.

Cited in *Baird v. Gleckler*, 7 S. D. 284, 64 N. W. 118, holding that appeal from judgment only, entered before application for new trial presents for review only errors of law occurring at the trial and brought up by proper bill of exceptions.

5 S. D. 468, MILLER v. WAY, 59 N. W. 467.**Motion for new trial as essential to review on appeal.**

Cited in *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below.

Parol evidence to explain written contract.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding contemporaneous agreements closely related thereto, admissible to explain contract of guaranty.

— Capacity in which note was signed.

Cited in *Small v. Elliott*, 12 S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92, holding parol evidence admissible to explain capacity and character in which one signed guaranty indorsed on note where letters "Pt." followed signature; *Janes v. Citizens Bank*, 9 Okla. 546, 60 Pac. 290, holding parol evidence admissible in a suit between the original parties to a note signed by "Fred R. James, Secretary of the Enid Town Co.," to show that said Janes signed in a corporate capacity.

5 S. D. 474, CARTER v. THORSON, 24 L.R.A. 734, 49 AM. ST. REP. 893, 59 N. W. 469.

Debt for public printing.

Cited in *Carter v. State*, 8 S. D. 153, 65 N. W. 422, holding an allegation in the complaint in an action for damages for alleged breach of a printing contract with the state, that there was "a large amount of printing to be done for said officials," not equivalent to an allegation that there was work which the state required to be done.

5 S. D. 480, STATE v. PHELPS, 59 N. W. 471.

Endorsing names of witnesses on indictment.

Cited in *State v. Holburn*, 23 S. D. 209, 121 N. W. 100, holding it not error to permit "Thomas Wasson" to testify where name indorsed on indictment was Thomas "Watson," surprise or prejudice not being shown.

Proof of commission of other crimes.

Cited in *State v. Coleman*, 17 S. D. 594, 98 N. W. 175, holding that in a prosecution for killing his brother to obtain the life insurance, evidence that the applications for further insurance, premium notes, etc., was not to be refused because it tended to show the defendant guilty of another crime; *State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 A. & E. Ann. Cas. 87, holding prior false reports made by him admissible in prosecution of bank cashier for making false report to bank examiner.

Cited in note in 62 L.R.A. 200, 293, on evidence of other crimes in criminal cases.

Sufficiency of indictment against one instigating crime.

Cited in *State v. Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631, holding that information for murder against instigator, may allege that defendant fired the fatal shot.

Requested instructions.

Cited in *State v. Coleman*, 17 S. D. 594, 98 N. W. 175, holding that an instruction was properly refused in a prosecution for murder, which was to the effect that if any one of the jury after having heard all the evidence and having consulted with his fellow jurors, should entertain a reasonable doubt as to the defendant's guilt, the jury could not find him guilty.

Presumption from silence.

Cited in *Martin v. State*, 148 Ind. 519, 47 N. E. 930, holding that, while evidence of conduct at time of arrest is admissible as tending to show a consciousness of guilt, evidence that defendant at the time of arrest for felony remained silent and manifested no surprise concerning it will not support a conviction.

5 S. D. 496, JOHN A. TOLMAN CO. v. SAVAGE, 59 N. W. 882.

5 S. D. 500, LINDSAY v. PETTIGREW, 59 N. W. 726, Later appeals in 8 S. D. 244, 66 N. W. 321; 10 S. D. 228, 72 N. W. 574.

What constitutes a contract of insurance.

Distinguished in *Brink v. Merchant's & F. United Mut. Ins. Asso.* 17

S. D. 235, 95 N. W. 929, holding that the acceptance of the premium and the application for insurance did not of itself constitute a contract of insurance, but the burden was upon the insured to show that the insurance was to commence the same day.

Liability for loss by failure to procure insurance as agreed.

Distinguished in *Hudson v. Ellsworth*, 56 Wash. 243, 105 Pac. 463, holding that where the mortgagee accepted thirty dollars and agreed to secure insurance upon the mortgaged premises, but failed to do so, he was not liable for the damages resulting from a destruction of the buildings by fire.

5 S. D. 504, THOMPSON & SONS. MFG. CO. v. GUENTHNER, 59 N. W. 727.

Determination of disputed rights to property in supplementary proceedings.

Cited in *Ryland v. Arkansas City Mill. Co.* 19 Okla. 435, 92 Pac. 160, holding that in supplementary proceedings in aid of an execution, the court cannot order the person under examination to turn over property in satisfaction of the execution where the title to the property is in dispute or appears to be in a third party.

5 S. D. 508, BROWN v. EDMONDS, 59 N. W. 731.

What constitutes wearing apparel.

Cited in *Re Evans*, 158 Fed. 153, on what constitutes wearing apparel within the meaning of the statute providing for exemptions from execution as adopted by the bankruptcy statutes.

5 S. D. 515, STANTON v. STATE, 59 N. W. 738.

Valid demands against state.

Cited in *Young v. State*, 19 Wash. 634, 54 Pac. 36, holding that the state is not liable for the compensation of one employed by the governor to examine the books and accounts of the state penitentiary, as the governor is not authorized to employ expert assistance by Const. art. 3, § 5, providing that he may require information in writing from state officers as to their official duties, and see that the laws are fully executed, or by Hill's Code, §§ 61, 1184, empowering him to supervise the conduct of all executive and ministerial officers, and to visit the state penitentiary.

Cited in note in 42 L.R.A. 34, 62, on what claims constitute valid demands against a state.

5 S. D. 524, PHILLIPS v. SIOUX FALLS, 59 N. W. 881.

5 S. D. 528, SIMPSON BRICK-PRESS CO. v. MARSHALL, 59 N. W. 728.

Counterclaims arising out of the same transaction.

Cited in *Small v. Speece*, 131 Mo. App. 513, 110 S. W. 7, holding that a counterclaim for the surrender and cancellation of notes given in pay-

ment of a piano, may be preferred in an action of replevin to recover the piano for a default in payment, where the court has equity jurisdiction and the claim is based upon the plaintiff's fraud in selling the piano; *Scully Steel & Iron Co. v. Hann*, 18 N. D. 528, 123 N. W. 275, holding that refusal to fill accepted order of repairs did not entitle to substantial damages as counterclaim action on note given for price of machinery.

Time for performance of contract.

Cited in *Shull v. New Birdsall Co.* 15 S. D. 8, 86 N. W. 654, holding only reasonable diligence on part of sellers of machinery required to fill order stating that machinery is "to be shipped at once."

5 S. D. 537, RE HOUGHTON, 59 N. W. 733, Later application to supreme court for leave to file charges in 9 S. D. 457, 70 N. W. 634.

5 S. D. 539, HOWARD v. HURON, 26 L.R.A. 493, 59 N. W. 833, Rehearing denied in 6 S. D. 180, 26 L.R.A. 498, 60 N. W. 803.

Matters concluded by judgment.

Cited in *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567, holding that, in an action to enforce the collection of coupons from bonds issued in payment of a judgment entered by default against a municipal corporation, the corporation is estopped from making the defense that the original indebtedness was in excess of the amount which the corporation had power to create; *Helena v. United States ex rel. Helena Waterworks Co.* 43 C. C. A. 429, 104 Fed. 113, holding that a municipal corporation, which treats a judgment against it as valid, by levying and collecting a tax for the payment thereof, is estopped by laches from asserting that the judgment represents a debt in excess of the constitutional limit; *Golden Reward Min. Co. v. Buxton Min. Co.* 18 Mor. Min. Rep. 592, 79 Fed. 868, holding that a decision of the land office awarding a patent to mineral land to a claimant in the absence of an adverse claim is a judgment by default, as conclusive of the matter adjudicated as a judgment upon contested issues; *Remilliard v. Authier*, 20 S. D. 290, 4 L.R.A.(N.S.) 295, 105 N. W. 626, holding that a judgment in a former action involving the title of the respective parties, is conclusive in an action between the same parties to quiet title to the same premises; *Kelley v. R. J. Schwab & Sons Co.* 22 S. D. 406, 118 N. W. 696, holding judgment in favor of foreign corporation bar to action to restrain enforcement thereof on ground that corporation had not complied with laws and could not sue; *Belcher Land-Mortg. Co. v. Norris*, 34 Tex. Civ. App. 111, 78 S. W. 390, holding that a judgment in an action by the owner of land to cancel a mortgage on the ground that the mortgagor was not the owner and that the mortgagee had notice of such fact, and adjudging that the mortgage is valid is conclusive as to the validity of the mortgage in an action to foreclose the same.

Parties in mandamus proceeding.

Cited in *Heintz v. Moulton*, 7 S. D. 272, 64 N. W. 135, holding that real

party in interest should be named in mandamus proceedings to enforce private right.

Cited in note in 105 Am. St. Rep. 123, on necessary parties to proceedings in mandamus.

5 S. D. 549, PARKER v. RANDOLPH, 29 L.R.A. 33, 59 N. W. 722.

Effect of quitclaim deed.

Cited in *Hill v. Alliance Bldg. Co.* 6 S. D. 160, 55 Am. St. Rep. 819, 60 N. W. 752, holding the failure of a mechanic's lien claimant to file a verified statement of his claim not available to one who, with actual notice of the lien, takes a quitclaim deed of the property, subject to all valid liens, under circumstances which fail to make him a purchaser in good faith; *Fowler v. Will*, 19 S. D. 131, 117 Am. St. Rep. 938, 102 N. W. 598, 8 A. & E. Ann. Cas. 1093, holding that an unrecorded warranty deed is valid as against a subsequent recorded quitclaim deed by the same grantor, since the latter only remises, releases, and quitclaims the interest of the grantor and is not a conveyance; *Schmidt v. Musson*, 20 S. D. 389, 107 N. W. 367, holding that a mortgagee from one claiming under a quitclaim deed is not a bona fide purchaser in good faith as they are presumed to take with notice to outstanding equities; *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439, holding quit claim deed as effectual for transferring title to land as warranty deed; *Rosenbaum v. Foss*, 7 S. D. 83, 63 N. W. 538 (dissenting opinion), majority holding that one claiming under a chattel mortgage purporting to convey only the mortgagor's "right, title, and interest in and to" specified property previously mortgaged is not entitled, as a "subsequent purchaser or encumbrancer," to attack the record of the prior mortgage.

Cited in notes in 4 L.R.A.(N.S.) 778, on quitclaim deed as color of title for adverse possession; 25 L.R.A.(N.S.) 1036, 1037, on effect of remote quitclaim in chain of title upon rights of subsequent purchaser.

Distinguished in *Citizens' Bank v. Shaw*, 14 S. D. 197, 84 N. W. 779, holding deed reciting that grantor has "granted, bargained, sold, and conveyed" specified land to grantee and his heirs and assigns forever effective to convey after-acquired title though not containing full covenants of warranty.

Criticized in *Schott v. Dosh*, 49 Neb. 187, 59 Am. St. Rep. 531, 68 N. W. 346, holding that a quitclaim deed properly recorded is within the protection of Neb. Comp. Stat. chap. 73, § 16.

5 S. D. 561, GRIGSBY v. WESTERN U. TELEG. CO. 59 N. W. 734.

Waiver by moving for directed verdict.

Cited in *Patty v. Salem Flouring Mills Co.* 53 Or. 350, 98 Pac. 521, holding that by moving for a nonsuit and refusing to submit any evidence when such motion was denied, the defendant waived the right to have the issues submitted to the jury and could not claim on appeal that

there were issues of fact which should have been submitted; *Angier v. Western Assur. Co.* 10 S. D. 82, 66 Am. St. Rep. 685n, 71 N. W. 761, holding right to complain on appeal of withdrawal of case from jury waived by motion to direct verdict and failure to subsequently request a submission of the case to the jury; *Sundling v. Willey*, 19 S. D. 293, 103 N. W. 38, 9 A. & E. Ann. Cas. 644, holding that where both parties moved for a directed verdict it was a waiver of the right to have the case submitted to the jury and the trial judge could draw all inferences from the facts that a jury might have drawn had the case been submitted to them; *Yankton F. Ins. Co. v. Fremont, E. & M. Valley R. Co.* 7 S. D. 428, 64 N. W. 514, holding that a party to an action waives his right to have the case submitted to the jury where he asks the court to direct a verdict in his favor; *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131, holding that where counsel for defendant in an action by a receiver of an insolvent purchaser to recover goods retaken from the purchaser moves that the case be taken from the jury on the ground that, there having been no payment, title could not have passed, the court, if entertaining the view that title had passed by actual delivery, may thereupon submit to the jury the sole question as to the value of the goods taken, since, the legal sufficiency of the evidence having been challenged by the motion, it was the duty of the court to decide, as a matter of law, its effect; *Lindquist v. Northwestern Port Huron Co.* 22 S. D. 298, 117 N. W. 365, holding that joining in motion for directed verdict estopped appellant from urging that evidence was conflicting and ought to have been submitted to jury; *Easterly v. Mills*, 54 Wash. 356, 23 L.R.A. (N.S.) 952, 103 Pac. 475, holding that by the plaintiff moving for a directed verdict and the defendant moving for a judgment in his favor and a discharge of the jury, they waived their right to have the case submitted to the jury and submitted the cause to the judge for determination.

Distinguished in *Poppitz v. German Ins. Co.* 85 Minn. 118, 88 N. W. 438, holding that a party does not waive his right to have the case submitted to the jury, when to his request for a directed verdict are coupled requests to submit specified issues to the jury.

Limited in *Wilson v. Commercial Union Ins. Co.* 15 S. D. 322, 89 N. W. 649, holding rule that party waives right to have issues passed on by the jury by moving for direction of verdict applicable only where both parties moved for verdict.

Waiver of refusal to direct verdict.

Cited in *Church v. Foley*, 10 S. D. 74, 71 N. W. 759, holding failure to submit case to jury not presented by defendant's exception to denial of his motion to direct verdict and to granting of same motion by plaintiff.

5 S. D. 568, *MEUER v. CHICAGO, M. & ST. P. R. CO.* 25 L.R.A. 81, 49 AM. ST. REP. 898, 59 N. W. 945, Later appeal in 11 S. D. 94, 74 AM. ST. REP. 774, 75 N. W. 823.

Law governing carrier's contract.

Cited in note in 63 L.R.A. 527, on conflict of laws as to carrier's contracts.

Distinguished in *Southern R. Co. v. Harrison*, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552, holding that the law of the state in which a contract of interstate transportation was made, and in which the performance begins, cannot govern the contract so far as it conflicts with the Act of Congress to regulate the commerce.

Presumptions as to foreign laws not pleaded or proved.

Cited in *Morris v. Hubbard*, 10 S. D. 259, 72 N. W. 894, holding law of sister state presumed to be same as law of forum; *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255; *Foss v. Petterson*, 20 S. D. 93, 104 N. W. 915; *Woolacott v. Case*, 63 Kan. 35, 64 Pac. 965; *Wilhite v. Skelton*, 5 Ind. Terr. 621, 82 S. W. 932,—holding that in the absence of allegation or proof the statutes and laws of another state will be presumed to be the same as the local laws; *Commercial Bank v. Jackson*, 7 S. D. 135, 63 N. W. 548, holding law of other jurisdiction as to liability of married women on contracts presumed to be the same as that of forum; *Commercial Bank v. Jackson*, 9 S. D. 605, 70 N. W. 846, holding law of other state as to order of payment of notes held by different persons, secured by same mortgage presumed to be same as that of forum.

Cited in note in 67 L.R.A. 53, on how case determined when proper foreign law not proved.

Validity of contracts limiting carrier's liability.

Cited in notes in 62 Am. St. Rep. 524, on relation of express companies and their employees to other carriers; 1 L.R.A.(N.S.) 675, on risks of negligence assumed by contract with carrier as including gross negligence.

Disapproved in *Summerlin v. Seaboard Air Line R. Co.* 56 Fla. 687, 19 L.R.A.(N.S.) 191, 131 Am. St. Rep. 164, 47 So. 557, holding that a special contract with a carrier limiting the liability of the carrier for loss by its negligence, is invalid, whether the negligence be gross or ordinary.

Contributory negligence of passenger.

Cited in *Heumphreus v. Fremont, E. & M. Valley R. Co.* 8 S. D. 103, 65 N. W. 466, holding shipper guilty of contributory negligence preventing recovery by riding, over conductor's objection, in car with property in violation of contract to ride in caboose.

5 S. D. 584, SOMERS v. STATE, 59 N. W. 962.

Increasing salary during term of office.

Cited in *Harrold v. Barnum*, 8 Cal. App. 21, 96 Pac. 104, holding that the phrase, term of office applies only to public officers having a fixed, definite term, so that the constitutional inhibition against increasing the salary during a term of office does not apply to appointive officers holding only during the pleasure of the appointing power.

5 S. D. 588, VAN DUSEN v. ARNOLD, 59 N. W. 961.

What constitutes conversion.

Cited in *Aylesbury Mercantile Co. v. Fitch*, 22 Okla. 475, 23 L.R.A.(N.S.) 573, 99 Pac. 1089, holding that to constitute conversion for which trover

will lie, nonconsent to the possession and disposition of the property by the defendant is indispensable.

5 S. D. 594, DAWLEY v. SHERWIN, 59 N. W. 1027.

Fraudulent assignments for creditors.

Cited in note in 58 Am. St. Rep. 80, 97, on fraudulent assignments for creditors.

Sufficiency of affidavit for attachment.

Cited in McCarthy Bros. Co. v. McLean County Farmers' Elevator Co. 18 N. D. 176, 138 Am. St. Rep. 757, 118 N. W. 1049, 20 A. & E. Ann. Cas. 574, holding that affidavit for attachment, in language of statute using disjunction, conjunction, "or," stated only one ground; Cook v. Burnham, 3 Kan. App. 27, 44 Pac. 447, holding that an affidavit for attachment alleging that defendants have sold, conveyed, "or" otherwise disposed of their property, with intent to defraud their creditors, is not invalid as stating more than one ground, because of the use of the disjunctive "or," instead of the conjunctive "and"; Deseret Nat. Bank v. Little, R. & Co. 13 Utah, 265, 44 Pac. 930, holding that an affidavit of attachment which states that defendant has assigned and disposed of, "and" is about to assign and dispose of, its property with intent to defraud creditors, is a substantial compliance with Utah Comp. Laws 1888, § 3308, subd. 3, which states the two grounds of attachment disjunctively, as the defendant may have disposed of a portion of its property, and may be about to dispose of another portion; Johnson v. Emery, 31 Utah, 126, 86 Pac. 869, 11 A. & E. Ann. Cas. 53, holding that an alternative statement that the defendant had assigned, disposed of, or concealed the property or was about to assign, dispose of or conceal such property, was sufficient in an affidavit for attachment as not alleging grounds for attachment.

5 S. D. 603, NOYES v. BELDING, 59 N. W. 1069.

When secondary evidence admissible.

Cited in Miller v. Durst, 14 S. D. 587, 86 N. W. 631, holding oral evidence by justice of peace as to judgment rendered by him in given action inadmissible because not best evidence.

Scope of cross-examination.

Cited in Bedtkey v. Bedtkey, 15 S. D. 310, 89 N. W. 479, holding it discretionary with court to exclude on cross-examination in action against father-in-law for slander question as to pendency of divorce suit between herself and husband at time of trial when not attached on any direct examination; Connor v. Corson, 13 S. D. 550, 83 N. W. 588, holding it discretionary with court to limit cross examination to subject matter of examination in chief and require party wishing to go into other matters to make the witness his own.

Right of married woman to claim exemption.

Cited in Linander v. Longstaff, 7 S. D. 157, 63 N. W. 775, holding married woman supporting children and maintaining invalid husband entitled to exemption as "head of a family."

Selection of exempt property.

Cited in *Ecker v. Lindskog*, 12 S. D. 428, 48 L.R.A. 155, 81 N. W. 905, holding that selection of exempt property may be made by wife where husband is incompetent because adjudged insane; *Meyer v. Beaver*, 9 S. D. 168, 68 N. W. 310, holding an allegation in an alternative writ of mandamus for the restoration to a married woman of property claimed by her as exempt out of her husband's property, that the claim therefor was made within a reasonable time admitted by demurring to the writ.

Transfer of homestead as a fraud on creditors.

Cited in *Commercial State Bank v. Kendall*, 20 S. D. 314, 129 Am. St. Rep. 936, 106 N. W. 53, holding that the transfer of the homestead to the wife not being for the purpose of defrauding creditors in case of a future abandonment, such transfer to the wife was not rendered fraudulent as to creditors by the husband abandoning it and entering upon a governmental homestead.

Right of vendee to rely upon representations of vendor.

Cited in *Woody v. Benton Water Co.* 54 Wash. 124, 132 Am. St. Rep. 1102, 102 Pac. 1054, holding that the vendee could rely upon the representations of the vendor that the land was below the level of a canal and was readily susceptible of irrigation; *Best v. Offield*, 59 Wash. 466, 30 L.R.A. (N.S.) 55, 110 Pac. 17, holding that purchaser of realty including orchard, area of which could not be ascertained without survey and who is unfamiliar with fruit business may rely upon vendor's statements as to area.

Presumption as to attorney's authority.

Cited in note in 126 Am. St. Rep. 39, on presumption of attorney's authority to appear for party whom he assumes to represent.

5 S. D. 623, JEWELL NURSERY CO. v. STATE, 59 N. W. 1025.**Ratification of agent's acts.**

Cited in *Moffitt-West Drug Co. v. Lyneman*, 10 Colo. App. 249, 50 Pac. 736, holding that a principal by appropriating part of the goods included in an unauthorized purchase by its agent, and keeping the proceeds thereof, ratifies the purchase as to all the goods, whether or not it knew of this purchase at the time of appropriation.

Valid demands against state.

Cited in note in 42 L.R.A. 56, on what claims constitute valid demands against a state.

Distinguished in *Van Dusen v. State*, 11 S. D. 318, 77 N. W. 201, holding state not rendered liable by mere fact that coal was furnished in good faith and actually used by college maintained by state.

5 S. D. 627, STATE EX REL. POWER v. POWER, 59 N. W. 1090.

5 S. D. 636, STATE EX REL. KUNZ v. CAMPBELL, 60 N. W. 32.

Notice of resale to bidder.

Cited in Kirby v. McCook County Circuit Ct. 10 S. D. 38, 71 N. W. 140, holding order setting aside foreclosure sale and directing resale for inadequacy of price, binding on all parties including bidder, though made without notice to him.

Foreclosure sale for inadequate price.

Cited in Stacy v. Smith, 9 S. D. 137, 68 N. W. 198, holding invalid as against mortgagee, sale under power in mortgage for one sixtieth of value of property, which amounts only to sheriff's and recording fees.

5 S. D. 646, PETTIGREW v. SIOUX FALLS, 60 N. W. 27.

Grounds for vacating judgment.

Cited in Corson v. Smith, 22 S. D. 501, 118 N. W. 705, holding application to open default for mistake or oversight, which was inexcusable, properly denied; State v. Casey, 9 S. D. 436, 69 N. W. 585, holding court not justified in setting aside for excusable neglect judgment by default against one charged with maintaining liquor nuisance on his mere affidavit that no liquors were found on search of premises and that he did not appear as he supposed the action would abate.

Review of ruling of trial court upon motion to set aside judgment.

Cited in Kjetland v. Pederson, 20 S. D. 58, 104 N. W. 677, holding that the ruling of the trial court upon a motion to set aside a judgment and for leave to answer, will not be disturbed upon appeal unless there has been an abuse of discretion; Merchants' Nat. Bank v. Stebbins, 10 S. D. 466, 74 N. W. 199, holding decision of question as to consideration on motion for new trial of objection to evidence not made when evidence was offered, not reviewable on appeal in absence of abuse of discretion.

5 S. D. 650, SEARLES v. CHRISTENSEN, 60 N. W. 29.

Construction of abstract on appeal.

Cited in Harrison v. Chicago, M. & St. P. R. Co. 6 S. D. 572, 62 N. W. 376, holding that abstract will be presumed on appeal to have been made from a bill or statement duly settled by the trial judge in absence of any showing to the contrary; Kehoe v. Hanson, 6 S. D. 322, 60 S. W. 31, holding that original papers sent up by clerk of the court below will be examined by appeal in settlement of a dispute raised by the abstracts as to whether the bill of exceptions was settled in the court below.

Vacating judgment secured through excusable mistake or neglect.

Cited in MacCall v. Looney, 4 Neb. (Unof.) 715, 96 N. W. 238, holding that a misunderstanding between the home attorneys of one sued at a distance, and the attorneys at the place of trial whereby the defense was not presented, was sufficient to warrant the setting aside of the judgment because of such mistake; Rosebud Lumber Co. v. Serr, 22 S. D. 389, 117 N. W. 1042, holding it not abuse of discretion to set aside default judg-

ment where failure to secure attorney was inadvertence or excusable neglect.

Cited in notes in 96 Am. St. Rep. 109, on vacation of judgments for negligence or mistake of attorney; 80 Am. St. Rep. 266, on negligence or inadvertence of attorney as ground for relief from judgment.

Distinguished in Minnehaha Nat. Bank v. Hurley, 13 S. D. 18, 82 N. W. 87, holding failure of discharged attorney to appear and interpose defense even though valid one exists no ground for vacating judgment.

Vacating judgment to let in defense of limitations.

Cited in Garvie v. Greene, 9 S. D. 608, 70 N. W. 847, holding that the defense of the statute of limitations may be interposed on opening a default without restriction.

Cited in note in 61 L.R.A. 747, on right to open default judgment to let in defense of limitations.

Dak. Rep.—51.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 6 S. D.

6 S. D. 1, KIRBY v. WESTERN U. TELEG. CO. 60 N. W. 152.

6 S. D. 5, UNDERWOOD v. LAWRENCE COUNTY, 60 N. W. 147.

6 S. D. 9, WILLIAMS v. RICE, 60 N. W. 153.

Sufficiency of transcript of justice's judgment.

Cited in *Froelich v. Aylward*, 11 S. D. 635, 80 N. W. 131, holding a transcript of a justice's judgment containing the venue, title, a memorandum of the amount, and a certificate of the justice that it is a true transcript, sufficient to authorize the issuance of an execution from the circuit court; *Garlock v. Calkins*, 14 S. D. 90, 84 N. W. 393, holding transcript of justice's judgment affirmatively showing jurisdiction of justice of peace of both person and of subject matter, prima facie evidence of jurisdiction.

Limitation of time to issue execution on judgment from justice court.

Disapproved in *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36, holding that the ten year period of limitations for the issuance of executions upon judgments in justice courts runs from the time the judgment is entered by the justice and not from the time the transcript is filed in the district court.

6 S. D. 16, BROWN v. McCAUL, 60 N. W. 151.

Necessity for exceptions to instructions.

Cited in *Greder v. Stahl*, 22 S. D. 139, 115 N. W. 1129, holding that

instruction as to rescission by consent, to which no exception was taken, will be assumed to be correct, on appeal.

6 S. D. 21, BRETTELL v. DEFFEBACH, 60 N. W. 167.

Followed without special discussion in *Brettell v. Deffebach*, 6 S. D. 39, 60 N. W. 173.

Vacating judgment by default.

Distinguished in *Coughran v. Germain*, 17 S. D. 529, 97 N. W. 743, holding that a judgment against joint and several makers of a note, where the service of the summons was by publication, was sustained by a finding that the defendants or one of them had property within the state and the judgment would not be set aside as to them for want of service.

— Who may apply therefor.

Cited in *Frederick Mill. Co. v. Frederick Farmers' Alliance Co.* 20 S. D. 335, 106 N. W. 298, holding that the stockholders of a corporation could appear to move the vacation of a judgment entered upon a stipulation signed by the president, where there was no board of directors to whom they could apply to defend the suit.

Cited in notes in 54 L.R.A. 768, on who may sue or take other proceedings to set aside judgments against other parties; 26 L.R.A.(N.S.) 1066, on availability to privies of remedy of party to open default judgment.

Distinguished in *Smith v. Roberts*, 1 Cal. App. 148, 81 Pac. 1026, holding that a settler upon state lands could not have a judgment determining the right of other purchasers of the land, set aside so as to enable him to contest their rights, since he was not a successor to the rights of either.

6 S. D. 39, BRETTELL v. DEFFEBACH, 60 N. W. 173.

6 S. D. 40, SAUNDERS v. CHICAGO & N. W. R. CO. 60 N. W. 148.

Presumption of negligence from happening of accident.

Cited in *Wyatt v. Pacific Electric R. Co.* 156 Cal. 170, 103 Pac. 892, holding that the doctrine of *res ipsa loquitur* does not apply where there is only proof that a passenger was injured in alighting from a car or while aboard the same, unless there is proof that the injury came from a movement of the car by those in charge of it or from something in control of the carrier; *Denver & R. G. R. Co. v. Fotheringham*, 17 Colo. App. 410, 68 Pac. 978, holding that the doctrine does not apply in case of an accident unconnected with the means of transportation; *McGinn v. New Orleans R. & Light Co.* 118 La. 811, 13 L.R.A.(N.S.) 601, 43 So. 450, holding nature of the accident must be shown to raise an inference; *Chicago City R. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238, holding that a presumption of negligence against a street car company does not arise from the fact that a passenger is struck by a passing wagon and injured; *Spencer v. Chicago, M. & St. P. R. Co.* 105 Wis. 311, 81 N. W. 407, holding that the mere unexplained fact that a stream of water enters a car window raises no presumption of negligence in favor of a passenger injured

thereby, but that to raise such a presumption the evidence must tend in some tangible way to show that the accident resulted from something connected with the operation of the railway.

Cited in notes in 113 Am. St. Rep. 1024, on presumption of negligence from happening of accident causing personal injuries; 7 L.R.A.(N.S.) 1077, on *res ipsa loquitur* as applied to jolts or jerks causing injury to passengers; 13 L.R.A.(N.S.) 603, on presumption of negligence from injury to passenger.

6 S. D. 47, TOWNSEND v. KENNEDY, 60 N. W. 164.

Sufficiency of land contract within statute of frauds.

Cited in *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142, holding that land contract within statute of frauds must contain all terms agreed upon between parties.

Objections to complaint after trial.

Cited in *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, holding that though the complaint may be inartistic, indefinite, and uncertain, reversible error cannot be predicated upon the overruling of the defendant's objection first raised after the trial began, the case having been heard upon the merits without apparent prejudice to defendant's rights; *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding that the objection to a complaint to enforce a lien, because it alleged ownership of the property in the alternative, cannot be urged for the first time on appeal.

6 S. D. 58, MERCHANTS' NAT. BANK v. MCKINNEY, 60 N. W. 162.

Filing new abstract after hearing.

Cited in *Re Seydel*, 14 S. D. 115, 84 N. W. 397, holding that matters outside record cannot be shown by affidavit or otherwise on motion for rehearing; *Harrison v. Chicago, M. & St. P. R. Co.* 6 S. D. 572, 62 N. W. 376, holding that application to reargue on new abstract to be presented will be denied unless circumstances are very exceptional where case had previously been submitted and decided on abstract to which no objection was made.

6 S. D. 62, SIOUX FALLS v. KIRBY, 25 L.R.A. 621, 60 N. W. 156.

Validity of regulatory municipal ordinances.

Cited in *State ex rel. Omaha Gas Co. v. Withnell*, 78 Neb. 33, 8 L.R.A.(N.S.) 978, 126 Am. St. Rep. 586, 110 N. W. 680, holding that a municipal ordinance prohibiting the erection or remodeling of any gas tank within the city unless the consent of all the property owners within one thousand feet of the tank should be secured in writing, was void; *Richmond v. Model Steam Laundry*, 111 Va. 758, 69 S. E. 932, holding invalid, ordinance giving city council arbitrary power over permits to use furnaces and stationary steam engines.

Cited in notes in 93 Am. St. Rep. 407, on constitutionality of building

regulations; 13 L.R.A.(N.S.) 738, on power of municipality to require building permit; 1 L.R.A.(N.S.) 942, on validity of ordinance vesting in officer's discretion as to subject-matter.

Distinguished in *Fischer v. St. Louis*, 194 U. S. 361, 48 L. ed. 1024, 24 Sup. Ct. Rep. 673, holding that a municipal ordinance which prohibited the erection and maintenance of cow and dairy stables within the city limits unless the consent of the municipal assembly was secured, was valid; *New York ex rel. Lieberman v. Van De Carr*, 199 U. S. 552, 50 L. ed. 310, 26 Sup. Ct. Rep. 144, on the same point.

Nature of prosecution for violating city ordinance.

Cited in *Lead v. Klatt*, 11 S. D. 109, 75 N. W. 896, holding the rules of criminal pleading inapplicable in any action by a city for violation of the health ordinance as the action is not a criminal one; *Lead v. Klatt*, 13 S. D. 143, 82 N. W. 391, holding a prosecution for violating a city ordinance as to nuisances a civil action, the judgment in which will not be arrested where the complaint shows a violation of the ordinance; *Madison v. Horner*, 15 S. D. 359, 89 N. W. 474, holding that judgments rendered for violation of city ordinances in name of the city must in all cases be brought to the supreme court by appeal and not by writ of error.

Cited in note in 4 L.R.A.(N.S.) 782, on character of proceeding for violation of ordinance as civil or criminal.

Power of municipal officers to bind city beyond their authority.

Cited in *Wilson v. Mitchell*, 17 S. D. 515, 65 L.R.A. 158, 106 Am. St. Rep. 784, 97 N. W. 741, holding that where the city had no authority to connect the city water works system with the artesian well on the plaintiff's land, the city was not liable for the trespass nor the water appropriated.

6 S. D. 73, HESNARD v. PLUNKETT, 60 N. W. 159.

Who entitled to homestead exemption.

Cited in note in 4 L.R.A.(N.S.) 380, on what constitutes a "family" under homestead and exemption laws.

Distinguished in *McCanna v. Anderson*, 6 N. D. 482, 71 N. W. 769, holding single man not entitled to homestead exemption.

6 S. D. 82, HORMANN v. SHERIN, 60 N. W. 145.

When replevin lies.

Cited in note in 80 Am. St. Rep. 751, as to when replevin or claim and delivery is sustainable.

Sufficiency of verdict in claim and delivery.

Cited in *Towne v. Liedle*, 10 S. D. 460, 74 N. W. 232, holding verdict for plaintiff in claim and delivery which merely assesses his damages at a specified amount sufficient to support judgment as against attack first made on appeal.

6 S. D. 89, STATE v. CHURCH, 60 N. W. 143.

Qualification of jurors.

Cited in *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482, holding refusal to

disqualify for actual bias juror stating that he has formed an impression as to guilt of accused but that he would try case solely on the evidence fairly and impartially, not ground for reversal.

Review of ruling of trial court as to qualification of juror.

Cited in *State v. Werner*, 16 N. D. 83, 112 N. W. 60; *Bemis v. Omaha*, 81 Neb. 352, 116 N. W. 31,—holding that the ruling of the trial court in determining the qualifications of a juror after a challenge for cause, will not be reviewed on appeal unless a clear abuse of discretion is shown; *State v. Fujita*, 20 N. D. 555, 129 N. W. 360, holding that decision of trial court as to qualification of juror who has formed opinion will be reversed only in clear case of abuse of discretion.

Use by state of witnesses whose names are not on indictment.

Cited in *State v. Albertson*, 20 N. D. 512, 128 N. W. 1122, holding it not error for trial court to allow examination of other witnesses than those indorsed on information; *State v. Reddington*, 7 S. D. 368, 64 N. W. 170, holding it discretionary in trial court to allow the state to use witnesses as names are not indorsed on indictment; *State v. Isaacson*, 8 S. D. 69, 65 N. W. 430, sustaining right to examine on trial witnesses not examined before grand jury after oral notice in open court that they will be called where defendant is not injured thereby; *State v. Matejousky*, 22 S. D. 30, 115 N. W. 96, holding that rule requiring endorsement of witnesses does not preclude state from calling witnesses whose names are not required to be indorsed.

Judicial notice of lager beer as an intoxicating liquor.

Cited in *Cripe v. State*, 4 Ga. App. 832, 62 S. E. 567, holding that the courts may take judicial notice that lager beer is an intoxicating liquor.

Cited in note in 7 L.R.A.(N.S.) 196, on sale of "lager beer" not shown to be intoxicating as sustaining conviction for unlawful sale of "intoxicating liquors."

Right to question constitutionality of statute.

Cited in *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321, holding that the constitutionality of a statute will be considered only in connection with the particular case wherein it is involved.

New trial for misconduct of jury.

Cited in note in 134 Am. St. Rep. 1041, on misconduct of jurors other than their separation for which a verdict may be set aside.

6 S. D. 98, WINTON v. KIRBY, 60 N. W. 409.

6 S. D. 100, HARRISON v. CHICAGO, M. & ST. P. R. CO. 60 N. W. 405, Rehearing denied in 6 S. D. 572, 62 N. W. 376.

Liability of railroad company for killing trespassing animal.

Cited in *Keilbach v. Chicago M. & St. P. R. Co.* 11 S. D. 468, 78 N. W. 951, holding railroad company not liable for value of trespassing animal killed on track where employees could not by exercise of reasonable care avert accident after the discovery of animal.

Duty to keep lookout for live stock on tracks.

Cited in *Mears v. Chicago & N. W. R. Co.* 103 Iowa, 203, 72 N. W. 509, holding that a locomotive engineer has a right to presume that the track is clear of stock at a point where the company has inclosed the right of way, and he owes no duty to the owner in relation to trespassing horses until their presence is discovered, and then only the duty of using ordinary care to avoid injuring them; *Corbett v. Great Northern R. Co.* 19 N. D. 450, 125 N. W. 1054, holding it duty of railroad company and its servants to use ordinary care not to injure trespassing stock after its discovery upon track or right of way.

Cited in note in 24 L.R.A.(N.S.) 859, to duty of train employees to keep lookout for live stock.

When presumption of negligence is rebutted.

Cited in *Lewis v. Fremont, E. & M. V. R. Co.* 7 S. D. 183, 63 N. W. 781, holding statutory presumption of negligence from killing of horse by passing train rebutted by undisputed evidence that train could not have been stopped after it jumped on the tracks; *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, holding prima facie evidence of negligence from killing horse by passing engine overcome by uncontroverted testimony of railroad employees showing that killing was unavoidable.

Submission of case to jury.

Cited in *Mankey v. Chicago, M. & St. P. R. Co.* 14 S. D. 468, 85 N. W. 1013, holding evidence that plaintiff's horse was injured by defendant's train and that defendant neglected to ring the bell or sound the whistle insufficient to take question of defendant's liability to jury; *McKeever v. Homestake Min. Co.* 10 S. D. 599, 74 N. W. 1053; *Aultman Engine & Thresher Co. v. Boyd*, 21 S. D. 303, 112 N. W. 151,—holding that case should be submitted to jury, when evidence is conflicting and different conclusions might be drawn therefrom.

— Case involving conjecture and guesswork.

Cited in *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, holding that where the question of damages cannot be determined without the jury resorting to conjecture, surmises, and guesswork, the case should be taken from the jury; *Peterson v. Chicago, M. & St. P. R. Co.* 19 S. D. 122, 102 N. W. 595, holding that where the evidence was not such as to convince fair minded men that the animals died from the causes alleged, without resorting to guess work and conjecture, the case should not have been submitted to the jury.

Presumption that abstract contains all the evidence in the absence of an additional abstract.

Cited in *Weeks v. Cranmer*, 17 S. D. 173, 95 N. W. 875, holding that where the respondent has filed no additional abstract, he cannot be heard to say that all the evidence is not contained in the abstract as filed.

6 S. D. 112, *JONES LUMBER & MERCANTILE CO. v. FARIS*, 55 AM. ST. REP. 814, 60 N. W. 403.

Review of errors of law occurring at the trial.

Cited in *Sioux Bkg. Co. v. Kendall*, 6 S. D. 543, 62 N. W. 377, holding a

direction of a verdict for defendant an error at law if error at all and properly specified as such in the statement on which a motion for a new trial is made; *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 634, 67 N. W. 837, holding that objection by appellee after reversal to taxation of costs for printing of so much of appellant's abstract as contains the evidence on the ground that the bill of exceptions contained no specifications of errors relied on or particulars in which the evidence was insufficient cannot be considered unless the omission is shown by appellant's abstract or by an additional abstract filed by appellee; *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029 (dissenting opinion), in which the majority hold the question of the sufficiency of the evidence to justify the verdict not reviewable on appeal, where an appeal from an order denying a new trial was dismissed because taken before such order was entered; *McCormick Harvesting Mach. Co. v. Woulph*, 11 S. D. 252, 76 N. W. 939, holding that order made after judgment on motion for new trial but never entered will be disregarded on appeal; *McGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281, holding that errors of law occurring at the trial may be reviewed upon exceptions there preserved, though there was no notice of intention to move for a new trial served and the appeal was taken from the order refusing a new trial.

6 S. D. 119, STATE EX REL. DICKSON v. WILLIAMS, 60 N. W. 410.

Removal or suspension of public officer without statutory report.

Cited in *Gray v. McLendon*, 134 Ga. 224, 67 S. E. 859, holding that under a statute providing for the suspension of a railroad commissioner by the governor and a report to the next general assembly of the reasons for the suspension, such report is not necessary to the suspension, but the latter is accomplished when the order for it is made.

6 S. D. 130, LINDSAY v. PETTIGREW, 60 N. W. 744.

Waiver of objection by delay.

Cited in *George v. Kotan*, 18 S. D. 437, 101 N. W. 31, holding that the plaintiff waived his right to object to an affidavit in support of a motion for a change of venue, by accepting service thereof, and allowing the same to be read without objection in support of the motion.

6 S. D. 134, SCHAETZEL v. HURON, 60 N. W. 741.

Appealable orders.

Cited in *State v. Van Nice*, 7 S. D. 104, 63 N. W. 537, holding that refusal of trial court to exercise its discretion on application for permission to withdraw plea of not guilty for purpose of presenting motion to set aside indictment on erroneous ground of absence of discretion will be corrected on appeal if substantial injury results; *Bolton v. Donovan*, 9 N. D. 575, 84 N. W. 357, holding order bringing in additional defendant in action to recover money only not appealable.

Right of plaintiff to dismiss action.

Cited in *Axiom Min. Co. v. Little*, 6 S. D. 438, 61 N. W. 441, holding

that action to quiet title to mining property should not be unconditionally discontinued at plaintiff's instance after defendant has asked to have title quieted in himself; *Tripp v. Yankton*, 11 S. D. 353, 77 N. W. 580, sustaining right of plaintiff to dismiss one or all of his causes of action either before or after joinder of issue in absence of counterclaim or a showing that defendant would be materially prejudiced thereby; *Cooke v. McQuarters*, 19 S. D. 361, 103 N. W. 385, holding that the right of the plaintiff to dismiss his action at any time before final judgment has been entered depends upon whether there has been any counterclaim filed, or whether any good reason exists why he should not; *Deere & W. Co. v. Hinckley*, 20 S. D. 359, 106 N. W. 138, holding that the plaintiff has a right at any time to dismiss his action where there has been no counterclaim filed and there exists no special reason why it should not be dismissed.

Cited in notes in 123 Am. St. Rep. 312, on right to withdraw complaint of intervention; 15 L.R.A. (N.S.) 344, on right at common law to take non-suit where defendant has interposed counterclaim entitling him to affirmative relief.

6 S. D. 140. J. I. CASE THRESHING MACH. CO. v. PEDERSON, 60 N. W. 747.

Proper party to bring action.

Cited in note in 64 L.R.A. 594, 609, as to who is real party in interest within statutes defining parties by whom action must be brought.

6 S. D. 147, GRANT v. GRANT, 60 N. W. 743.

Reversal of order granting new trial.

Cited in *Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161, refusing to disturb decision on motion for new trial for newly discovered evidence except for abuse of discretion; *Finch v. Martin*, 13 S. D. 274, 83 N. W. 263, refusing to disturb discretion of trial court in granting or refusing motion for new trial; *Williams v. Chicago & N. W. R. Co.* 11 S. D. 463, 78 N. W. 949, refusing to disturb discretion of trial court in granting or refusing motion for new trial on questions of fact; *Thompson v. Ulrikson*, 8 S. D. 567, 67 N. W. 626; *State v. Crowley*, 20 S. D. 611, 108 N. W. 491; *Morrow v. Letcher*, 10 S. D. 33, 71 N. W. 139,—holding that stronger case must be made to justify interposition of appellate court where new trial is granted than where it is refused; *State v. Andre*, 14 S. D. 215, 84 N. W. 783, holding that refusal of new trial on ground of alleged misconduct of jury will not be disturbed on appeal unless abuse of discretion affirmatively appears; *Merchants' Nat. Bank v. Stebbins*, 10 S. D. 466, 74 N. W. 199, holding decision of question as to consideration on motion for new trial of objection to evidence not made when evidence was offered, not reviewable on appeal in absence of abuse of discretion.

— For insufficiency of evidence.

Cited in *Morrow v. Letcher*, 10 S. D. 33, 71 N. W. 139; *Distad v. Shanklin*, 11 S. D. 1, 75 N. W. 205; *Thomas v. Fullerton*, 13 S. D. 199, 83 N. W. 45; *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 539; *Troy*

Mining Co. v. Thomas, 15 S. D. 238, 88 N. W. 106,—holding that order granting new trial for the insufficiency of the evidence will be disturbed only for the manifest abuse of discretion; Clifford v. Latham, 19 S. D. 376, 103 N. W. 642, holding that the action of the trial court in granting or refusing a new trial because of the insufficiency of the evidence will not be reversed upon appeal where the evidence is conflicting, unless there appears a clear abuse of discretion, and a stronger case is required to reverse an order granting a new trial than one refusing it.

6 S. D. 152, WARNER v. CITIZENS' BANK, 60 N. W. 746.

Conflict of laws as to negotiable paper.

Cited in notes in 121 Am. St. Rep. 872, 874, on law governing demand, protest and notice of dishonor of foreign bill of exchange; 61 L.R.A. 213, 217, on conflict of laws as to negotiable paper.

6 S. D. 157, JAMES RIVER LODGE, NO. 32 I. O. O. F. v. CAMPBELL, 60 N. W. 750.

6 S. D. 160, HILL v. ALLIANCE BLDG. CO. 55 AM. ST. REP. 819, 60 N. W. 752.

Liberal construction of mechanic's lien law.

Cited in Rolewitch v. Harrington, 20 S. D. 375, 6 L.R.A.(N.S.) 550, 107 N. W. 207, holding that the mechanic's lien law should be liberally construed so as to carry out the intention of the legislature.

Waiver of mechanic's lien.

Cited in Wisconsin Trust Co. v. Robinson & C. Co. 15 C. C. A. 668, 32 U. S. App. 435, 68 Fed. 778, holding mechanic's lien not waived by accepting and discounting notes maturing within time allowed for foreclosure of lien under an agreement to credit them on account when paid; Farmers' & M. Nat. Bank v. Taylor, 91 Tex. 78, 40 S. W. 876, 966, holding that contractors who supply labor and material for a building do not by the mere act of taking notes and a trust deed waive their mechanics' liens.

Priority between mechanic's lien and mortgage.

Cited in Wisconsin Trust Co. v. Robinson & C. Co. 15 C. C. A. 668, 32 U. S. App. 435, 68 Fed. 778, holding that lienor's failure to file account and claim of lien within ninety days from completion of contract does not subordinate the lien to a mortgage made and filed within such period; Reynolds v. Manhattan Trust Co. 27 C. C. A. 620, 55 U. S. App. 96, 83 Fed. 593, holding a subcontractor's lien upon a railway prior to a mortgage executed before the work was commenced, but under which no bonds were issued until after the commencement of the work; Edward P. Allis Co. v. Madison Electric Light, H. & P. Co. 9 S. D. 459, 70 N. W. 650, denying right of vendors of machinery to abandon notes of third person received for deferred payments and full lien for money as against bond holders under trust deed executed before the contract for machinery was entered into.

Effect of omission of jurat from mechanic's lien statement.

Cited in Tygart Valley Brewing Co. v. Vilter Mfg. Co. 107 C. C. A.

169, 184 Fed. 849, holding that omission of authentication of certificate of officer before whom statement was sworn to invalidates mechanic's lien.

Distinguished in *Cox v. Stern*, 170 Ill. 442, 62 Am. St. Rep. 385, 48 N. E. 906, affirming 71 Ill. App. 194, holding that the jurat or certificate of the officer administering the oath is not a necessary part of an affidavit reciting on its face that affiants have been duly sworn, and that the fact that the affidavit was sworn to may be shown aliunde.

Disapproved in *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340, holding written account to secure mechanic's lien duly sworn to not fatally defective because of absence of jurat.

Usury as defense by purchaser from mortgagor.

Cited in *Higbee v. Aetna Bldg. & L. Asso.* 26 Okla. 327, 109 Pac. 236, holding that purchaser from trustee in bankruptcy of realty subject to mortgage cannot set up usury as defense against mortgage; *Irwin v. Washington Loan Asso.* 42 Or. 105, 71 Pac. 142, on the right of the purchaser of land subject to a mortgage to have the excess of usurious interest applied in satisfaction of the mortgage debt.

Cited in note in 8 L.R.A.(N.S.) 814, on right of vendee of realty to raise question of usury in lien.

6 S. D. 180, HOWARD v. HURON, 26 L.R.A. 493, 60 N. W. 803.

Matters concluded by judgment.

Cited in *State ex rel. Ledger Pub. Co. v. Gloyd*, 14 Wash. 5, 44 Pac. 103, holding it no defense in action to enforce judgment against county that it was based upon debt incurred when county had exceeded constitutional debt limit, as judgment concludes county on that point; *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567, holding same in an action to enforce the collection of coupons from bonds issued in payment of a judgment entered by default against a municipal corporation; *Stallcup v. Tacoma*, 13 Wash. 141, 52 Am. St. Rep. 25, 42 Pac. 541, holding a decision involving the determination as to the legality of municipal bonds, in an action by a taxpayer in behalf of himself and all others similarly situated to restrain the city from issuing them, conclusive of their validity in a subsequent action by another taxpayer to restrain the city from paying interest thereon; *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 34 L.R.A. 835, 71 Am. St. Rep. 926, 45 Pac. 494, holding that a judgment against a county cannot be collaterally attacked on the ground that the debt on which it was based had been created in excess of the constitutional limit of indebtedness; *Selbie v. Graham*, 18 S. D. 365, 100 N. W. 755, holding that it is not enough that the issue presented in the later suit was presented and ought to have been litigated in the former, but it must appear further that it was litigated and decided as well as involved, in order that the first judgment may operate as an estoppel in the second; *Ft. Pierre v. Hall*, 19 S. D. 663, 117 Am. St. Rep. 972, 104 N. W. 470, holding that it was not a sufficient excuse to warrant equitable relief against a default judgment against a city that the defense involved the production of certain public records, which were difficult to locate; *Remillard v.*

Authier, 20 S. D. 290, 4 L.R.A. (N.S.) 295, 105 N. W. 626, holding that a judgment in a former action involving the title of the respective parties, is conclusive in an action between the same parties to quiet title to the same premises.

Distinguished in **Dewey v. Feiler**, 11 S. D. 632, 80 N. W. 130, holding judgment of justice of peace for costs and attorney's fees for defendant in absence of plaintiff, and without pleadings, not bar to another suit; **Pitts v. Oliver**, 13 S. D. 561, 79 Am. St. Rep. 907, 83 N. W. 591, holding judgment bar to subsequent action on different claim or judgment, only as to matters in issue or controverted on the prior action.

Right to writ of mandamus.

Cited in **White v. Decatur**, 119 Ala. 476, 23 So. 999, holding that an application for mandamus to municipal officers directing them to set apart out of the revenues of the current year sufficient funds to satisfy a judgment against the city will not be refused because the precise amount of the surplus has not been ascertained and it may prove to be less than the amount of the judgment, so that the applicant will not obtain the full relief asked for.

Right to impeach judgment.

Cited in **Minnesota Thresher Mfg. Co. v. Schaack**, 10 S. D. 511, 74 N. W. 445, denying right of debtor's grantee in creditor's action to set aside conveyance to impeach judgment on which statute is founded except for fraud, collusion, want of good faith, or causes affecting the jurisdiction.

6 S. D. 196, MATTOON v. FREMONT, E. & M. VALLEY R. CO. 60 N. W. 740.

Sufficiency of motion to direct verdict.

Cited in **Knight v. Towles**, 6 S. D. 575, 62 N. W. 964, in which the court questioned the sufficiency of a motion to direct a verdict, but did not consider the same, as no objection was taken to the motion on that ground; **Cooper v. Merchants' & M. Nat. Bank**, 25 Ind. App. 341, 57 N. E. 569, raising, but not deciding, the question whether a motion for a peremptory instruction to find a verdict for the party moving shall specify the grounds on which the instruction is requested.

Review of order denying motion to direct verdict.

Cited in **First Nat. Bank v. Laughlin**, 4 N. D. 391, 61 N. W. 473, refusing to consider on appeal from order denying motion to direct verdict other grounds than those called to attention of trial court.

6 S. D. 200, STEVENS v. WILLIAM DEERING & CO. 60 N. W. 739.

6 S. D. 206, JOHN A. TOLMAN CO. v. BOWERMAN, 60 N. W. 751.

New questions upon rehearing.

Cited in **Powell v. Nevada, C. & O. R. Co.** 28 Nev. 305, 82 Pac. 96, holding

that questions not raised upon the original hearing will not be considered upon rehearing; *Sweigle v. Gates*, 9 N. D. 538, 84 N. W. 481, holding that no question not presented on original argument or passed on in opinion delivered by the court will be considered on petition for rehearing; *State v. Sexton*, 11 S. D. 105, 75 N. W. 895, holding that rehearing will be granted on questions not discussed in briefs or presented in assignments of error where circumstances are exceptional and question can be first raised on appeal.

6 S. D. 209, FARGO v. VINCENT, 60 N. W. 858.

6 S. D. 212, STATE v. SASSE, 55 AM. ST. REP. 834, 60 N. W. 853.

Effect of good faith in commission of statutory crime.

Cited in *People v. Christian*, 144 Mich. 247, 107 N. W. 919, holding that good faith in trespassing upon state lands and cutting timber does not affect the crime under the statute making it a felony to enter upon state tax homestead lands and cutting timber therefrom; *State v. Dorman*, 9 S. D. 528, 70 N. W. 848, holding the removal of timber from school lands, although in ignorance that they are such, punishable.

Cited in notes in 55 Am. St. Rep. 514, on ignorance of one's rights as a ground of relief in criminal cases; 78 Am. St. Rep. 240, 254, on acts which legislature may declare criminal; 25 L.R.A.(N.S.) 669, on ignorance of minority of purchaser of liquor as defense to prosecution for sale.

6 S. D. 217, LAIRD-NORTON CO. v. HOPKINS, 60 N. W. 857.

Sufficiency of affidavit for mechanic's lien.

Distinguished in *Howe v. Smith*, 6 N. D. 432, 71 N. W. 552, holding affidavit for lien not rendered insufficient as between lienor and owner by failure to state that the addition in which the property is situated is the second one of that name.

6 S. D. 221, EVERT v. KLEIMENHAGEN, 60 N. W. 851.

Contract void as Sunday contract.

Cited in note in 20 L.R.A.(N.S.) 86, on delivery on week day pursuant to Sunday contract.

Review of verdict.

Cited in *Meyer v. Davenport Elevator Co.* 12 S. D. 172, 80 N. W. 189, holding it allowable on appeal in action at law to determine only whether there is substantial evidence which with inferences fairly deducible will sustain the verdict; *Schott v. Swan*, 21 S. D. 639, 114 N. W. 1005; *Comeau v. Hurley*, 22 S. D. 79, 115 N. W. 521,—holding that verdict will not be disturbed, where there is ample evidence to sustain it.

6 S. D. 226, AULTMAN & T. CO. v. GUNDERSON, 55 AM. ST. REP. 837, 60 N. W. 859.

Sufficiency of notice to seller of failure of machine to fulfil warranty.

Cited in *J. I. Case Threshing Mach. Co. v. Ebbighausen*, 11 N. D. 466, 92 N. W. 826, holding that the acts of the company's general agent was not a waiver of the clause of the contract requiring the notification that the machine would not work be sent to the head office, where he was not authorized to receive such notice, and notice to him not sufficient.

Questions reviewable on appeal.

Cited in *Atchison, T. & S. F. R. Co. v. Kansas Farmers' Ins. Co.* 7 Kan. App. 447, 53 Pac. 607, holding that a party who struck from his petition allegations in reference to subrogation while a motion to make the petition more definite and certain was pending, and relied upon the trial upon a direct written assignment of the cause of action, cannot urge upon appeal the theory of subrogation; *La Crosse Boot & Shoe Mfg. Co. v. Mons Anderson Co.* 13 S. D. 301, 83 N. W. 331, holding that review on appeal will be limited to a question of law where the decision below was made solely on such question.

— Questions involving discretion.

Cited in *Phenix Ins. Co. v. Perkins*, 19 S. D. 59, 101 N. W. 1110, holding that the rule that the order granting or refusing a temporary injunction cannot be reviewed unless there has been an abuse of discretion does not apply where the injunction was refused because the plaintiff had no grounds of action and no discretion was exercised.

6 S. D. 235, CHURCH v. CHICAGO, M. & ST. P. R. CO. 26 L.R.A. 616, 60 N. W. 854.

Reasonableness of carrier's ticket regulations.

Cited in *Kelly v. New York City R. Co.* 119 App. Div. 223, 104 N. Y. Supp. 561, holding that a street railroad could enforce a regulation requiring persons using transfers to use same only in the general direction of their original trip.

Questioned in *Illinois C. R. Co. v. Harper*, 83 Miss. 560, 64 L.R.A. 283, 102 Am. St. Rep. 469, 35 So. 764, holding that where the ticket contained no directions and the passenger inquired of the ticket agent and he gave her the wrong directions as to the route of her journey, the conductor wrongfully ejected her because she was on the wrong train.

Carrier's liability for misdirection by employer.

Cited in note in 2 L.R.A.(N.S.) 111, on liability of carrier for misdirection of passenger by employee.

6 S. D. 244, CLARK v. EVANS, 60 N. W. 862.

Admissibility of intent.

Cited in note in 23 L.R.A.(N.S.) 386, 397, on right of one to testify as to his intent.

What constitutes a homestead.

Cited in *Re Malloy*, 179 Fed. 942, holding that where the homesteader left his homestead within three months after receiving the patent, and was married and resided elsewhere, his mere intention to return and occupy the homestead at some future time was not sufficient to enable him to claim the same exempt as his homestead.

6 S. D. 253, SCOTT v. ESTERBROOKS, 60 N. W. 850.**6 S. D. 257, BATTERTON v. FULLER, 60 N. W. 1071, Later appeal in 9 S. D. 216, 68 N. W. 308.****Eligibility to office as prerequisite to right to contest election.**

Cited in *Gillespie v. Dion*, 18 Mont. 183, 33 L.R.A. 703, 44 Pac. 954, holding that in a special statutory proceeding for contesting an election, to maintain which under the statute the contestant must be an elector, an omission from the record of any averment to show that he is an elector will be fatal.

Distinguished in *Church v. Walker*, 10 S. D. 450, 74 N. W. 198, holding eligibility of contestant or contestee under election contest immaterial in case of contest between two candidates as such.

Evidence of eligibility to office.

Cited in *Tunks v. Vincent*, 106 Ky. 829, 51 S. W. 622, holding that eligibility to an office is prima facie established by the fact that a person appears as the candidate of a political party; *Church v. Walker*, 10 S. D. 90, 72 N. W. 101 (dissenting opinion), majority holding that notice of election contest alleging that plaintiff was regularly and duly nominated for office of county judge and that he was "duly elected" sufficiently shows that he possesses requisite qualifications for such office.

Effect on election of ineligibility of successful candidate.

Cited in note in 124 Am. St. Rep. 211, on effect of election where successful candidate is ineligible.

6 S. D. 269, GRISWOLD v. SUNDBACK, 60 N. W. 1068.**When officer is trespasser ab initio.**

Cited in *Bowman v. Knott*, 8 S. D. 330, 66 N. W. 457, holding that a sale under execution and notice for less than the statutory time renders the officer a trespasser ab initio.

6 S. D. 276, JOHNSON v. GILMORE, 60 N. W. 1070.**Sufficiency of allegations of damages for breach of contract.**

Cited in *West v. Johnson*, 15 Idaho, 681, 99 Pac. 709, holding that a complaint which alleged that the plaintiff had complied with the provisions of the contract and that the defendant had delayed compliance for the purpose of defrauding the plaintiff, alleged a cause of action entitling plaintiff to at least nominal damages if true; *Bussard v. Hibler*, 42 Or. 500, 71 Pac. 642, holding that in an action for breach of contract, where

the complaint alleges a breach such that damages would necessarily be sustained by the plaintiff, special damages need not be alleged.

Opinion evidence as to value.

Cited in *Frye v. Ferguson*, 6 S. D. 392, 61 N. W. 161, holding attorney of twenty years' practice competent to testify as to value of legal services with which he is familiar though performed in adjoining state; *State v. Montgomery*, 17 S. D. 500, 97 N. W. 716, holding that a witness who stated that he had purchased hogs for sometime and had had experience in valuing hogs, was competent to testify as to the value of the hogs which the defendant was accused of stealing.

Review of order granting a new trial.

Cited in *Dinnie v. Johnson*, 8 N. D. 153, 77 N. W. 612, holding that order granting new trial for insufficiency of evidence will be disturbed only for manifest abuse of discretion.

Evidence admissible under pleadings.

Cited in *Zipp v. Colchester Rubber Co.* 12 S. D. 218, 80 N. W. 367, holding objection to admission of evidence on ground of insufficiency of complaint alleging breach of mutual agreement to sell and buy certain merchandise properly overruled.

Allowance of costs on appeal.

Cited in *Swenson v. Christopherson*, 10 S. D. 342, 73 N. W. 96, refusing to allow costs to respondent for printing unnecessary matter in additional abstracts or extended quotations from text books and reports in his brief.

6 S. D. 281, SWEET v. CHICAGO, M. & ST. P. R. CO. 60 N. W. 77.

6 S. D. 284, WILLIAMS v. WILLIAMS, 61 N. W. 38.

Double appeals.

Cited in *Granger v. Roll*, 6 S. D. 611, 62 N. W. 970, holding reference to order granting new trial in notice of appeal from a judgment will be considered as surplusage; *McVay v. Bridgman*, 17 S. D. 424, 97 N. W. 20, holding that an appeal from a judgment and an appeal from an order denying a new trial constitutes but one appeal so that the appeal cannot be dismissed if brought within two years from the time of the judgment though it is after six months after notice of the order had been given; *Gordon v. Kelley*, 20 S. D. 70, 104 N. W. 605, holding that an appeal from a default judgment and from an order denying the motion to open up the judgment and for leave to answer, is a double appeal and cannot be taken upon one notice of appeal and undertaking.

Allowance of gross sum as alimony.

Cited in *De Roche v. De Roche*, 12 N. D. 17, 94 N. W. 767, 1 A. & E. Ann. Cas. 221, holding that the court may grant alimony in a gross sum instead of a monthly or yearly allowance.

Service of order for alimony or counsel fees.

Distinguished in *Larson v. Larson*, 9 S. D. 1, 67 N. W. 842, holding that
Dak. Rep.—52.

to justify the striking out of an answer and cross bill for contempt in disobeying an order to pay temporary alimony or counsel fees, such order must be served on defendant, service upon his attorney being insufficient.

Review of findings of referee or court.

Cited in *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14, holding that on appeal the Supreme Court would review the evidence whenever the question of its sufficiency to support the findings upon disputed questions of fact, to ascertain whether there is a clear preponderance against the finding; *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207, holding that the findings of a referee or court upon disputed questions of fact are presumptively right, and though not controlling as is a verdict of a jury they must stand unless there is a clear preponderance of evidence against them.

6 S. D. 297, STATE EX REL. GUNDERSON v. KING, 60 N. W. 75.

Who is entitled to appeal.

Cited in note in 119 Am. St. Rep. 744, on right to appeal as party interested or injured.

Second appeal while prior appeal is pending.

Cited in *American Contract & Finance Co. v. Perrine*, 40 Fla. 412, 24 So. 484, holding that when an appeal is pending and effective, and can be made to accomplish every purpose for which a second may be made available, a second appeal from the same decree will be dismissed.

6 S. D. 301, MATTOON v. FREMONT E. & M. VALLEY R. CO. 60 N. W. 69.

Sufficiency of evidence of authority to do act.

Cited in *Baxter v. Great Northern R. Co.* 73 Minn. 189, 75 N. W. 1114, holding that a jury is justified in finding that defendant railway company's sectionmen were acting within the scope of their employment from the fact that they were engaged, during the ordinary hours of labor, in performing work usually done by such company's through sectionmen at the time of the year in which plaintiff's property was destroyed by means of a fire alleged to have been negligently set by defendant's sectionmen on its right of way.

6 S. D. 313, REMINGTON v. HIGGINS, 60 N. W. 73.

Implied repeal of statutes.

Cited in note in 88 Am. St. Rep. 294, on implied repeal of statutes.

6 S. D. 319, JEWETT v. DOWNS, 60 N. W. 76.

What constitutes a preference.

Cited in *Noyes v. Brace*, 9 S. D. 603, 70 N. W. 846, holding evidence that defendant possessed no property subject to levy other than that included in a mortgage attacked as fraudulent by a judgment creditor of the mortgagor inadmissible to show that the mortgage should be recorded

as a general assignment; *Gardner v. Haines*, 19 S. D. 514, 104 N. W. 244, holding that the creation of a corporation and the transfer of all the property of an insolvent debtor to it, and the issuance of stock in payment therefor, which stock was transferred to a creditor in payment of his debt, was not void as a preference where there was no intent to defraud; *Smith v. Baker*, 5 Okla. 326, 49 Pac. 61, holding that a mortgage of all an insolvent debtor's personal property, executed in good faith in payment of bona fide indebtedness to one or more of his creditors, does not amount to a voluntary assignment within the Oklahoma assignment law so as to bring the preferences thereby secured within the inhibition of such law.

6 S. D. 322, KEHOE v. HANSON, 60 N. W. 31.

6 S. D. 325, STATE v. HICKS, 60 N. W. 66.

Corroboration of testimony of accomplice.

Cited in *State v. Kent*, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631, holding evidence corroborating accomplice as to commission of murder or accomplice's guilt insufficient to sustain conviction of defendant; *State v. Levers*, 12 S. D. 265, 81 N. W. 294, holding testimony of accomplice that defendant suggested getting money from neighboring town not sufficiently corroborated by evidence that some of stolen property was found concealed in barn belonging to defendant's principal and that defendant told officer that accomplice was a thief and suggested to latter to pay for rig before spending money; *State v. Mungeon*, 20 S. D. 612, 108 N. W. 552, holding that in a prosecution for incest, evidence that the defendant paid money for the sending away of the child born to the defendant's daughter and the defendant's silence when the daughter stated in his presence that he was the father of the child, was sufficient to corroborate her testimony.

Cited in note in 98 Am. St. Rep. 170, on convicting on testimony of accomplice.

6 S. D. 335, DREW v. WATERTOWN INS. CO. 61 N. W. 34.

Right of jurors to disregard testimony of witness.

Cited in *Chicago, B. & Q. R. Co. v. Roberts*, 35 Colo. 498, 84 Pac. 68, holding that where there is nothing to show or tending to show that the testimony of a witness is not true, the jury has no right to arbitrarily or capriciously disregard his testimony or any part thereof.

Distinguished in *Studebaker Bros. Mfg. Co. v. Zollars*, 12 S. D. 296, 81 N. W. 292, holding jury not bound to believe evidence of contradicted witness.

6 S. D. 341, CRANMER v. BUILDING & L. ASSO. 61 N. W. 35.

6 S. D. 348, GREENLEAF v. GREENLEAF, 61 N. W. 42.**Power of court to modify its decree for alimony.**

Cited in *Harding v. Harding*, 16 S. D. 406, 102 Am. St. Rep. 694, 92 N. W. 1080, holding that the court had power to modify its decree for alimony, which was silent as to the disposition of the homestead, and direct that the husband should pay the wife a fixed sum, and make the same a lien upon the homestead; *Marks v. Marks*, 22 S. D. 453, 118 N. W. 694, holding that court can order allowance for support of minor child, though no claim therefor was made in original complaint.

6 S. D. 354, MERRILL v. LUCE, 55 AM. ST. REP. 844, 61 N. W. 43.**Rights of unrecorded assignee of mortgage.**

Cited in *Day v. Brenton*, 102 Iowa, 482, 63 Am. St. Rep. 460, 75 N. W. 538, holding that a purchaser in good faith of land covered by a deed of trust, who relies upon a recorded satisfaction by the trustee of the notes and deed of trust purporting to be executed after the notes matured, and reciting the receipt of payment, is entitled to protection as against the cestui que trust or their assignees, although the notes had not in fact been paid and the trustee therefore had no authority to satisfy the deed; *Henniges v. Paschke*, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350, holding assignments of real estate mortgages conveyances within recording laws; *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958, holding that failure to record assignment of mortgage while unauthorized reconveyance by trustee is recorded, makes mortgage subsequently taken in reliance on record superior to former; *Pickford v. Peebles*, 7 S. D. 166, 63 N. W. 779, denying right of purchaser of note secured by trust deed taking no formal assignment and failing to have the assignment recorded, to enforce a lien as against innocent purchaser for value without notice from maker who agrees to give clear title; *Higbee v. Daeley*, 15 N. D. 339, 109 N. W. 318, holding that where the assignee of a mortgage foreclosed the same in the name of the mortgagee, the assignment being unrecorded, he was estopped to allege his actual but undisclosed ownership as a ground for invalidating the apparently good foreclosure which he had brought about; *Barry v. Stover*, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672, holding that where a person purchased mortgaged premises subject to the mortgage, without notice that it had been assigned, the assignment not being recorded, and afterward paid the mortgage to the original payee, the assignee could not afterward enforce the mortgage against him.

Cited in note in 15 L.R.A.(N.S.) 1027, 1031, on right of assignee of mortgage as against subsequent bona fide purchasers or encumbrancers relying on apparent discharge.

6 S. D. 364, OLSON v. HUNTAMER, 61 N. W. 479.**Purpose of meander lines on public lands.**

Cited in *Schloosser v. Cruickshank*, 96 Iowa, 414, 65 N. W. 344, holding

that meander lines on public lands are not run as boundaries of the fractional tract thus surveyed, but to ascertain the quantity of land subject to sale and which is to be paid for by the purchaser, and said purchaser takes title to and is the owner of all land lying between said line and the shore line of the stream or body of water.

Right to maintain assumpsit against trespasser.

Cited in *Parkinson v. Shew*, 12 S. D. 171, 80 N. W. 189, holding an action on an applied assumpsit for the use and occupation of the land maintainable by the owner against one who has wrongfully entered upon and occupied the same for his own use and benefit, the tort in such case being waived.

Damages recoverable in trespass.

Cited in *Baldwin v. Bohl*, 23 S. D. 395, 122 N. W. 247, holding that owner of farm can recover one-fourth of value of crops raised by person wrongfully occupying same.

6 S. D. 376, DAVENPORT v. BUCHANAN, 61 N. W. 47.

Agreements to share in profits from real estate as within the statute of frauds.

Cited in *Jones v. Patrick*, 140 Fed. 403, holding that an agreement to share in the profits of a real estate speculation is not such an interest in lands that the agreement must be in writing under the statute of frauds; *Bond v. Taylor*, 68 W. Va. 317, 69 S. E. 1000, holding that verbal contracts of partnership to deal in real estate are not within statute of frauds.

Cited in notes in 102 Am. St. Rep. 239, on contract for sale of land within statute of frauds; 4 L.R.A.(N.S.) 429, on validity of parol partnership to deal in real property.

What constitutes partnership to deal in land.

Cited in note in 5 L.R.A.(N.S.) 504, on what constitutes a partnership to deal in real estate.

Liability of person in fiduciary relation, to account for secret profits.

Cited in *Walker v. Pike County Land Co.* 71 C. C. A. 593, 139 Fed. 609, holding that where an agent, for the sale of lands, joined with several associates and formed a corporation for the purchase of the lands, he must account to them and the corporation for any secret profits made in the sale of the land; *Hinton v. Ring*, 111 Ill. App. 369, holding that where a joint purchaser makes a secret profit through a concealment of the true purchase price, it gives the other joint purchasers a cause of action for deceit; *Calkins v. Worth*, 117 Ill. App. 478, holding that where the part owner of real estate, acting for himself and his co-owner, sells the estate and realizes a secret profit by concealing the true purchase price, he must account for such profit to his co-owner; *Vannum v. Palmer*, 123 Ill. App. 619, holding that where one person induces another to purchase property upon a representation that it can be obtained at a certain price, and sells it at that price, making a secret profit because of a rebate secured, the party purchasing has a cause of action for deceit; *Coulter v. Clark*, 160 Ind. 311, 66 N. E. 739, holding that where the defendant acting as agent

for the sale of territorial patent rights, represented them to be of a great value and that they could be secured for much less, when the patent rights were valueless, the purchaser could recover for the profit made by him in the sale; *Muir v. Samuels*, 110 Ky. 695, 62 S. W. 481, holding that a partner who has been induced by the fraudulent representations of his co-partners as to the amount of the debts of the firm, to purchase their interest, could compel them to account for the amount of the debts concealed from him; *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 6 A. & E. Ann. Cas. 1057, holding that in the absence of a fiduciary relation, a misrepresentation as to the price paid for the property by the vendor, does not constitute actionable deceit, where there is no circumstance showing that the price to be paid should be governed by such price already paid.

Actionable fraud.

Cited in *Gilpin v. Netograph Co.* 25 Okla. 408, 29 L.R.A.(N.S.) 477, 108 Pac. 382, holding void for fraud, note given in payment for share of price of worthless patent right, purchased jointly with others, where maker was induced to join by one of the others who received his interest free by secret agreement with seller.

Cited in note in 37 L.R.A. 613, on right to rely upon representations made to effect contract as a basis for a charge of fraud.

Measure of damages for false representations.

Cited in *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40, holding that the measure of damages for a false representation by one having an option for the purchase of land at \$100 per acre, that he is paying \$150 per acre, inducing another to purchase at the latter price, is the difference between the two prices without regard to the actual value of the land.

Presumption as to evidence in abstract where no additional abstract is filed.

Cited in *Weeks v. Cranmer*, 17 S. D. 173, 95 N. W. 875, holding that where the respondent has filed no additional abstract, he cannot be heard to say that all the evidence is not contained in the abstract as filed.

6 S. D. 382, HARDY v. PURINGTON, 61 N. W. 158.

Sufficiency of denial of allegations of complaint.

Cited in *State ex rel. Brown v. City of Pierre*, 15 S. D. 519, 90 N. W. 1047, holding sufficient denial of each and every allegation of complaint "not hereinafter specifically denied, admitted, or explained."

6 S. D. 392, FRYE v. FERGUSON, 61 N. W. 161.

Omission of court to instruct without request.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that in the absence of a request for an instruction on the issue, the failure of the court to instruct upon such issue is not reversible error; *Belknap v. Belknap*, 20 S. D. 482, 107 N. W. 692, holding that a party cannot complain that the instructions of the court were not as full and complete as they might have

been where he has made no requests for instructions upon the points claimed omitted; *Winn v. Sanborn*, 10 S. D. 642, 75 N. W. 201, holding failure to instruct on certain proposition not assignable as error in absence of request therefor.

¶ S. D. 396, *FEURY v. McCORMICK HARVESTING MACH. CO.* 61 N. W. 162.

¶ S. D. 401, *BUSBY v. RILEY*, 61 N. W. 164.

Implied repeal of statutes.

Cited in *State ex rel. Long v. Rexford*, 21 S. D. 86, 109 N. W. 216; *State v. Cooper*, 18 N. D. 583, 120 N. W. 878,—holding that later of two irreconcilable acts on same subject repeals former by implication.

¶ S. D. 406, *STATE EX REL. McGREGOR v. YOUNG*, 61 N. W. 165.

Mandamus to compel calling of election.

Cited in *State ex rel. Kaufman v. Martin*, 31 Nev. 493, 103 Pac. 840, holding that mandamus will lie to compel county commissioners to call election on question of removal of county seat.

Necessity of judgment as basis for issuance of peremptory writ of mandamus.

Cited in *State ex rel. Billings v. Lamprey*, 57 Wash. 84, 106 Pac. 501, holding that before a peremptory writ of mandamus may be issued there must be a judgment entered authorizing it and determining the nature and extent of the relief granted.

¶ S. D. 415, *BANK OF COMMERCE v. HUMPHREY*, 61 N. W. 444.

Personal liability of church trustees for deficiency on foreclosure proceedings.

Cited in *Dillaway v. Peterson*, 11 S. D. 210, 76 N. W. 925, holding church trustees released from personal liability for deficiency on foreclosure of a mortgage securing their joint note given for the benefit of the corporation, where the mortgagee without their knowledge extended to one of their number, who purchased on foreclosure, the time of paying the note until the property depreciated and the purchaser became insolvent.

¶ S. D. 421, *HILL v. WALSH*, 61 N. W. 440.

¶ S. D. 424, *FIRST NAT. BANK v. DAKOTA F. & M. INS. CO.* 61 N. W. 439.

One paper as part of another by reference.

Cited in *Cranmer v. Kohn*, 11 S. D. 245, 76 N. W. 937, holding that copy of contract of employment for a year attached to complaint as exhibit in action for discharge before expiration of such period will not be stricken

out as redundant, irrelevant, and no part of complaint; *Murtha v. Howard*, 20 S. D. 152, 105 N. W. 100, holding that the complaint in an election contest is a part of the notice of contest and must be considered as a part thereof in determining the sufficiency of the grounds of contest, where the complaint is referred to and made a part of the notice in said notice.

Pleading in actions for trover and conversion.

Cited in note in 9 N. D. 633, on question of pleading in actions for trover and conversion.

6 S. D. 429, AUSTIN, T. & W. MFG. CO. v. HEISER, 61 N. W. 445.

Attorneys as witnesses.

Cited in note in 66 Am. St. Rep. 213, on attorneys as witnesses.

6 S. D. 438, AXIOM MIN. CO. v. LITTLE, 61 N. W. 441.

Followed without special discussion in *Axiom Min. Co. v. White*, 6 S. D. 610, 62 N. W. 956.

Right of plaintiff to dismiss his action.

Cited in *Jones v. Pacific Dredging Co.* 9 Idaho, 186, 72 Pac. 956, on the right of the plaintiff to dismiss his action to quiet title, so as to leave the adverse claims without a suit to support it; *Cooke v. McQuarters*, 19 S. D. 361, 103 N. W. 385, holding that an action may be dismissed by the plaintiff at any time before final judgment, where no counterclaim has been interposed or any special injury is shown which would result to the defendant; *Subera v. Jones*, 20 S. D. 628, 108 N. W. 26, holding that it was proper to refuse to allow the plaintiff to dismiss his action where the defendant's title had been attacked and the defendant had answered setting up title in fee in himself and demanded a decree adjudging him the sole owner.

Cited in note in 15 L.R.A.(N.S.) 344, on right at common law to take nonsuit where defendant has interposed counterclaim entitling him to affirmative relief.

6 S. D. 445, BILLINGSLEY v. HILES, 61 N. W. 687.

Necessity for specification of errors in record on appeal.

Cited in *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 634, 67 N. W. 837, holding that objection by appellee after reversal to taxation of costs for printing of so much of appellant's abstract as contains the evidence on the ground that the bill of exceptions contained no specifications of errors relied on or particulars in which the evidence was insufficient cannot be considered unless the omission is shown by appellant's abstract or by an additional abstract filed by appellee; *D. S. B. Johnston Land-Mortg. Co. v. Case*, 13 S. D. 28, 82 N. W. 90, holding that alleged error in denying new trial cannot be considered on appeal except in so far as disclosed by the judgment roll where the settled statement of facts or bill of exceptions used on the motion contained no specifications of the particulars in which the

evidence was claimed to be insufficient or of the errors of law occurring at trial; *Wenke v. Hall*, 17 S. D. 305, 96 N. W. 103; *Regan v. Whittaker*, 14 S. D. 373, 85 N. W. 863,—holding that supreme court will not review evidence where motion for new trial for insufficiency of evidence was made on minutes of court or on bill of exceptions, and notice of intention or bill of exceptions does not specify particulars as to insufficiency.

Distinguished in *Thompson v. Ulrikson*, 8 S. D. 567, 67 N. W. 626, holding that order granting new trial for insufficiency of evidence and other reasons will not be disturbed on appeal in absence of abuse of discretion where record fails to show that bill of exceptions did not contain specification of particulars as to insufficiency.

Sufficiency of certification by public officer.

Cited in *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, holding that in an action to establish the invalidity of a county tax levy, a certificate of the county auditor, "that the above is a true copy of all that pertains to the county tax levy for 1897 as the same appears of record in my office" was an insufficient certification of the copy of the records to make them admissible in evidence.

Copies of records of other states as evidence.

Cited in note in 5 L.R.A.(N.S.) 960, on admissibility in evidence of copies of records of other states.

6 S. D. 449, MINNEHAHA COUNTY v. THORNE, 61 N. W. 688.

Party plaintiff in action to remove clerk of court.

Disapproved in *Wishek v. Becker*, 10 N. D. 63, 84 N. W. 590, holding that such an action cannot be maintained in either the name of the county or that of a private person.

6 S. D. 460, NOYES v. CRANDALL, 61 N. W. 806.

6 S. D. 466, VERMILLION ARTISIAN WELL ELECTRIC LIGHT MIN. INDUSTRIAL & IMPROV. CO. v. VERMILLION, 61 N. W. 802.

Waiver of objection to improper evidence.

Cited in *Yoder v. Reynolds*, 28 Mont. 183, 72 Pac. 417, holding that failure to object at the time the evidence is offered waives the right to object to the admission of improper evidence and the party cannot thereafter move to strike it out.

Opinion testimony of non-expert witnesses.

Cited in *Gardner v. Metropolitan Street R. Co.* 223 Mo. 389, 122 S. W. 1068, 18 A. & E. Ann. Cas. 1166, holding that persons who had measured the railroad tracks with a yardstick or straightedge and tapeline, were competent to testify that one rail at the curve was an inch higher than the other though they were not experts in such measurements and did not use a spirit level in making the measurements; *Olson v. Burlington*, C. R. & N. R. Co. 12 S. D. 326, 81 N. W. 634, holding that

brakeman injured by defective coupler may express opinion that he could not because of such defect have pulled out coupling pin without being pinched.

6 S. D. 472, SEARLES v. SEIPP, 61 N. W. 804.

Alteration of negotiable instrument.

Cited in *Bank of Herrington v. Wangerin*, 65 Kan. 423, 59 L.R.A. 717, 70 Pac. 330, holding that the maker of an altered promissory note is not liable thereon even to a bona fide purchaser without notice; *Porter v. Hardy*, 10 N. D. 551, 88 N. W. 458, holding void as against makers even in hands of innocent indorsee for value a negotiable instrument materially altered by payee or his agent.

Cited in notes in 86 Am. St. Rep. 121, on unauthorized alteration of written instruments; 21 L.R.A.(N.S.) 403, on duty to see spaces on commercial paper are filled so as to prevent raising.

Distinguished in *First Nat. Bank v. Shaw*, 149 Mich. 362, 13 L.R.A.(N.S.) 426, 112 N. W. 904, 12 A. & E. Ann. Cas. 437, holding that where a part of the names upon a "stallion note" were admittedly genuine, the fact that several names were subsequently forged thereon did not affect the validity of the note as to the ones admittedly signing it.

6 S. D. 478, LORANGER v. BIG MISSOURI MIN. CO. 61 N. W. 686.

Sham answers.

Cited in *Pacific Mill Co. v. Inman*, 50 Or. 22, 90 Pac. 1099, holding that when the pleading is verified by affidavit the truth or falsity of the amended pleading must be determined from the record and cannot be tried out upon the affidavits when making up the issues; *King v. Waite*, 10 S. D. 1, 70 N. W. 1056, holding that verified answer denying material allegations of complaint in action at law cannot be stricken out as sham though defendant makes admissions in affidavit on motion inconsistent with answer.

Cited in note in 113 Am. St. Rep. 646, 648, on sham pleadings.

6 S. D. 483, CLEMENT v. BARNES, 61 N. W. 1126.

Power of trial court to grant new trials upon its own motion.

Cited in *Mizener v. Bradbury*, 128 Cal. 340, 60 Pac. 928, discussing without deciding whether a court may, after verdict rendered and an order granting a stay of proceedings until further order of court, of its own motion set aside a verdict rendered in disregard of instructions and evidence, under Cal. Code Civ. Proc. § 662, after time for notice of a new trial had expired; *Hensley v. Davidson Bros. Co.* 135 Iowa, 106, 112 N. W. 227, 14 A. & E. Ann. Cas. 62, holding that the court may upon its own motion grant a new trial for the grounds enumerated in the statute, or in the absence of statutory authority, though a motion for new trial is pending upon other grounds; *Flugel v. Henschel*, 6 N. D. 205, 69 N.

W. 195, holding trial court not justified in vacating verdict on own motion on ground that it is against evidence or contrary to law or for errors of law occurring during trial; *Scott v. Ford*, 52 Or. 288, 97 Pac. 99, holding that the power to grant new trials upon its own motion, is limited exclusively to the grounds enumerated by statute; *Parrott v. Hot Springs*, 9 S. D. 202, 68 N. W. 329, holding court authorized to grant new trial on its own motion, only at time jury returns its verdict; *Traxinger v. Minneapolis, St. P. & S. Ste. M. R. Co.* 23 S. D. 90, 120 N. W. 770, holding that trial court cannot vacate verdict after lapse of nine months.

6 S. D. 487, *HARDENBERG v. ROBERTS*, 61 N. W. 1128.

6 S. D. 489, *FORDHAM SCHOOL TWP. v. DARLINGTON SCHOOL TWP.* 61 N. W. 1128.

6 S. D. 492, *GRIGSBY v. MINNEHAHA COUNTY*, 62 N. W. 105.

6 S. D. 498, *WINONA LUMBER CO. v. CHURCH*, 62 N. W. 107.

Liability of members of unincorporated voluntary association.

Cited in *Clark v. O'Rourke*, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147, holding that evidence that lumber dealers entered upon their books an account for lumber furnished for a church building, as being with the unincorporated church society, will not support the conclusion that the credit was given to the society, and not to the individuals forming the society; *Learn v. Upstill*, 52 Neb. 271, 72 N. W. 213, holding that persons appointed a committee by a public meeting of the citizens of a village to cause a public highway to be opened and improved are liable personally for work performed in grading the road and building bridges thereon under a guaranty by them that the work should be paid for, as their alleged principal had no legal existence or responsibility; *Clements v. Miller*, 13 N. D. 176, 100 N. W. 239, on a joint-stock company as a partnership and the liability of the members, joint.

What constitutes partnership.

Cited in note in 115 Am. St. Rep. 408, on what constitutes a partnership.

Agent's liability where principal has no legal existence.

Cited in note in 66 Am. St. Rep. 528, on liability of agent where principal has no legal existence.

6 S. D. 504, *PECH MFG. CO. v. GROVES*, 62 N. W. 109.

Enforcement of contract with foreign corporation.

Cited in *Chicago Mill & Lumber Co. v. Sims*, 101 Mo. App. 569, 74 S. W. 123, holding that contracts made with foreign corporations doing business within the state without complying with the statutes relative

to their admission, are not void but may be enforced after the corporation has complied with the requirements of the statutes.

Absence of debtor from state as grounds for attachment.

Cited in *Webb v. Wheeler*, 79 Neb. 172, 112 N. W. 369, holding that the prolonged absence of the debtor from the state, coupled with the fact that at the time of his departure, he had no intention to return, and he had no dwelling within the state where service of process might be made, justified proceedings by attachment.

Dissolving attachment because property is exempt.

Disapproved in *Shelby v. Ziegler*, 22 Okla. 799, 98 Pac. 989, holding that attachment may be dissolved because the property levied upon is exempt.

6 S. D. 509, LAIRD-NORTON CO. v. HERKER, 62 N. W. 104.

6 S. D. 511, TAYLOR v. NATIONAL BANK, 62 N. W. 99.

Recovery from insolvent bank of money deposited with or collected by it.

Cited in note in 86 Am. St. Rep. 806, on right to recover money deposited with or collected by bank upon its insolvency.

6 S. D. 518, RE STATE WARRANTS, 55 AM. ST. REP. 852, 62 N. W. 101.

Warrants as public indebtedness.

Cited in *Bryan v. Menefee*, 21 Okla. 1, 95 Pac. 471, holding that a warrant drawn by the proper officer on the treasure of the state under an appropriation by law is not an evidence of indebtedness within the meaning of the constitution limiting the state indebtedness where there was money in the treasury to pay the warrant; *Western Town-Lot Co. v. Lane*, 7 S. D. 1, 62 N. W. 982, holding that city warrants issued against a fund to meet which a tax has been levied do not constitute a debt within the constitutional limitation of indebtedness; *Shannon v. Huron*, 9 S. D. 356, 69 N. W. 598, holding city warrants issued for a lawful purpose not invalid because the municipal indebtedness exceeded the constitutional limit, where there remained at the time an unappropriated part of the tax levied for the next year out of which they could be paid; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78, holding no new or additional indebtedness created by bonds issued to refund existing indebtedness; *Darling v. Taylor*, 7 N. D. 538, 75 N. W. 766, holding the existing county indebtedness not increased by the issuance of county warrants for current expenses; *Chicago & N. W. R. Co. v. Faulk County et al.*, 15 S. D. 501, 90 N. W. 149, holding that a sinking fund to meet county warrants drawn upon designated funds in anticipation of uncollected revenue, cannot be included in levy under S. D. Laws 1897, chap. 28, § 71, to meet the interest on "all outstanding indebtedness" of the county; *State ex rel. Atty. Gen. v. McGraw*, 13 Wash. 311, 43 Pac. 176, holding that a proposed plan of a state capitol

commission, for an exchange, on the letting of the contract, of warrants drawn upon a special fund from which the capitol building must be built, at par for cash, to be held by the state treasurer and disbursed for services on such building, does not constitute a borrowing of money so as to violate Wash. act March 21, 1893, as amended, providing that all the cost of such building shall be paid for in warrants upon such fund; *Walling v. Lummis*, 16 S. D. 349, 92 N. W. 1063, holding that warrants legally issued were a legal indebtedness of the county though taxes in excess of the amount of the warrants had been legally levied and an amount insufficient to pay them had been collected thereon; *Williamson v. Aldrich*, 21 S. D. 13, 108 N. W. 1063, holding sinking fund applicable to future maturing bonds deductible in estimating indebtedness of city.

6 S. D. 526, RE LACKEY, 62 N. W. 134.

Effect of excessive sentence.

Cited in note in 45 L.R.A. 141, on effect of excessive sentence.

Distinguished in *Re Taylor*, 7 S. D. 382, 45 L.R.A. 136, 58 Am. St. Rep. 843, 64 N. W. 253, holding sentence to excessive term of imprisonment not void so as to entitle prisoner to habeas corpus.

6 S. D. 528, LAWRENCE COUNTY v. MEADE COUNTY, 62 N. W. 131.

Construction of statutes.

Cited in *Jones v. Fidelity Loan & T. Co.* 7 S. D. 122, 63 N. W. 553, holding that words may in construing statute be modified, altered or supplied so as to obviate repugnancy with legislative intent if ascertainable from statute; *Dell Rapids v. Irving*, 9 S. D. 222, 68 N. W. 313, in which the court construing together Dak. Comp. Laws, §§ 1324, 1327, decided that an appeal from an award of damages for taking land for a highway should be taken to a justice of the peace where the amount "claimed" did not exceed \$100; *State ex rel. Grigsby v. Buechler*, 10 S. D. 156, 72 N. W. 114, holding general purposes and intent of legislative enactment considered with reference to existing laws bearing on subject to which its provisions relate, a reliable key to meaning of its parts; *Meade County Bank v. Reeves*, 13 S. D. 193, 82 N. W. 751, holding that court will take into consideration all provisions of act in construing same for purpose of ascertaining legislative intent; *Lawrence v. Ewert*, 21 S. D. 580, 114 N. W. 709, holding that court can add words to statute to give it effect.

Apportionment of indebtedness on change of county boundaries.

Cited in *Stuart v. Kirley*, 12 S. D. 245, 81 N. W. 147, holding statutory provisions for which change in boundaries of county by including certain unorganized counties not illegal for failure to provide for apportioning indebtedness of the several counties.

6 S. D. 537, STATE v. BREEN, 62 N. W. 135.**Discharge of sureties on recognizance.**

Cited in *People v. Hanaw*, 106 Mich. 421, 64 N. W. 328, holding that the sureties on a recognizance requiring the principal to appear "at the next term of the court, and not depart therefrom without leave until discharged," are not discharged by a continuance to the following term, granted at the term at which the principal was bound to appear.

6 S. D. 540, RE STATE CENSUS, 62 N. W. 129.**Power to compel legislature to perform imperative duty.**

Cited in *Re Sharp*, 15 Idaho, 120, 18 L.R.A.(N.S.) 886, 96 Pac. 563, holding that though the command to the legislature be imperative, no power exists in the counts to discharge this duty for it; *State v. Robira*, 118 La. 251, 42 So. 792, holding that the performance of a duty imposed upon the legislature by the constitution depends solely upon the volition of the legislature guided by the sense of public duty; *State v. Hageman*, 123 La. 802, 49 So. 530, on the same point; *Stevens v. Benson*, 50 Or. 269, 91 Pac. 577, holding that there is no power to compel a state legislature to perform the imperative mandatory duties imposed upon it by the constitution, but such performance must depend upon the volition of the legislature itself; *Stuart v. Kirley*, 12 S. D. 245, 81 N. W. 147, holding a special act providing for changing the boundaries of a particular county not invalidated by a provision of S. D. Const. art. 9, § 1, that the legislature shall provide "by general law" for organizing new counties and changing boundaries, as it prescribes no penalty for failure to perform such duty.

Selfexecuting constitutional provisions.

Cited in *State v. Bradford*, 12 S. D. 207, 80 N. W. 143, holding constitutional provision that manufacture and sale of intoxicating liquors shall be under exclusive state control and conducted by authorized agents of state and that the purity of all liquors shall be established not self-executing nor prohibitive.

6 S. D. 543, SIOUX BKG. CO. v. KENDALL, 62 N. W. 377.**Reviewable questions of law on appeal.**

Cited in *Carroll v. Nisbet*, 9 S. D. 497, 70 N. W. 634, holding that an assignment that the court erred in directing a verdict presents a reviewable question of law on appeal, although the order denying a new trial is not complained of; *Roberts v. Ruh*, 22 S. D. 13, 114 N. W. 1097, holding that appellate court may determine as matter of law whether case should have been submitted to jury, on appeal from denial of new trial, assigning as error refusal to direct verdict.

6 S. D. 548, FIRST NAT. BANK v. VAN VOORIS, 62 N. W. 378.**Judgment as a cause of action ex contractu.**

Cited in *Meyer v. Brooks*, 29 Or. 203, 54 Am. St. Rep. 790, 44 Pac. 281, holding that an action on a foreign judgment is an action on "a

contract, express or implied, for the direct payment of money" within the Oregon statute authorizing attachment in such cases; *Wattles v. Wayne* Circuit Judge, 117 Mich. 662, 72 Am. St. Rep. 590, 76 N. W. 115, holding an action on a foreign judgment an action on contract within 3 How. Stat. § 8058, providing for the issuance of a writ of garnishment in personal actions arising upon contract, express or implied; *Spilde v. Johnson*, 132 Iowa, 484, 8 L.R.A. (N.S.) 439, 119 Am. St. Rep. 578, 109 N. W. 1023, holding that a judgment debt is an obligation *ex contractu* which may be reviewed under the statute allowing causes of actions *ex contractu* to be revived by a new promise to pay.

6 S. D. 554, DEMMON v. MULLEN, 62 N. W. 380.

New trial because of newly discovered evidence.

Cited in *State v. Smith*, 18 S. D. 341, 10 N. W. 740, holding that the exercise of the discretionary powers of the court in refusing a new trial because of newly discovered evidence, will not be reversed where there has been no abuse of discretion, and where the newly discovered evidence is not likely to change the result of the previous trial; *Re McCellan*, 20 S. D. 498, 107 N. W. 681, holding that to secure a new trial because of newly discovered evidence, the party must be diligent in securing and presenting his evidence at the trial, and the evidence must not be cumulative, and must be likely to change the result of the previous trial; *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding that new trial for newly discovered evidence in election case will not be granted, when party has not used reasonable diligence.

Review of the exercise of discretionary powers of trial court.

Cited in *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107, holding that the action of the trial court in granting or refusing a continuance will not be reversed except in a clear case of an abuse of discretion.

6 S. D. 557, PITTS AGRI. WORKS v. YOUNG, 62 N. W. 432.

Evidence admissible under general denial in replevin.

Cited in *Conner v. Knott*, 8 S. D. 304, 66 N. W. 461, holding proof that goods in controversy belonged to third person and that defendant's possession is rightful by virtue of writ of attachment under which he seized the property as sheriff admissible under general denial.

Conclusiveness of return of officer.

Cited in *Clark v. Sublette*, 117 Mo. App. 519, 94 S. W. 733, holding that the return of the officer that he took the property from the possession of the defendant is not conclusive that he had possession at the time the suit was instituted.

Sufficiency of objection to evidence.

Cited in *State v. La Croix*, 8 S. D. 369, 66 N. W. 944, holding objection that testimony is immaterial and irrelevant too general for consideration on appeal; *Tanderup v. Hansen*, 8 S. D. 375, 66 N. W. 1073, holding point that proper foundation was not laid for testimony of a witness as to testi-

mony of deceased witness on former trial by showing that the latter was duly sworn and that the former could give the substance of his testimony on both direct and cross-examination not saved by mere objection to the testimony as incompetent, irrelevant, and immaterial; *Plano Mfg. Co. v. Person*, 12 S. D. 448, 81 N. W. 897, holding objection that evidence was inadmissible under pleading not available on appeal under objection that evidence was incompetent, immaterial and irrelevant; *Harrison v. State Bkg. & T. Co.* 15 S. D. 304, 89 N. W. 477, holding objection to admission against bank of sheriff's affidavit showing sale on foreclosure brought by person connected with the bank on the ground that evidence did not show that the latter acted for the bank in foreclosing the mortgage not saved by objection that the evidence was incompetent, irrelevant, and immaterial to the issues in the case; *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344, holding point that chattel mortgage was introduced without proof of execution not preserved by objection to its admission as incompetent, immaterial, and irrelevant, and as conveying no reference to the disposition of the goods in controversy because not filed until after filing of plaintiff's mortgage; *McQueen v. Bank of Edgemont*, 20 S. D. 378, 107 N. W. 208, holding that where the grounds for objection to evidence are not specified, the objection must be disregarded upon appeal; *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341, holding that a general objection to evidence is not sufficient unless the objection is such that it could not have been obviated had it been specifically pointed out; *Tilton v. Flormann*, 22 S. D. 324, 117 N. W. 377, holding that party is confined on appeal to specific objection made in trial court to admission of evidence.

Distinguished in *Davis v. Tubbs*, 7 S. D. 488, 64 N. W. 534, holding objection that testimony as to inspecting briefs from contract is incompetent and immaterial in action on quantum meruit reviewable on appeal where the evidence was improper, clearly immaterial and doubtless of great weight with the jury; *Bowdle v. Jencks*, 18 S. D. 80, 99 N. W. 98, holding that a general objection which went to the merits and not to a formal defect which could have been obviated, is sufficient to present the question for review on appeal.

6 S. D. 566, ANDERSON v. ALSETH, 62 N. W. 435.

Objection to complaint after trial.

Cited in *Sherwood v. Sioux Falls*, 10 S. D. 405, 73 N. W. 913, holding the overruling of an objection to evidence because the complaint does not state a cause of action not ground for reversal, where the complaint, although demurable, is amendable; *De Luce v. Root*, 12 S. D. 141, 80 N. W. 181, holding the overruling of an objection to any evidence on the ground that the complaint failed to state a cause of action not reversible error, where the complaint contained no defects not curable by amendment; *Strait v. Eureka*, 17 S. D. 326, 96 N. W. 695, holding that an objection to a complaint after trial has begun that the complaint does not state a cause of action will not be sustained unless the defect is such that it could not be cured by amendment; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, holding that though the complaint may be inartistic, indefinite, and uncer-

tain, reversible error cannot be predicated upon the overruling of the defendant's objection first raised after trial began, the case having been heard upon the merits without apparent prejudice to defendant's rights; *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding that the objection to a complaint to enforce a lien because it alleged ownership in the alternative cannot be urged for the first time on appeal.

Sufficiency of complaint in action for damages.

Cited in *Walker v. McCaull*, 13 S. D. 512, 83 N. W. 578, holding sufficient, complaint in action for damages as to consignment of wheat containing general allegation of damages from want of requisite care and alleging that specified acts and omissions of defendant were negligent and resulted in injury in specified amount.

Cited in note in 9 N. D. 633, on the question of pleadings in actions for trover and conversion.

6 S. D. 572, HARRISON v. CHICAGO, M. & ST. P. R. CO. 62 N. W. 376.

Facts considered upon rehearing.

Cited in *Re Seydel*, 14 S. D. 115, 84 N. W. 397, holding that the court can consider only facts appearing in the record, on rehearing and rehearing will be denied where the facts relied upon are presented by affidavits and extrinsic evidence.

6 S. D. 575, KNIGHT v. TOWLES, 62 N. W. 964.

6 S. D. 583, SMITH v. CHICAGO, M. & ST. P. R. CO. 28 L.R.A. 573, 62 N. W. 967.

Damages for death by wrongful act.

Cited in *Scherer v. Schlaberg*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, holding that the measure of damages for the wrongful death of a minor child, is the value to the father of the services of the child during minority, considering the cost of support and maintenance during the early and helpless part of its life; *Huff v. Peoria & E. R. Co.* 127 Ill. App. 242, holding evidence of agreement by adult son to reimburse father for expenses of education admissible in action for wrongful death to show disposition and ability of son, had he lived, to be of pecuniary benefit to father; *Atchison, T. & S. F. R. Co. v. Townsend*, 71 Kan. 524, 81 Pac. 205, 6 A. & E. Ann. Cas. 191, holding that exemplary damages for death by wrongful act may not be allowed.

Action by mother for death of adult son.

Cited in *Lintz v. Holy Terror Min. Co.* 13 S. D. 489, 83 N. W. 570, holding that an action cannot be maintained by a mother for the death of her adult son, who left neither widow nor children

Dak. Rep.--53.

6 S. D. 592, **MERRILL v. HURLEY**, 55 AM. ST. REP. 859, 62 N. W. 958.

Presumption of authority of president of company to transfer company paper.

Cited in *Iowa Nat. Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12, holding that the company being engaged in a business in which it received notes from its agents and customers, the president in the absence of any evidence to the contrary, may reasonably be presumed to be authorized to transfer and discount the notes of the company.

Provisions regarding interest as affecting negotiability of note.

Cited in *Hollinshead v. John Stuart & Co.* 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89, holding negotiability affected by provision in note for specified higher rate of interest after maturity; *National Bank of Commerce v. Feeney*, 12 S. D. 156, 76 Am. St. Rep. 594, 46 L.R.A. 732, 80 N. W. 186, holding negotiable note containing stipulation for specified discount on payment before maturity; *Davis v. Brady*, 17 S. D. 511, 97 N. W. 719, holding a note non-negotiable where there was a question whether the overdue interest bore interest at the rate of ten or twelve per cent, and the same question as to the rate of interest the principal bore.

Cited in note in 125 Am. St. Rep. 201, 204, on agreements and conditions destroying negotiability.

Distinguished in *Cornish v. Wolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4, holding that a note containing a provision for the increased rate of interest if not paid at maturity is not a negotiable note.

Assignment or indorsement.

Cited in *Leahy v. Haworth*, 4 L.R.A.(N.S.) 657, 73 C. C. A. 84, 141 Fed. 850, holding that under the state statute relative to negotiability of notes, a written assignment upon the back of a promissory note payable to the order of the payee and signed by the payee is an indorsement in blank and transfers title free from equities; *Dunham v. Peterson*, 5 N. D. 414, 57 Am. St. Rep. 556, 36 L.R.A. 232, 67 N. W. 293, holding that transferee of note may be protected as indorsee though person negotiating it incurred more or less liability than that of indorser.

Construing deed to be mortgage.

Cited in *Southern Bldg. & L. Asso. v. McCants*, 120 Ala. 616, 25 So. 8, holding that a conveyance of land to a trustee upon a declared trust to sell the property for payment of the grantor's debt if not paid according to the contract, and to apply the proceeds thereto, and convey the title to the purchaser, is not a "mortgage;" *Banta v. Wise*, 135 Cal. 277, 67 Pac. 129, holding that a deed to a partner to secure an indebtedness due to the firm, and future advances by the firm, and containing no power of sale, is a mortgage; *David Bradley & Co. v. Helgeson*, 14 S. D. 593, 86 N. W. 634, holding warranty deed to specified person as trustee a mortgage when executed and delivered solely to secure payment of certain notes and interest.

Rights of assignee of chose in action.

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding that

the rights of an assignee of a non-negotiable chose in action are the same as those of his assignor at the time of the assignment.

Assignment of mortgage as within recording laws.

Cited in *Henninges v. Paschke*, 9 N. D. 489, 81 Am. St. Rep. 588, 85 N. W. 350, holding assignments of real estate mortgages conveyances within recording laws; *Pickford v. Peebles*, 7 S. D. 166, 63 N. W. 779, denying right of purchaser of note secured by trust deed taking no formal assignment and failing to have the assignment recorded to enforce a lien as against innocent purchaser for value without notice from maker who agrees to give clear title.

Cited in note in 15 L.R.A.(N.S.) 1027, on rights of assignee of mortgage as against subsequent bona fide purchasers or encumbrancers relying on apparent discharge.

Foreclosure for whole mortgage debt on default in interest.

Cited in *Russell v. Wright*, 23 S. D. 338, 121 N. W. 842, holding that mortgage may be foreclosed for whole amount on default in interest on note, where whole amount is to become due on such default.

6 S. D. 606, SHELDON v. CHICAGO, M. & ST. P. R. CO. 62 N. W. 955.

Question for jury as to negligence in killing live stock upon railroad track.

Cited in *Hutchinson v. Chicago, M. & St. P. R. Co.* 9 S. D. 5, 67 N. W. 853, holding question of negligence of railroad company in killing live stock for jury where evidence is conflicting as to distance of train when animals were first discovered on track, and as to whether employees tried to stop train after discovering them; *Schimke v. Chicago, M. & St. P. R. Co.* 11 S. D. 471, 78 N. W. 951, holding question for jury where testimony as to negligence of railroad company in killing cattle on track presents a material conflict of evidence so that different impartial minds might reasonably reach different conclusions; *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192, holding the jury not required to believe contradicted evidence of railroad employees as to the impossibility to prevent the killing of the animal sued for.

Distinguished in concurring opinion in *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, in which the majority held that the prima facie evidence of negligence on the part of the railroad company arising from the killing of a horse is overcome by uncontradicted testimony of the railroad employees that the killing was unavoidable in the skillful exercise of due care in operating a properly equipped train running at a proper rate of speed; *Crary v. Chicago, M. & St. P. R. Co.* 18 S. D. 237, 180 N. W. 18, holding that where the evidence on the part of the defendant rebutting negligence was not contradicted, the evidence on the part of the plaintiff was not sufficient to carry the question of the defendant's negligence to the jury and judgment for the defendant was proper; *Miller v. Chicago & N. W. R. Co.* 21 S. D. 242, 111 N. W. 553, holding verdict for defendant prop-

erly directed, where testimony of conductor, engineer and fireman that they did not see animals on track is uncontradicted.

Evidence of negligence and rebuttal as to animals killed by railroad.

Cited in *Borneman v. Chicago, St. P. M. & O. R. Co.* 19 S. D. 459, 104 N. W. 208, holding that evidence on the part of the plaintiff in rebuttal tending to prove the distance the engineer could have seen the live stock on the track at the time of the accident, was competent.

6 S. D. 610, AXIOM MIN. CO. v. WHITE, 62 N. W. 956.

6 S. D. 611, GRANGER v. ROLL, 62 N. W. 970.

Time to appeal.

Cited in *White v. Atchison, T. & S. F. R. Co.* 74 Kan. 778, 88 Pac. 54, 11 A. & E. Ann. Cas. 550, holding that the party against an appealable order has been made during the progress of the litigation may institute proceedings in error at once or wait until final judgment and attack the correctness of the preliminary ruling in an attack upon the final judgment.

Review of intermediate order upon appeal from judgment alone.

Cited in *Kinney v. American Yeoman*, 15 N. D. 21, 106 N. W. 44, holding that where the order is reviewable upon appeal from the judgment alone, it is not necessary to state in the notice of appeal that the appellant desires such a review; *Neeley v. Roberts*, 17 S. D. 161, 95 N. W. 921, holding that an order granting a new trial is reviewable upon an appeal from the judgment alone, and the same is true of an order setting aside the report of the referee; *McVay v. Bridgman*, 17 S. D. 424, 97 N. W. 20, on the right to review an order denying a new trial upon appeal from the judgment alone; *Meade County Bank v. Decker*, 17 S. D. 590, 98 N. W. 86, holding that since an order denying leave to renew a motion to vacate a judgment by default and for leave to answer is not an appealable order, and attempted appeal therefrom will be treated as mere surplusage where there is an appeal in the same case from an appealable order; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding that where a motion for a new trial is made and determined before judgment is entered, an appeal from the judgment alone brings up for review the order of the court denying or granting the new trial, provided the decision of the court is assigned as error; *Gade v. Collins*, 8 S. D. 322, 66 N. W. 466, holding that appeal from judgment brings up as intermediate order, order denying or granting motion for new trial made and determined before entry of judgment; *Noble Twp. v. Aasen*, 8 N. D. 77, 76 N. W. 990, holding order striking counterclaim from files for failure to state facts sufficient to constitute a counterclaim reviewable on appeal from final judgment; *Sands v. Cruickshank*, 12 S. D. 1, 80 N. W. 173, holding reference to order granting new trial in notice of appeal from a judgment will be considered as surplusage.

Review of evidence on appeal.

Cited in *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish facts essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below.

Agreement to share in profits from land sale as rendering one liable for mortgage debt.

Cited in *Dillaway v. Peterson*, 11 S. D. 210, 76 N. W. 925, holding that one who is to share in the profits that may be realized on a sale of land purchased by another is not liable on the latter's assumption and agreement to pay as part of the purchase price an existing mortgage.

Liability of wife for husband's debts.

Cited in *Cooper v. Bank of Indian Territory*, 4 Okla. 632, 46 Pac. 475, holding that a wife may, under Okla. Stat. § 2968, authorizing either husband or wife to enter into any transaction respecting property which either might if unmarried, bind herself by the provisions of a promissory note for the debt of her husband alone, signed by herself and her husband.

6 S. D. 626, LAWRENCE COUNTY v. MEADE COUNTY, 62 N. W. 957.

6 S. D. 629, NOYES v. BELDING, 62 N. W. 953.

Judgment as bar.

Cited in *Brown v. Hollister*, 21 S. D. 272, 111 N. W. 564, holding judgment vacating outstanding tax deed no bar to action to recover amount paid to free property from tax liens.

6 S. D. 634, FYLPAA v. BROWN COUNTY, 62 N. W. 962.

De facto officer's acts in his own interest.

Distinguished in *Murphy v. Lentz*, 131 Iowa, 328, 108 N. W. 530, holding a de facto officer's right to office by virtue of which he was custodian of ballots, could not be denied in order to make ballots incompetent as evidence on recount though the officer was interested in the result of the recount.

Termination of term of office.

Cited in *State ex rel. Bickford v. Fabrick*, 16 N. D. 94, 112 N. W. 74, holding that the superintendent of schools held office until his successor had been elected and qualified.

Right of de jure officer to salary of office.

Cited in *State ex rel. Bickford v. Fabrick*, 16 N. D. 94, 112 N. W. 74, holding that where the superintendent of schools held over until his successor was elected and qualified, he was entitled to the compensation fixed by law as the salary of the incumbent of that office.

Cited in note in 16 L.R.A.(N.S.) 796, on payment to de facto as defense to action for salary by de jure officer.

Distinguished in *Chandler v. Hughes County*, 9 S. D. 24, 67 N. W. 946, holding payment of full compensation of county assessor to one performing duties of office under appointment by county commissioners under mistaken notion that person elected had forfeited right, full protection against liability to latter who slept on rights until after performance of duties and payment; *Fuller v. Roberts County*, 9 S. D. 216, 68 N. W. 308, holding county or municipality paying salary to de facto officer who performed du-

ties of office under color or title while right thereto was in litigation not liable therefor to one subsequently establishing title to office.

Self executing judgments.

Cited in *Fawcett v. Pierce County Superior Ct.* 15 Wash. 342, 55 Am. St. Rep. 894, 46 Pac. 389, holding that a judgment of ouster in quo warranto which is self-executing is not suspended so as to entitle defendant pending the appeal to retain the office by the filing of a stay bond which does not suspend the effect of a judgment, but merely stays proceedings thereon.

Distinguished in *Foster v. San Francisco City & County Super. Ct.* 115 Cal. 279, 47 Pac. 58, holding that the right of the superior court to punish, as contempt of a decree adjudging plaintiff elected a director of a corporation and enjoining the defendant from interfering with him in the exercise of his office, the exclusion of plaintiff from participation in directors' meetings, is lost by the giving of an undertaking on appeal from the decree, under Cal. Code Civ. Proc. § 949, providing that the perfecting of an appeal by giving the \$300 undertaking "stays proceedings in the court below upon the judgment or order appealed from."

Disapproved in *Palmer v. Harris*, 23 Okla. 500, 138 Am. St. Rep. 822, 101 Pac. 852, holding that a self-executing judgment such as one in an election contest can be superseded by a supersedeas bond and judgment stayed in the discretion of the trial court.

6 S. D. 640, COLER v. RHODA SCHOOL TWP. 63 N. W. 153, 60 N. W. 403.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 7 S. D.

7 S. D. 1, WESTERN TOWN-LOT CO. v. LANE, 62 N. W. 982, Re-hearing denied in 7 S. D. 599, 65 N. W. 17.

Priority in payment of municipal indebtedness.

Cited in *Freeman v. Huron*, 10 S. D. 368, 73 N. W. 260, holding city not authorized to collect revenues and place them in special fund for payment of current expenses to exclusion of legal warrants previously issued and registered.

Constitutional debt limit as affecting validity of city warrants.

Cited in *Shannon v. Huron*, 9 S. D. 356, 69 N. W. 598, holding that city warrants issued for lawful purposes are not invalid because municipal indebtedness at time of their issue exceeded constitutional limit, where there remained unappropriated at such time part of tax levy for ensuing fiscal year out of which they could be paid.

Burden of proving validity of municipal warrants.

Cited in *Lake County v. Keene Five-Cents Sav. Bank*, 47 C. C. A. 464, 108 Fed. 505, placing the burden upon a county to prove that warrants for which refunding bonds in the hands of an innocent purchaser for value have been exchanged were not issued for debts incurred before the debt limit had been reached, or for current expenses thereafter, to meet which a valid and adequate tax levy had been made; *Johnson v. Pawnee County*, 7 Okla. 686, 56 Pac. 70, upholding warrants issued at a time when the debt limit had been reached, to pay a prior debt, there being no evidence to show that the latter at the time of its creation exceeded such limit, nor any finding of the court that the warrants were not actually issued to meet current expenses in anticipation of an adequate tax levy.

Creation of sinking fund to meet county warrants.

Cited in *Chicago & N. W. R. Co. v. Faulk County et al.*, 15 S. D. 501,

90 N. W. 149, holding that a sinking fund to meet county warrants drawn upon designated funds in anticipation of uncollected revenue, cannot be included in a levy under S. D. Laws 1897, chap. 28, § 71, to meet the interest on "all outstanding indebtedness" of the county.

Availability of plea of limitations in proceeding to enforce city warrants.

Distinguished in *Coler v. Sterling*, 15 S. D. 415, 89 N. W. 1022, holding that a plea of the statute of limitations is available in a proceeding to enforce warrants either by civil action or writ of mandamus, although they are not expressly excepted from the provisions of S. D. Laws 1891, chap. 14, § 80, that school warrants shall be receivable for taxes.

Refunding bonds as creating indebtedness.

Cited in *Williamson v. Aldrich*, 21 S. D. 13, 108 N. W. 1063, holding that execution and exchange of refunding bonds for equal amount of valid outstanding indebtedness does not operate to increase city's liability.

7 S. D. 9, HURON WATERWORKS CO. v. HURON, 30 L.R.A. 348, 58 AM. ST. REP. 817, 62 N. W. 975, Rehearing denied in 8 S. D. 169, 30 L.R.A. 859, 65 N. W. 816.

Maintenance of municipal waterworks as a public use.

Cited in *Water Comrs. v. Westchester County Waterworks Co.* 176 N. Y. 239, 68 N. E. 348, holding that when a municipality engages to furnish its inhabitants with water and light it must first secure the special authority therefor from the legislature.

Cited in note in 61 L.R.A. 34, 35, 120, on establishment and regulation of municipal water supply.

Right to sell municipal waterworks.

Cited with special approval in *Lake County Water & Light Co. v. Walsh*, 160 Ind. 32, 98 Am. St. Rep. 264, 65 N. E. 530, holding that city cannot sell its waterworks system and electric light plant without express legislative authority since such were public properties; *Brockenbrough v. Water Comrs.* 134 N. C. 1, 46 S. E. 28, holding that the waterworks of a city cannot be sold for any indebtedness of the city.

Cited in *Ogden City v. Bear Lake & River Waterworks & Irrig. Co.* 16 Utah, 440, 41 L.R.A. 305, 52 Pac. 697, holding void a resolution of a municipal council, and a writing executed without special statutory authority, purporting to turn over to a private company the city waterworks system.

Regulation of rates of water company by municipal corporation.

Cited in *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 61 L.R.A. 888, 64 S. W. 1075, holding that power in municipal corporation to "regulate" price of water supplied by waterworks company is not exhausted by agreement with such company at any particular time upon schedule of prices, but is continuing right.

Estoppel by recitals in municipal warrants.

Cited in *Watson v. Huron*, 38 C. C. A. 264, 97 Fed. 449, holding city not estopped to deny that non-negotiable warrants were issued to obtain

money with which to carry on campaign to secure location of state capital by recital that they were issued for public improvements.

7 S. D. 34, FOLEY-WADSWORTH IMPLEMENT CO. v. PORTEOUS, 63 N. W. 155.

Preservation in record of oral evidence upon hearing or order.

Cited in *Anderson v. Hultman*, 12 S. D. 105, 80 N. W. 165, holding that an appeal will be dismissed where the abstract shows that oral evidence admitted on the hearing of the order appealed from is not incorporated in a bill of exceptions settled by the court or judge; *Woodcock v. Reilly*, 16 S. D. 198, 92 N. W. 10, on the dismissal of the appeal where oral evidence was introduced upon the hearing of the order, which evidence has not been preserved in the bill or exceptions.

Striking out judge's certificate to statement of facts.

Cited in *Juckett v. Fargo Mercantile Co.* 18 S. D. 347, 100 N. W. 742, holding that where the judge's certificate is to the effect that the statement was served within the time allowed by law after notice of intention to move for a new trial, and the certificate is uncontradicted, the statement should not be stricken from the record.

Prerequisites to appellate jurisdiction.

Cited in *Smith v. Hawley*, 11 S. D. 399, 78 N. W. 355, holding that appeal will not lie until judgment or order sought to be appealed from has been entered as a permanent record of the trial court.

Time for amendment of bill of exceptions.

Cited in *Hedlun v. Holy Terror Min. Co.* 14 S. D. 369, 85 N. W. 861, holding application by the respondent to have bill of exceptions returned to court below for correction or mistake therein not too late when made within a year after the bill is settled.

7 S. D. 38, HANSON v. RED ROCK TWP. 63 N. W. 156.

Followed without discussion in *Johnson v. Winston*, 68 Neb. 425, 94 N. W. 607.

Parol evidence to explain letters not in evidence.

Cited in *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142, holding parol evidence inadmissible to explain letters, where such letters had not been introduced in evidence nor had any offer been made as to what was expected to be proved.

7 S. D. 42, RE STATE BONDS, 63 N. W. 223.

7 S. D. 51, STATE EX REL. GILBERT v. UNION INVEST. CO. 63 N. W. 232.

Proper party to bring action.

Cited in note in 64 L.R.A. 609, 623, as to who is real party in interest within statutes defining parties by whom action must be brought.

7 S. D. 54, BAUDER v. SCHAMBER, 63 N. W. 227.

Review of error in instructions.

Cited in *Drexel v. Daniels*, 49 Neb. 99, 68 N. W. 399, holding that assignment of error that verdict is "contrary to law" does not permit of review of error in instructions.

7 S. D. 61, FITZGERALD v. MILLER, 63 N. W. 221.

7 S. D. 67, KING v. McCLURG, 63 N. W. 219.

7 S. D. 72, AMERICAN INVEST. CO. v. THAYER, 63 N. W. 233.

Prospective operation of tax statutes.

Cited in *Manwaring v. Missouri Lumber & Min. Co.* 200 Mo. 718, 98 S. W. 762; *Petring v. Current River Land & Cattle Co.* 111 Mo. App. 373, 85 S. W. 933,—holding that the statute requiring persons suing to set aside tax deeds, to tender the amount for which the property was sold together with the taxes afterwards paid, was prospective in operation only, and did not apply to sales made before the statute was enacted.

7 S. D. 74, ESSHOM v. WATERTOWN HOTEL CO. 63 N. W. 229.

Right of landlord to lien on tenant's property.

Cited in note in 119 Am. St. Rep. 123, on landlord's right to lien on tenant's property.

Right to include chattel mortgage in lease.

Cited in *Peet v. Dakota F. & M. Ins. Co.* 7 S. D. 410, 64 N. W. 206, holding that chattel mortgage may constitute part of lease.

Availability of evidence.

Cited in *Dielmann v. Citizens' Nat. Bank*, 8 S. D. 263, 66 N. W. 311, holding a written instrument introduced in evidence by one party, without any limitation of the purpose for which it is offered, available to the other party.

Review of order granting a new trial.

Cited in *Distad v. Shanklin*, 11 S. D. 1, 75 N. W. 205, holding that order granting new trial for the insufficiency of the evidence will be disturbed only for the manifest abuse of discretion; *Finch v. Martin*, 13 S. D. 274, 83 N. W. 263, refusing to disturb discretion of trial court in granting or refusing motion for new trial; *Rochford v. Albaugh*, 16 S. D. 628, 94 N. W. 701, holding that the supreme court will not reverse an order of the trial court granting a new trial because of the insufficiency of the evidence to support the verdict unless there has been an abuse of discretion and a stronger case is required to reverse an order granting a new trial than denying one.

7 S. D. 83, ROSENBAUM v. FOSS, 63 N. W. 538.

Priority between quit claim and senior unrecorded deed.

Cited in note in 12 L.R.A.(N.S.) 242, on precedence as between quit-claim and senior unrecorded deed.

7 S. D. 93, LEONOSIO v. BARTILINO, 63 N. W. 543.

7 S. D. 98, STATE v. VALENTINE, 63 N. W. 541.

Election as to offenses charged.

Cited in *State v. Norris*, 122 Iowa, 154, 97 N. W. 999, holding that where in a prosecution for rape several acts of copulation as shown as each constitute an independent offense, the state may be required to elect upon which transaction it will rely; *State v. Poull*, 14 N. D. 557, 105 N. W. 717, holding that in prosecution for illegally selling intoxicating liquors, where several offenses are proven, it is prejudicial error to refuse to require the prosecution to elect upon which one it will rely.

Distinguished in *State v. Ely*, 22 S. D. 487, 118 N. W. 687, 18 A. & E. Ann. Cas. 92, holding that under allegation, in indictment for selling liquor without license, that defendant engaged in business on May 1st and continued until June 10th following, state need not be required to elect as to which sale it relies upon.

7 S. D. 103, STATE v. BOUGHNER, 63 N. W. 542.

Election of offenses charged.

Cited in *State v. Poull*, 14 N. D. 557, 105 N. W. 717, holding that in a prosecution for illegally selling intoxicating liquors, where several offenses are shown, it is prejudicial error to refuse to require the prosecution to elect upon which one it will rely.

Surplusage in indictment.

Cited in *Deadwood v. Allen*, 8 S. D. 618, 68 N. W. 835, holding phrase "divers and sundry other days," following allegation of violation of municipal ordinance on a particular day, surplusage.

7 S. D. 104, STATE v. VAN NICE, 63 N. W. 537.

Withdrawal of plea of not guilty.

Cited in *Ingraham v. State*, 82 Neb. 553, 118 N. W. 320, holding that it lies in the discretion of the trial court to allow or refuse to allow a plea of not guilty to be withdrawn in order that a plea of abatement may be interposed.

Distinguished in *State v. Isaacson*, 8 S. D. 69, 65 N. W. 430, holding refusal of application for leave to withdraw plea of not guilty for purpose of moving to quash indictment because of nonindorsement thereon of name of a witness examined before the grand jury on ground that motion was too late not ground for reversal.

Review of questions involving discretion.

Cited in *Daley v. Forsythe*, 9 S. D. 34, 67 N. W. 948, holding appealable, order denying motion for order fixing time within which motion may be

made for new trial on ground of newly discovered evidence; *Phoenix Ins. Co. v. Perkins*, 19 S. D. 59, 101 N. W. 1110, holding that the rule that the order granting or refusing a temporary injunction cannot be reviewed unless there has been an abuse of discretion, does not apply where the injunction was refused because the plaintiff had no ground of action, and no discretion was exercised.

7 S. D. 109, SUNDBACK v. GRIFFITH, 63 N. W. 544.

Debts for property secured by false pretenses.

Cited in *Paxton & G. Co. v. McDonald*, 18 S. D. 172, 99 N. W. 1107, holding that a judgment in an action for the purchase price of goods obtained by false pretenses, the decision and judgment should recite the fact that they were thus secured by false pretenses; *Jewett Bros. v. Bentson*, 18 S. D. 575, 101 N. W. 715, holding that where a separate paragraph of the complaint alleged that the debt was incurred for property obtained under false pretenses made by the defendant to the plaintiff to secure more credit, it was error to refuse evidence offered to prove such facts.

Distinguished and questioned in *Sobolisk v. Jacobson*, 6 N. D. 175, 69 N. W. 46, holding that a sheriff cannot avoid liability for exempt property seized by him under execution because the execution recited, contrary to the fact, that the judgment on which it was issued was rendered for a debt incurred for property obtained under false pretenses.

7 S. D. 114, WILLSIE v. RAPID VALLEY HORSE-RANCH CO. 63 N. W. 546.

Judgment lien holder as an incumbrancer.

Cited in *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836, holding that a judgment lien holder is an incumbrancer within the meaning of the statute of limitations and may plead the statute against the mortgage.

Validity of mortgage issued in violation of injunction.

Cited in *Scaman v. Gilligan*, 8 S. D. 277, 66 N. W. 458, holding a mortgage executed in violation of an injunction of which the mortgagee has notice invalid as against the one in whose behalf the injunction was granted.

7 S. D. 122, JONES v. FIDELITY LOAN & T. CO. 63 N. W. 553.

"Mortgagor" as including successors in estate.

Cited in *Scott v. District Ct.* 15 N. D. 259, 107 N. W. 61, holding that the term mortgagor as used in the statute regulating the foreclosure of mortgages, includes any person claiming title to the mortgaged premises under and in privity to the original mortgagor.

Construction of statutes.

Cited in *Dell Rapids v. Irving*, 9 S. D. 222, 68 N. W. 313, construing Comp. Laws, §§ 1324, 1327, and holding that under them a justice has jurisdiction of an appeal in highway proceedings when the damages are less than one hundred dollars; *State ex rel. Grigsby v. Buechler County*, 10 S. D. 156, 72 N. W. 114, holding general purposes and intent of legis-

lative enactment considered with reference to existing laws bearing on subject to which its provisions relate, a reliable key to meaning of its parts; *Meade County Bank v. Reeves*, 13 S. D. 193, 82 N. W. 751, holding that court will take into consideration all provisions of act in construing same for purpose of ascertaining legislative intent; *Lawrence v. Ewert*, 21 S. D. 581, 114 N. W. 709, to point that court may in proper case add word to section of statute in order to give it effect.

Conflict of laws as to measure of damages.

Cited in notes in 91 Am. St. Rep. 729; 56 L.R.A. 312,—on conflict of laws as to measure of damages.

7 S. D. 135, COMMERCIAL BANK v. JACKSON, 63 N. W. 548,
Affirmed on rehearing in 9 S. D. 605, 70 N. W. 846.

Presumption as to foreign laws.

Cited in *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255, holding that in the absence of evidence to the contrary it will be presumed that the laws of a foreign state are the same as the local laws.

Cited in note in *Cherry v. Sprague*, 67 L.R.A. 53, on how case determined when proper foreign law not proved.

Conflict of laws as to transfers of real estate.

Cited in *Hannah v. Vensel*, 19 Idaho, 796, 116 Pac. 115, holding that law of state where realty is situated governs mortgage thereon; *Bowdle v. Jencks*, 18 S. D. 80, 99 N. W. 98, holding that the laws of the state where the real estate is situated governs as to the transfers of such property whether conveyed absolutely or conditionally.

7 S. D. 148, CLARK v. DARLINGTON, 58 AM. ST. REP. 835, 63 N. W. 771.

Actions to determine adverse claims to real estate.

Cited in *Ormsby v. Ottman*, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 492, holding that under the statute empowering any person claiming title to real estate to maintain a suit to quiet title against any person who claims an adverse estate or interest therein, authorizes a suit against any person who claims an adverse right, title, or estate in, or lien upon the estate in question; *Battelle v. Wolven*, 19 S. D. 87, 102 N. W. 297, holding that an action to determine adverse claims under the statute may be maintained by the owner of a note secured by a trust deed, against parties claiming title adverse to the trust deed.

— Sufficiency of complaint.

Cited in *Buckham v. Hoover*, 18 S. D. 429, 101 N. W. 28, holding that a complaint under one section of the statute authorizing an action to determine adverse claims, is sufficient though it does not comply with the provisions of a later statute, where there are no parties to the action brought within the terms of the later act.

— Relief granted.

Cited in *Murphy v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614,

holding that in an action to determine adverse claims, under the statute, the defendant can have affirmative relief to reform a mistake in a quit claim deed to the land and to have it foreclosed as a mortgage.

What constitutes cloud on title.

Cited in *Brace v. Van Eps*, 12 S. D. 191, 80 N. W. 197, holding certificate of sale under execution issued after husband's death of widow's third interest in land formerly owned by husband but conveyed by him in trust for wife and children a cloud on title of one deriving title from trustee.

Necessity of tender of taxes before action to set aside tax deed.

Cited in *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570, holding no payment or tender of taxes necessary before suing to recover lands sold for non-payment of taxes, where plaintiff alleges and proves that defendant's claim of title was without foundation and the tax deed on which he relies void; *Mather v. Darst*, 13 S. D. 75, 82 N. W. 407, holding plaintiff in an action to foreclose a real estate mortgage not required to pay or tender taxes which are just and proper against the land before attacking the tax title of a defendant; *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212, holding that where there was no valid assessment so that there was nothing to authorize the sale of the land for taxes, no tender of the amounts paid by the defendants as taxes was necessary before bringing the action to set aside the tax deed.

7 S. D. 152, JONES v. MEYER, 63 N. W. 773.

Proceedings to dissolve attachments.

Cited in *Lindquist v. Johnson*, 12 S. D. 486, 81 N. W. 900, holding that attachment issued on affidavit stating several grounds should not be discharged on affidavits which fail to traverse one of such grounds.

Cited in note in 123 Am. St. Rep. 1032, on proceedings to dissolve attachments.

7 S. D. 155, COUGHRAN v. WILSON, 63 N. W. 774.

New trial upon reversal of judgment of justice court.

Cited in *Yankton v. Douglass*, 8 S. D. 440, 66 N. W. 923, holding alleged errors of justice not reviewable on trial de novo on appeal on questions of both law and fact where no statement of the case is provided for.

Distinguished in *Olson v. Shirley*, 12 N. D. 106, 96 N. W. 297, holding that under the state statutes upon a reversal of the judgment of the justice court upon questions of law alone, the district court retains the action and may enter judgment therein.

7 S. D. 157, LINANDER v. LONGSTAFF, 63 N. W. 775.

Right to maintain replevin.

Cited in note in 80 Am. St. Rep. 761, as to when replevin or claim and delivery is sustainable.

Husband as head of the family.

Cited in *Thompson v. Donahoe*, 16 S. D. 244, 92 N. W. 27, holding that

the plaintiff and his wife constitute a family and presumptively he is the head of the family; *Ecker v. Lindskog*, 12 S. D. 428, 48 L.R.A. 155, 81 N. W. 905, holding that selection of exempt property may be made by wife where husband is incompetent because adjudged insane.

Distinguished in *Ness v. Jones*, 10 N. D. 587, 88 Am. St. Rep. 755, 88 N. W. 706, holding that husband does not lose position as "head of a family" within exemption laws by bankruptcy.

Liberal construction of exemption laws.

Cited in *Nelson v. Oium*, 21 S. D. 541, 114 N. W. 691, to point that exemption laws should be liberally construed.

7 S. D. 163, SCHOUWEILER v. HOUGH, 63 N. W. 776.

7 S. D. 166, PICKFORD v. PEEBLES, 63 N. W. 779.

Followed without discussion in *Robeson v. Dunn*, 17 S. D. 310, 96 N. W. 104.

Assignments of mortgages as within recording act.

Cited in *Henniges v. Paschke*, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350, holding assignments of real estate mortgages conveyances within recording laws; *McVay v. Bridgman*, 21 S. D. 374, 112 N. W. 1138, holding that one who fails to take and record assignment of trust security cannot enforce same as against innocent purchaser.

Cited in note in 15 L.R.A.(N.S.) 1031, on rights of assignee of mortgage as against subsequent bona fide purchasers or encumbrances relying on apparent discharge.

Payment to agent as payment to mortgagee.

Cited in *Barry v. Stover*, 20 S. D. 469, 129 Am. St. Rep. 941, 107 N. W. 672, holding that where the wife of a broker permitted him to take and transfer notes in her name, she was bound by his act in receiving payment of a mortgage and discharging the same.

7 S. D. 174, TODD v. TODD, 63 N. W. 777.

Right of plaintiff to dismiss action.

Cited in *Cooke v. McQuaters*, 19 S. D. 361, 103 N. W. 385, holding that the plaintiff may dismiss his suit at any time before final judgment provided there has been no counterclaim interposed or any special reason for not dismissing the same.

Nunc pro tunc entries.

Cited in *Skelly's Estate*, 21 S. D. 424, 113 N. W. 91, holding it proper to enter correct judgment, nunc pro tunc, where judgment entered is set aside for mistake as embracing matters not rightfully therein.

7 S. D. 179, WINTON v. KNOTT, 63 N. W. 783.

Followed without discussion in *Winton v. Kirby*, 7 S. D. 461, 64 N. W. 528.

Appeals in habeas corpus proceedings.

Cited in *Ex parte Johnson*, 1 Okla. Crim. Rep. 414, 98 Pac. 461, holding

that the decision in habeas corpus proceedings is not appealable unless specially provided for by statute.

Disapproved in *Carruth v. Taylor*, 8 N. D. 166, 77 N. W. 617, holding final order in habeas corpus proceeding not appealable.

When body execution will issue.

Cited in *Hormann v. Sherin*, 8 S. D. 36, 59 Am. St. Rep. 744, 65 N. W. 434, holding that body execution may issue on judgment for wrongful conversion of personal property.

7 S. D. 183, LEWIS v. FREMONT, E. & M. VALLEY R. CO. 63 N. W. 781.

7 S. D. 187, FROMHERZ v. YANKTON F. INS. CO. 63 N. W. 784.

When direction of verdict is proper.

Cited in *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516, holding direction of verdict proper where verdict by jury for adverse party would have to be set aside.

7 S. D. 196, JERAULD COUNTY v. WILLIAMS, 63 N. W. 905.

Liability of sureties on official bonds.

Cited in note in 91 Am. St. Rep. 528, on acts for which sureties on official bonds are liable.

Authority of states attorney to bring suit.

Cited in *Hughes County v. Ward*, 81 Fed. 314, holding that a state's attorney exceeds his power in instituting a suit on behalf of his county without being directed so to do by the county commissioners; *State v. Welbes*, 11 S. D. 86, 75 N. W. 820, holding that it will be presumed on appeal that attorney general, who signed complaint in action by state on county treasurer's bond, was requested by the governor, auditor or treasurer to prosecute the action.

7 S. D. 202, BELL v. THOMAS, 63 N. W. 907.

7 S. D. 206, TOLERTON & S. CO. v. CASPERSON, 63 N. W. 908.

Time for filing supplemental abstract.

Cited in *Mather v. Darst*, 11 S. D. 480, 78 N. W. 954, holding that motion by respondent for leave to serve and file supplemental abstract denying service of undertaking on bill comes too late when not made until nearly four months after submission of the case upon its merits.

New undertaking to remedy defects in appeal bond.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, holding that defects or omissions in appeal bonds may be remedied by giving new undertaking.

Who may ask for discharge of attachment.

Cited in *McCord v. Bowen*, 51 Neb. 247, 70 N. W. 950, holding that a

defendant in an attachment proceeding against his property may move, under Neb. Code Civ. Proc. § 235, to discharge the attachment, although the property is encumbered by mortgages for more than its value and the mortgagees are in possession.

Cited in note in 123 Am. St. Rep. 1046, on persons entitled to move for dissolution of attachment.

Estoppel by conduct.

Cited in *Custer County v. Walker*, 10 S. D. 594, 74 N. W. 1040, holding a bank which furnishes to a county treasurer a statement of a balance due him as such including an amount for which he had given his individual note secured by mortgage, in reliance upon which his accounts as treasurer are settled by the county commissioners, estopped to subsequently deny that such money was county money; *Sutton v. Consolidated Apex. Min. Co.* 14 S. D. 33, 84 N. W. 211, holding the superintendent of a mining company estopped to claim a lien on the corporate property as against one from whom he procures a loan for the company secured by a mortgage on its property without disclosing such lien; same case, on rehearing, 15 S. D. 410, 89 N. W. 1020, reversing prior decision on the ground that it did not affirmatively appear that the mortgagee was misled or induced to act by the conduct of such superintendent.

7 S. D. 214, KNUDSON v. GRAND COUNCIL, 63 N. W. 911.

Parol evidence to vary contract of insurance.

Cited in *Kelsey v. Continental Casualty Co.* 131 Iowa, 207, 8 L.R.A. (N.S.) 1014, 108 N. W. 221, holding that where an accident policy of insurance limited the recovery in a certain case to a certain amount of the face value of the policy, parol evidence in the absence of fraud, was not admissible to show that the agent had represented that such provision applied only to causes existing at the time the policy was issued.

Cited in note in 16 L.R.A. (N.S.) 1177, 1260, on parol-evidence rule as to varying on contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

What is insurance company.

Cited in notes in 38 L.R.A. 51, on is a benefit association an insurance company; 52 Am. St. Rep. 548, on mutual or membership life or accident insurance.

7 S. D. 225, UNION TRUST CO. v. PHILLIPS, 63 N. W. 903.

7 S. D. 229, CONSOLIDATED LAND & IRRIG. CO. v. HAWLEY, 63 N. W. 904.

Want of demand as defeating right of action.

Cited in *Thompson v. Thompson*, 11 N. D. 208, 91 N. W. 44, holding that where a demand before suit is necessary, failure to prove the demand at the trial will not defeat the action where it appears that the want of demand is not relief upon as a defense but the action is tried on the merits, contesting the rights because of the superior right of possession
Dak. Rep.—54.

of the defendant; *Hahn v. Sleepy Eye Mill Co.* 21 S. D. 324, 112 N. W. 843, holding demand of possession not condition precedent to suit for conversion where demand would be wholly ineffectual.

Submission of case to jury.

Cited in *Lockhart v. Hewitt*, 18 S. D. 522, 101 N. W. 355, holding that where the facts are such that different impartial minds might reasonably draw different conclusions from them, they should be submitted to the jury; *Roberts v. Ruh*, 22 S. D. 13, 114 N. W. 1097, holding that court should not direct verdict upon conflicting evidence from which different impartial minds might draw different conclusions; *Coughran v. Western Elevator Co.* 22 S. D. 214, 116 N. W. 1122, holding that verdict will be sustained where evidence was such that different impartial minds might draw different conclusions.

Lease or contract with stipulation as to title to crops.

Cited in *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547, holding it competent for parties to cropper's contract to stipulate that legal title to crops shall remain in owner of land until division by him; *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304, holding that lessee cannot maintain action for conversion until crops are divided, where contract provides that lessor shall retain title until division is made.

—Effect on right to sell or mortgage crops before division.

Cited in *Sanford v. Modine*, 51 Neb. 728, 71 N. W. 740, reversing a judgment for a tenant in an action against his landlord for malicious prosecution, the trial court having instructed the jury that a tenant could not have made a sale, criminal in nature, of crops raised by him under a contract by which the title to the crops was to remain in the owner of the land; *Savings Bank v. Canfield*, 12 S. D. 330, 81 N. W. 630, holding that a mortgage, by lessee under a contract containing provision that ownership title and possession of crops shall remain in lessor until division thereof, of two-thirds of all the crops to be raised by him passes no title to the mortgagee where the lessee never received his share and owed the lessor more than the value of the crops at the close of the season.

What constitutes conversion of grain by elevator company.

Cited in *Willard v. Monarch Elevator Co.* 10 N. D. 400, 87 N. W. 996, holding delivery to lessee, of tickets representing grain which elevator company had express notice was claimed by lessor under chattel mortgage and which it had agreed to withhold until lessee's performance of obligations thereunder is conversion of the grain represented thereby.

Sufficiency of motion to direct verdict.

Cited in *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747, holding motion to direct verdict for defendant because evidence is "insufficient to show or constitute a cause of action," insufficient in failing to point out specifically the grounds relied on.

Evidence in actions for trover and conversion.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

7 S. D. 234, STATE EX REL. FARRAR v. HIPPLE, 64 N. W. 120.

Payment of expenses of criminal prosecutions arising in unorganized counties.

Cited in *Lyman County v. State*, 9 S. D. 413, 69 N. W. 601, upholding provision that expenses of criminal prosecutions arising in unorganized counties shall be audited and paid out of the state treasury when properly certified and allowed.

7 S. D. 237, STATE EX REL. HOLMES v. FINNERUD, 64 N. W. 121.

Term of office when vacancy is filled by governor.

Cited in *State ex rel. Lavin v. Bacon*, 14 S. D. 284, 85 N. W. 225, holding that appointment by governor to board of charities and corrections to fill vacancies created by expiration of term of office of certain members, which vacancies were not filled during legislative session for year in which they were created, may be made for full unexpired term.

Construing together provisions of constitution.

Cited in *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605, holding that the entire constitution must be examined in considering any provision with the view of arriving at the true intention of each part.

7 S. D. 247, CRANMER v. KOHN, 64 N. W. 125, Later appeal in 11 S. D. 245, 76 N. W. 937.

Measure of damages for breach of contract.

Cited in *Davis v. Tubbs*, 7 S. D. 488, 64 N. W. 534, holding that party to a contract prevented by the wrongful act of the other from completing it may, where he elects to bring an action for breach, recover the contract price less the expense of completing the same; *Bowers v. Graves & V. Co.* 8 S. D. 385, 66 N. W. 931, holding measure of damages for land owner's breach of cropper's contract by which lessee was to have three-fourths of the products, on division, is value of such three-fourths less cost of producing same.

—Future profits as.

Cited in *Spencer Medicine Co. v. Hall*, 78 Ark. 336, 93 S. W. 985, holding that where plaintiff was selling goods on commission under a contract whereby he was to receive a certain per cent of the sales until they reached \$10,000 when the contract should cease, he was entitled to recover damages for the breach, the profits which he would have made upon future sales; *Emerson v. Pacific Coast & N. Packing Co.* 96 Minn. 1, 1 L.R.A. (N.S.) 445, 113 Am. St. Rep. 603, 104 N. W. 573, 6 A. & E. Ann. Cas. 973, holding that where plaintiffs were the exclusive agents of the defendant under a contract to sell their goods on commission, the profits past and present may be recovered by the plaintiffs for a breach of the contract, where the same are reasonably certain.

Cited in notes in 53 L.R.A. 78, on loss of profits as an element of dam-

ages for breach of contract; 1 Brc. Rul. Cas. 130, 134, on right to recover for commissions lost in action for wrongful dismissal.

Remedy of wrongfully discharged servant.

Cited in note in 6 L.R.A. (N.S.) 86, on remedy of wrongfully discharged servant by action for breach of contract.

What constitutes double damages.

Cited in *Nebraska & D. Land & Live Stock Co. v. Burris*, 10 S. D. 430, 75 N. W. 919, holding damages not doubled though assessed for each of two distinct stipulations in contract to furnish fifty cows to be fed on crops raised on certain land and to provide water supply to irrigate such crops.

7 S. D. 254, ENGLE v. YORKS, 64 N. W. 132.

7 S. D. 263, MARTIN v. MINNEKAHTA STATE BANK, 64 N. W. 127.

Power of court to correct or supply findings.

Cited in *School Dist. No. 3 v. Western Tube Co.* 13 Wyo. 304, 80 Pac. 155, holding that where the findings of fact were omitted from the judgment by the mistake of the clerk, the court could after judgment was entered, order them entered nunc pro tunc as of the day when they should have been entered.

Reversal for failure to make findings.

Cited in *Maddy v. Dietze*, 15 S. D. 26, 86 N. W. 753, holding failure of court to make findings on alleged issue not ground for reversal where the additional findings if made must have been adverse to appellant.

Right of bank to question rights of depositor to money.

Limited in *Whitsett v. People's Nat. Bank*, 138 Mo. App. 81, 119 S. W. 999, holding that though the acceptance of the money and crediting it upon the books makes the person a depositor and the bank when sued cannot question his title or right to it, but it is not estopped from showing that the money was paid out pursuant to an agreement and direction of the depositor.

7 S. D. 272, HEINTZ v. MOULTON, 64 N. W. 135.

Necessary parties to proceedings in mandamus.

Cited in note in 105 Am. St. Rep. 123, 125, on necessary parties to proceedings in mandamus.

Mandamus to compel filing of referendum petition.

Cited in *Norris v. Cross*, 25 Okla. 287, 105 Pac. 1000, holding that writ of mandamus will issue to compel secretary of state to file referendum petition.

7 S. D. 277, STATE v. SERENSON, 64 N. W. 130.

Reasonable doubt.

Cited in *Wallace v. State*, 41 Fla. 547, 26 So. 713, upholding a charge

which states that "a reasonable doubt is a doubt for which you can give a reason. In other words, if the evidence of defendant's guilt satisfied you to such an extent as to leave you without a doubt that he may be innocent, for which you can give an intelligent reason, then it would be your duty to convict;" *State v. Patton*, 66 Kan. 486, 71 Pac. 840, holding not erroneous an instruction to the effect that reasonable doubt was not a mere possible or imaginary doubt arising from caprice or groundless conjecture, but such as the jury are able to give a reason for; *State v. Grant*, 20 S. D. 164, 105 N. W. 97, 11 A. & E. Ann. Cas. 1017, holding that an instruction to the effect that reasonable doubt is a doubt of guilt reasonably arising from all the evidence is not erroneous.

Cited in note in 16 L.R.A.(N.S.) 263, on propriety of instruction as to what is a reasonable doubt.

Question for jury.

Cited in *Carter v. Chicago, M. & St. P. R. Co.* 146 Iowa 201, 125 N. W. 94, to point that question of contract for through transportation is for jury, in absence of express contract.

7 S. D. 284, BAIRD v. GLECKLER, 64 N. W. 118.

Motion for new trial as essential to review of evidence.

Cited in *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below.

7 S. D. 289, STATE v. CHURCH, 64 N. W. 152.

Separation of jury as ground for new trial.

Distinguished in *Edward Thompson Co. v. Gunderson*, 10 S. D. 42, 71 N. W. 764, holding temporary separation of jurors for innocent purposes after submission of case not ground for new trial where they held no communication with any one on any subject.

7 S. D. 297, PAGE v. CHICAGO, ST. P. M. & O. R. CO. 64 N. W. 137.

Contracts for continuous carriage over connecting lines.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Bryant*, 36 Ind. App. 340, 75 N. E. 829, holding that where the initial carrier's agent accepted the entire charge for shipment beyond its line, and the bill of lading in no way indicated that it was not undertaking to carry the goods to their destination, it was sufficient evidence to show that the agent contracted to carry them to their destination; *McLagan v. Chicago & N. W. R. Co.* 116 Iowa, 183, 89 N. W. 233, holding that where the bill of lading states that the initial carrier will carry the goods to a certain point and there deliver them to another carrier for carriage to their destination, there is no contract for continuous carriage, and the agent cannot bind the former as to the rates of the latter; *Coates v. Chicago, M. & St. P. R. Co.* 8 S. D. 173, 65 N. W. 1067, holding that no authority on the part of a local station agent to bind his company by a contract to ship property over connecting lines will be

inferred from the fact that a car was billed through and the freight for the entire distance collected by such agent; *Sutton v. Chicago & N. W. R. Co.* 14 S. D. 111, 84 N. W. 396, denying power of local railroad agent to contract for shipment of property over connecting lines.

Cited in note in 31 L.R.A.(N.S.) 14, 20, 31, 33, 35, on liability of connecting carrier for loss beyond own line.

7 S. D. 310, DELL RAPIDS v. IRVING, 29 L.R.A. 861, 64 N. W. 149.

Meaning of word "municipal."

Cited in *Davenport v. Elrod*, 20 S. D. 567, 107 N. W. 833, holding that the erection of a state capitol building is not a municipal function, so that it may be delegated to a special commission; *Western Town Lot Co. v. Lane*, 7 S. D. 599, 65 N. W. 17, as to whether "municipal corporation" includes towns and counties.

7 S. D. 319, STATE EX REL. HOLMES v. SHANNON, 64 N. W. 175.

7 S. D. 331, POLLOCK v. POLLOCK, 64 N. W. 165.

Jurisdiction of appellate court to allow temporary alimony.

Cited in *Holcomb v. Holcomb*, 49 Wash. 498, 95 Pac. 1091; *Duxstad v. Duxstad*, 16 Wyo. 396, 94 Pac. 463, 15 A. & E. Ann. Cas. 228; *Mosher v. Mosher*, 16 N. D. 269, 12 L.R.A.(N.S.) 820, 125 Am. St. Rep. 654, 113 N. W. 99,—holding that in a proper case the appellate court has power to allow temporary alimony and attorney's fees after the trial court has lost jurisdiction of the case.

Cited in note in 27 L.R.A.(N.S.) 715, on jurisdiction to award temporary alimony, suit money, and counsel fees pending appeal.

7 S. D. 333, MIDDLESEX BKG. CO. v. LESTER, 64 N. W. 168.

Validity of foreclosure sale for inadequate price or en masse.

Cited in *Northwestern Mortgage Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W. 648, holding voidable only, foreclosure sale by advertisement for inadequate price or en masse instead of in separate parcels.

Sales under powers in mortgages and trust deeds.

Cited in note in 92 Am. St. Rep. 583, 588, on sales under powers in mortgages and trust deeds.

7 S. D. 338, SIEMS v. PIERRE SAV. BANK, 64 N. W. 167.

Accounting for rents and profits.

Cited in *Ferguson v. Epperly*, 127 Iowa, 214, 103 N. W. 94, holding that the vendor having sued the vendee and recovered the purchase price of the land with interest, upon the refusal of the vendee to complete the contract, the vendor was liable to account for the rents and profits up to the time of delivery of possession.

Assumpsit for money had and received.

Cited in *Finch v. Park*, 12 S. D. 63, 76 Am. St. Rep. 588, 80 N. W. 155, holding action for money had and received maintainable by attaching creditor against one who induced sheriff to turn over to him proceeds of sale of attached property.

Receivership in foreclosure proceedings.

Distinguished in *Roberts v. Parker*, 14 S. D. 323, 85 N. W. 591, holding that a receiver may be appointed in an action to foreclose a mortgage, where it appears that the conditions of the mortgage have not been performed and that the property is probably insufficient to discharge the mortgage debt.

Implied contract between banker and depositor.

Cited in *Bates v. Capital State Bank*, 18 Idaho, 429, 110 Pac. 277, holding that there is implied contract that banker will on demand return deposit to depositor; *Hyde v. Thompson*, 19 N. D. 1, 120 N. W. 1095, holding that law raises implied promise to pay proceeds from sale of chattels under chattel mortgage, to one holding prior lien.

7 S. D. 343, VALLIER v. BRAKKE, 64 N. W. 180.

Followed without special discussion in *Le Claire v. Wells*, 7 S. D. 426, 64 N. W. 519; *Church v. Walker*, 10 S. D. 90, 72 N. W. 101.

Marking and counting ballots.

Cited in *Baldwin v. Wade*, 50 Colo. 109, 114 Pac. 399 (dissenting opinion), as to proper designation of person for whom elector intended to vote; *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191, on the requirements of a legal ballot; *Chamberlain v. Wood*, 15 S. D. 216, 56 L.R.A. 187, 91 Am. St. Rep. 674n, 88 N. W. 109, holding no constitutional provision valid by South Dakota election law requiring names of all candidates for office to be printed on official ballot and denying two electors in effect right of writing candidate's name on ballot; *Morris v. Charleston Bd. of Canvassers*, 49 W. Va. 251, 38 S. E. 500, holding that compliance with the mandatory requirement of W. Va. Code 1899, chap. 3, § 34, that a voter use only one ballot of the election sheet, is essential to validity of the ballot; *Martin v. Miles*, 46 Neb. 772, 65 N. W. 880, striking out votes upon which a contestant's name had been written in the proper space, but which failed to show the additional cross marked opposite thereto, as required by Neb. Comp. Stat. chap. 26, § 145.

Cited in note in 47 L.R.A. 816, 817, 819, 830, 833, 836, 837, 843, on marking official ballot.

Criticised in *Truelsen v. Hugo*, 81 Minn. 73, 83 N. W. 500, holding a substantial compliance, or a bona fide attempt to comply, with the statutory requirements, sufficient.

Disapproved in *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346, holding that ballots should be counted in spite of erasures and irregular markings, where the intention of the voter can be ascertained.

— Marks in circle or square.

Cited in *People ex rel. Anderson v. Byers*, 135 Mich. 45, 97 N. W. 51,

holding that ballot containing a mark in the circle under the party's name and the name of a candidate of another party being written in place of one of the candidates, is not a vote for the latter under the statute providing that a cross opposite the party name should be a vote for all candidates of that party except where the name of a person not a candidate of any party should be written in; *Parmley v. Healy*, 7 S. D. 401, 64 N. W. 186, holding ballot cross in circle at head of a one party ticket without erasure of any name thereon must be counted for such county ticket throughout, notwithstanding mark opposite name of any candidate on another ticket; *McMahon v. Polk*, 10 S. D. 296, 47 L.R.A. 830, 73 N. W. 77, holding that ballot containing any circle at head of one ticket, below cross apparently made with ink on rubber stamp outline of which is traced with lead pencil mark forming perfect cross within circle, should be counted for candidates for office of such ticket; *Gainer v. Dunn*, 29 R. I. 239, 69 Atl. 851, holding that under a statute substantially the same as that involved in the leading case, a ballot containing a cross in the circle opposite the party name is to be counted for all the candidates of that party even though there is a cross opposite the name of a candidate of another party.

Disapproved in *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018, holding effect of cross mark in square at head of party ticket claimed to include all candidates nullified to extent of particular candidates of their parties for whom voter has signified intention of voting by placing marks against their names.

— Marks outside circle or square.

Cited in *Parmley v. Healy*, 7 S. D. 401, 64 N. W. 186; *McKittrick v. Pardee*, 8 S. D. 39, 65 N. W. 23,—holding cross at head of ticket not effectual for any purpose unless made in circle; *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018, holding cross mark on ballot outside of square intended for such mark not compliance with statutory requirements.

— Marks at heads of two party columns.

Cited in *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315, 61 N. E. 405, counting for a candidate against whose name a proper cross mark had been placed, a ballot which bore cross marks at the heads of two party columns; *Parmley v. Healy*, 7 S. D. 401, 64 N. W. 186, holding that cross in circles at head of two or more party tickets must be disregarded as to all tickets so marked; *McMahon v. Polk*, 10 S. D. 296, 47 L.R.A. 830, 73 N. W. 77, holding that ballot marked in circle at head of two party tickets cannot be counted for any candidate on their ticket not even as to candidate on one ticket, for office for which no candidate is named on other ticket; *Moody v. Davis*, 13 S. D. 86, 82 N. W. 410, holding that ballot marked by cross in circle at head of ticket which contains only names of candidate for county commissioner and also in circle head of other ticket containing names of other candidates for supreme court judges but not candidate for county commissioner cannot be counted.

— Marks at right of candidate's name.

Cited in *Parmley v. Healy*, 7 S. D. 401, 64 N. W. 186; *McKittrick v.*

Pardee, 8 S. D. 39, 65 N. W. 23,—holding cross to right of name of candidate a nullity.

— Marks to left of candidate's name.

Disapproved in *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346, counting votes plainly marked with crosses to the left of a party's name, instead of to the right, as required by the statute.

— Distinguishing marks.

Cited in *Bloedel v. Cromwell*, 104 Minn. 487, 116 N. W. 947, holding that in determining whether in a particular case the mark is a means of identification natural rules of interpretation apply and names or initials on ballots are natural means of identification, and explanations to the contrary must be excluded.

Distinguished in *Doll v. Bender*, 55 W. Va. 404, 47 S. E. 293, holding that under the state statute, distinguishing marks upon a ballot do not prevent such ballots from being counted.

Mandatory provisions of election law.

Cited in *Rampendahl v. Crump*, 24 Okla. 873, 105 Pac. 201, holding provision of election law relating to deposit of ballots, mandatory; *Westville v. Stillwell*, 24 Okla. 892, 105 Pac. 664, holding that provision of election law requiring elector, before being given ballot, to subscribe and swear to affidavit as to qualifications, is mandatory.

Right to compel voter to disclose for whom he voted.

Cited in *People v. Turpin*, 49 Colo. 234, 33 L.R.A.(N.S.) 766, 112 Pac. 539, holding that illegal voters can be forced to testify as to how they voted.

7 S. D. 361, **CALDWELL v. MAXFIELD**, 64 N. W. 166.

7 S. D. 363, **McCORMICK HARVESTING MACH. CO. v. FAULKER**.
58 AM. ST. REP. 839, 64 N. W. 163.

Parol evidence to show nondelivery of written contract.

Cited in *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590, holding that a written document may by parol evidence or otherwise, be shown not to be a contract at all because of the nonperformance of a condition precedent as to which the writing is silent; *Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734, holding that it is competent to show as between the parties to it, or others having notice, that the manual delivery of the note to the payee was accomplished by a condition precedent which was never fulfilled; *Sutton v. Weber*, 127 Iowa, 361, 101 N. W. 775, holding that in an action for the price of goods sold under a written contract it is competent to show that the agreement was signed by one of the partners upon the condition that it was to be approved by the absent partners; *Manufacturer's Furnishing Co. v. Kremer*, 7 S. D. 463, 64 N. W. 528, holding admissible, parol evidence that written order for school apparatus, apparently complete, was signed by school board, and taken into possession of soliciting agents, on express conditions which were never complied with so as to give binding effect to such

order; *Anderson v. Matheny*, 17 S. D. 225, 95 N. W. 911 (dissenting opinion), on the right to show nondelivery of note because of nonperformance of conditions precedent; *Rectenbaugh v. Northwestern Port Huron Co.* 22 S. D. 410, 118 N. W. 697, holding parol evidence admissible to show contract to have been procured by false representations; *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262, holding that it is always competent as between the parties to prove that a paper negotiable upon its face was delivered to the payee or other person on condition that it was not to take effect except upon the happening of some given event or to be used only for some given purpose.

Cited in notes in 45 L.R.A. 344, on conditional execution of contract under parol agreement that it shall not take effect until others have signed it; 128 Am. St. Rep. 616, on parol evidence of conditions in bills and notes; 43 L.R.A. 480, on contemporaneous agreements and their breach as a defense to a promissory note; 18 L.R.A.(N.S.) 290, on parol evidence to show bill or note delivered upon condition; 130 Am. St. Rep. 918, on escrows.

Construction of pleadings in absence of demurrer.

Cited in *Nerger v. Equitable Fire Asso.* 20 S. D. 419, 107 N. W. 531, holding that a party who fails to test the sufficiency of an amendable complaint by demurrer, but answers upon the merits, is not in a position to demand a reversal on the ground that his general objection was overruled by the trial court.

7 S. D. 368, STATE v. REDDINGTON, 64 N. W. 170.

Effect of failure to give accused opportunity to plead.

Cited in *State v. Bunker*, 7 S. D. 639, 65 N. W. 33, holding failure to call on defendant in bastardy proceedings to plead not reversible error.

Cited in note in 13 L.R.A.(N.S.) 813, on effect of failure to give accused opportunity to plead.

Competency of child as witness.

Cited in *Crosby v. State*, 93 Ark. 156, 137 Am. St. Rep. 80, 124 S. W. 781, holding discretion of court in permitting child of ten to testify will not be disturbed where abuse of discretion is not shown; *State v. Werner*, 16 N. D. 83, 112 N. W. 60, holding that there is no certain rule as to the age at which a child becomes a competent witness, but it rests in the discretion of the trial court to be based upon the intelligence of the child to be determined by an examination.

Cited in notes in 124 Am. St. Rep. 297, 298; 40 L. ed. U. S. 244,—on children as witnesses.

Adoption of construction of statute with adoption of statute.

Cited in *Murphy v. Nelson*, 19 S. D. 197, 102 N. W. 691, holding that where the statute of another state has been adopted as the law of the state, the construction of such statute by the courts of that state will be presumed to have been adopted together with the statute.

Effect of omission of name of witness from indictment.

Cited in *State v. Kent*, 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052, hold-

ing that failure to indorse names of witnesses for state on information does not require exclusion on second trial of such witnesses who had testified without objection on the first trial; *State v. Cambron*, 20 S. D. 282, 105 N. W. 241, holding that the allowance of testimony of a witness whose name has been omitted from the indictment, is dependent upon the intentional withholding the witness's name from the defendant; *State v. Matejousky*, 22 S. D. 30, 115 N. W. 96, holding that court's permitting of testimony of witnesses not endorsed on information not reversible error where abuse of discretion is not shown.

Error in receipt of verdict in criminal case.

Cited in *State v. Finder*, 10 S. D. 103, 72 N. W. 97, holding receipt of verdict in criminal case by judge of circuit after other judge had been called in to try case not reversible error.

Improper remarks of court or counsel as reversible error.

Cited in *State v. Pirkey*, 22 S. D. 550, 118 N. W. 1042, 18 A. & E. Ann. Cas. 192, holding improper remarks of court and prosecuting attorney not ground for reversal where record shows defendant not to have been prejudiced.

Error in refusal to dismiss prosecution for delay.

Cited in *State v. Fleming*, 20 N. D. 105, 126 N. W. 565, holding refusal to dismiss prosecution not error where "next term of court" was one at which accused could not be regularly tried.

When technical errors are ground for reversal.

Cited in *State v. Ham*, 21 S. D. 598, 114 N. W. 713, holding that supreme court will not disregard technical errors occurring in course of criminal trial which substantially affect defendant's rights.

7 S. D. 382, RE TAYLOR, 45 L.R.A. 136, 58 AM. ST. REP. 843, 64 N. W. 253.

Habeas corpus to review proceedings of court.

Cited in *State v. Pratt*, 20 S. D. 440, 107 N. W. 538, 11 A. & E. Ann. Cas. 1049, holding that the writ of habeas corpus cannot be used as a writ of error to review the proceedings of the court where the latter has jurisdiction, no matter what errors or irregularities occurred on trial.

Cited in note in 87 Am. St. Rep. 195, on release of prisoner on habeas corpus after judgment and sentence.

Jurisdiction.

Cited in *Ex parte Wade*, 2 Okla. Crim. Rep. 100, 100 Pac. 35, as to the definition of jurisdiction.

Erroneous sentence void for the excess.

Cited in *State ex rel. Bone v. Barr*, 133 Iowa, 132, 110 N. W. 280, holding that an erroneous sentence is void only for the excess; *State v. Taylor*, 7 S. D. 533, 64 N. W. 548, holding sentence for five years for crime, maximum punishment of which is two years, only valid for two years.

Annotation cited in *Shields v. People*, 132 Ill. App. 109, holding that where an erroneous fine or sentence is imposed it is void only as to the

excess and the valid portion may stand and the court may correct its sentence.

Validity of judgment in excess of relief demanded.

Cited in *Mach v. Blanchard*, 15 S. D. 432, 58 L.R.A. 811, 91 Am. St. Rep. 698, 90 N. W. 1042, holding a judgment in excess of the relief demanded in the complaint, erroneous, but not void, the court having jurisdiction of the parties and the subject-matter.

7 S. D. 399, KNAPP v. CHARLES MIX COUNTY, 64 N. W. 187.

Situs for taxation of personal property in unorganized county.

Cited in *Meade County v. Hoehn*, 12 S. D. 468, 81 N. W. 886, holding personal property in unorganized county belonging to persons residing in organized county taxable in latter county for all purposes.

7 S. D. 401, PARMLEY v. HEALY, 64 N. W. 186.

Followed without discussion in *Le Claire v. Wells*, 7 S. D. 426, 64 N. W. 519.

Marking and counting ballots.

Cited in *McKittrick v. Pardee*, 8 S. D. 39, 65 N. W. 23, holding cross at head of party ticket not effectual for any purpose unless made in circle; *Church v. Walker*, 10 S. D. 90, 72 N. W. 101, holding that a cross made outside the circle at the head of a party ticket in addition to the cross made inside the circle renders it void; *McMahon v. Polk*, 10 S. D. 296, 47 L.R.A. 830, 73 N. W. 77, holding that ballot containing any circle at head of one ticket, below cross apparently made with ink on rubber stamp outline of which is traced with lead pencil mark forming perfect cross within circle, should be counted for candidates for office of such ticket; *Chamberlain v. Wood*, 15 S. D. 216, 56 L.R.A. 187, 91 Am. St. Rep. 674n, 88 N. W. 109, holding no constitutional provision valid by South Dakota election law requiring names of all candidates for office to be printed on official ballot and denying two electors in effect right of writing candidate's name on ballot.

Cited in notes in 91 Am. St. Rep. 683, on right of elector to vote for candidate not named on official ballot; 47 L.R.A. 825, 830, 833, 837, 842, on marking official ballot.

Distinguished in *Roberts v. Bope*, 14 N. D. 311, 103 N. W. 936, holding that under the statute an elector may indicate his choice by writing or pasting the name of the candidate in the space provided for that purpose or over the name of an opposing candidate, and such vote will be counted even though the name is printed in another place on the ballot; *Chamberlain v. Wood*, 15 S. D. 216, 56 L.R.A. 187, 91 Am. St. Rep. 674, 88 N. W. 109, by Fuller, P. J., dissenting from the opinion of the court that the S. D. election law, which requires the names of all candidates to be printed on the ballot, does not violate the constitution by in effect denying to electors the right to vote for any person whose name does not appear upon the ballot.

7 S. D. 404, SWEENEY v. BAILEY, 64 N. W. 188.

Setting off one judgment against another.

Cited in note in 109 Am. St. Rep. 145, 147, on setting off one judgment against another.

7 S. D. 408, FELDMAN v. TRUMBOWER, 64 N. W. 189.

Presumption as to correctness of decision of trial court.

Cited in *Ricker v. Stott*, 13 S. D. 208, 83 N. W. 47, holding that findings of fact will be presumed on appeal to be fully sustained until the contrary clearly appears from competent evidence; *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462; *Re McCellan*, 20 S. D. 498, 107 N. W. 681; *International Harvester Co. v. McKeever*, 21 S. D. 91, 109 N. W. 642; *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960; *Empson v. Reliance Gold Min. Co.* 23 S. D. 412, 122 N. W. 346; *Larson v. Dutiel*, 14 S. D. 476, 85 N. W. 1006,—holding that finding by court will not be disturbed on appeal unless clearly against the preponderance of evidence; *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589, holding that findings by court on disputed question of fact will not be disturbed unless evidence clearly preponderates against them; *Krueger v. Dodge*, 15 S. D. 159, 87 N. W. 965, holding that finding of fact will be presumed on appeal to be sustained by weight of evidence; *Hill v. Whale Min. Co.* 15 S. D. 574, 90 N. W. 853, holding that findings on disputed questions of fact are presumptively right; *Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641, holding that the decision of the trial court is presumptively correct and must prevail unless upon review it appears that the evidence clearly preponderates against the decision; *Clark v. Conners*, 18 S. D. 600, 101 N. W. 883, holding that to overcome the presumption that facts found by the trial court are fully justified, a preponderance of evidence against such findings must clearly appear from the record presented on appeal.

7 S. D. 410, PEET v. DAKOTA F. & M. INS. CO. 64 N. W. 206.

Encumbrance avoiding insurance policy.

Cited in *Raulet v. Northwestern Nat. Ins. Co.* 157 Cal. 213, 107 Pac. 292, holding security for rent not encumbrance which avoids insurance policy on furniture; *Harding v. Norwich Union F. Ins. Soc.* 10 S. D. 64, 71 N. W. 755, holding that failure of insurer issuing policy without written application to inquiry as to encumbrances does not avoid effect of provision rendering policy void if property is encumbered.

Distinguished in *Read v. State Ins. Co.* 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665, holding an existing, undisclosed lease of the premises in which the insured articles were stored, not an encumbrance upon the property so as to defeat a policy requiring the disclosure of existing as well as future "encumbrances."

7 S. D. 421, GRIGSBY v. MINNEHAHA COUNTY, 64 N. W. 179.**7 S. D. 423, BOYNTON v. FAULK COUNTY, 64 N. W. 518.**

7 S. D. 426, LE CLAIRE v. WELLS, 64 N. W. 519.**Review of evidence on appeal.**

Cited in *McMahon v. Polk*, 10 S. D. 296, 47 L.R.A. 830, 73 N. W. 77, holding that appellate court judgment alone brings up findings of fact; *Mac Gregor v. Pierce*, 17 S. D. 51, 95 N. W. 281, holding that errors of law occurring at trial may be reviewed upon exceptions preserved in judgment roll, without motion for new trial.

Distinguished in *Bessie v. Northern P. R. Co.* 14 N. D. 614, 105 N. W. 936, holding that under the statutes the Supreme court will review the evidence in the absence of a motion for new trial in actions at law tried by the court without a jury, to determine whether the findings of facts are sustained or not.

7 S. D. 428, YANKTON F. INS. CO. v. FREMONT, E. & M. VALLEY R. CO. 64 N. W. 514.**Waiver by both parties moving for a directed verdict.**

Cited in *Saxton v. Perry*, 47 Colo. 263, 107 Pac. 281, holding that where at the close of the evidence, each party moves for a directed verdict, and neither party, after a ruling upon such motions, asks to have any facts submitted to the jury, the decision of the court has the effect of a general verdict and is a finding in favor of the successful party; *Patty v. Salem Flowering Mills Co.* 53 Or. 350, 98 Pac. 521, holding that where after a motion for a nonsuit is denied and the defendant refuses to introduce evidence the plaintiff moves for a directed verdict, it is a waiver of the right of jury trial; *Sundling v. Willey*, 19 S. D. 293, 103 N. W. 38, 9 A. & E. Ann. Cas. 644, holding that where both parties move for a directed verdict and no request is made by either party for a submission to the jury, the facts must be regarded as undisputed and the court may draw the same inferences therefrom as the jury could have; *Church v. Foley*, 10 S. D. 74, 71 N. W. 759, holding that the decision of the trial court directing a verdict will not be reversed where there is evidence to sustain it and both parties moved for a direct verdict; *Angier v. Western Assur. Co.* 10 S. D. 82, 66 Am. St. Rep. 685, 71 N. W. 761, holding that a party who asks the court to direct a verdict cannot subsequently claim that these were facts that should have been submitted to the jury. *McComb v. Baskerville*, 20 S. D. 353, 106 N. W. 300, holding that where both parties move for a directed verdict, it is an admission that the facts are undisputed and they waive the right of their submission to the jury; *Lindquist v. Northwestern Port Huron Co.* 22 S. D. 298, 117 N. W. 365, holding that party by joining in motion for directed verdict, is estopped from urging that evidence was conflicting and should have been submitted to jury.

Sufficiency of verdict.

Qualified in *Wilson v. Commercial Union Ins. Co.* 15 S. D. 322, 89 N. W. 649, holding that verdict must in form pass on all issues either in form of general or special verdict.

Proximate cause of injury from fire started by spark from engine.

Cited in *Liverpool, L. & G. Ins. Co. v. Southern P. Co.* 125 Cal. 434, 58

Pac. 55, upholding an instruction in an action to recover for loss occasioned by a fire alleged to have been started by a spark from an engine, which directs the jury to determine "upon the whole evidence" which was the "more probable" origin of the fire; *Chicago & E. R. Co. v. Kreig*, 22 Ind. App. 393, 53 N. E. 1033, holding a fire negligently caused by sparks from an engine to be the proximate cause of the loss of a barn situated so that it is reasonably possible that the fire would have reached it, in the existing wind and weather, without the intervention of any independent and responsible human cause; *Chicago & E. I. R. Co. v. Ross*, 24 Ind. App. 222, 56 N. E. 451, holding that a recovery by the owner of grain in cars upon a railway for a loss resulting from a fire started through defendant railway's negligence and spreading naturally to the cars in question is not prevented by the negligent failure of the railway in whose cars the grain stood, to remove them from danger.

7 S. D. 439, CONNOR v. NATIONAL BANK, 64 N. W. 519.

7 S. D. 443, FOX v. WILLIAM DEERING & CO. 64 N. W. 520.

Implied authority of attorneys.

Cited in notes in 132 Am. St. Rep. 161, on implied authority of attorney in conducting litigation; 23 L.R.A.(N.S.) 710, on implied power of attorney to bind client for expenses incidental to trial, including associate counsel fees.

7 S. D. 447, McCLELLAN v. HARRIS, 64 N. W. 522.

Recovery for services by servant.

Cited in *Stolle v. Stuart*, 21 S. D. 643, 114 N. W. 1007, holding that recovery of reasonable value of services rendered may be had where sickness prevents complete performance of contract; *McFarlane v. Allan-Pfeiffer Chemical Co.* 59 Wash. 154, 28 L.R.A.(N.S.) 314, 109 Pac. 604, holding that a servant employed by the month cannot recover for time lost through his own illness or other inability to perform the required service.

Cited in note in 28 L.R.A.(N.S.) 327, on right of servant to compensation in case of incomplete performance of contract caused by physical disability.

7 S. D. 451, WARDER, B. & G. CO. v. RAYMOND, 64 N. W. 525.

Amount of jurisdiction of justice of the peace.

Cited in *Parks v. Granger*, 96 Miss. 503, 27 L.R.A.(N.S.) 157, 51 So. 716, holding that attorneys' fees provided for in a note are a part of the principal debt, and if they together with the face of the note exceed the statutory limit, the justice of the peace has not jurisdiction to try an action thereon; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695, on the determination of the jurisdiction of the court of a justice of the peace.

Cited in note in 27 L.R.A.(N.S.) 158, on inclusion of stipulated attorney's fee in ascertaining jurisdictional amount.

7 S. D. 454, PERROTT v. OWEN, 64 N. W. 526.

Certiorari to review error of justice of peace.

Cited in *Lewis v. Gallup*, 5 N. D. 384, 67 N. W. 137, upholding appeal in certiorari proper remedy to review error of justice of peace in refusing to enter defendant's appearance by attorney on return day.

Trial de novo on appeal from default judgment by justice of peace.

Cited in *Wimsey v. McAdams*, 12 S. D. 509, 81 N. W. 884, holding one appealing from judgment by default by justice of peace entitled to new trial in circuit court.

7 S. D. 458, SCHOOL DIST. NO. 116 v. GERMAN INS. CO. 64 N. W. 527.**7 S. D. 461, WINTON v. KIRBY, 64 N. W. 528.****7 S. D. 463, MANUFACTURERS' FURNISHING CO. v. KREMER, 64 N. W. 528.****7 S. D. 465, SMITH v. COMMERCIAL NAT. BANK, 64 N. W. 529.****7 S. D. 471, WOODS v. ELY, 64 N. W. 531.**

Liability of grantee on covenants and conditions in deed.

Cited in note in 126 Am. St. Rep. 376, on liability of grantee on covenants and conditions in deed.

7 S. D. 476, UPTON v. HUGOS, 64 N. W. 523.

Reinstatement of mortgage released or discharged by mistake.

Cited in *Ricker v. Stott*, 13 S. D. 208, 83 N. W. 47, holding that mortgage discharged by mistake will be reinstated as against subsequent purchaser assuming its payment; *Ipswich v. Brock*, 13 S. D. 409, 83 N. W. 436, holding one taking third mortgage in reliance on mortgagor's representation of arrangement with second mortgagee to release his mortgage and take new mortgage subject to third mortgage which was to be partly used in payment of first mortgage, entitled to be subrogated to rights of first mortgagee where release of second mortgage is not obtained as agreed; *Home Inv. Co. v. Clarson*, 15 S. D. 518, 90 N. W. 153, subrogating a purchaser on foreclosure of a second mortgage to the rights of the first and second mortgagees against the third mortgagee, although such purchaser, under the mistaken belief that the third mortgagee had been served in the foreclosure proceedings, had procured a release of the first mortgage; *Home Invest. Co. v. Clarson*, 21 S. D. 72, 109 N. W. 507, holding that purchaser at second mortgage sale who paid first mortgage and filed release under mistaken belief that rights of third mortgagee had been foreclosed, was entitled to have first and second mortgage restored of record.

Cited in note in 58 L.R.A. 796, on right to reinstatement of mortgage when released or discharged by mistake.

7 S. D. 482, CUSTER COUNTY v. ALBIEN, 64 N. W. 532.**Liability of sureties on official bond.**

Cited in note in 90 Am. St. Rep. 198, 205, as to when official bond binds sureties and what irregularities fail to relieve them from liability.

7 S. D. 488, DAVIS v. TUBBS, 64 N. W. 534.**Requiring election between causes of action.**

Cited in *Norbeck & N. Co. v. Pease*, 21 S. D. 368, 112 N. W. 1136, holding election should not be required where in one count recovery is sought on ground of performance of written contract alleged to have been subsequently modified by parol and in another count on quantum meruit.

7 S. D. 494, WILSON v. SELBIE, 64 N. W. 537.**Usurious interest as consideration for extension of payment.**

Cited in *Niblack v. Champeny*, 10 S. D. 165, 72 N. W. 402, holding payment of usurious interest a sufficient consideration for the extension of payment of a note.

7 S. D. 503, CATHOLICON HOT SPRINGS CO. v. FERGUSON, 64 N. W. 539.**Issuance of injunction pendente lite.**

Cited in *Florida East Coast R. Co. v. Taylor*, 56 Fla. 788, 47 So. 345, holding that as a general rule a mandatory injunction will not be granted except after final hearing, unless the right is clear and free from reasonable doubt; *Forman v. Healey*, 11 N. D. 563, 93 N. W. 866, holding that to entitle the plaintiff to an injunction pendente lite, it must appear from the complaint that the plaintiff is entitled to the relief demanded and its issuance is made to appear as necessary to protect plaintiff's rights during the litigation.

Cited in note in 9 L.R.A.(N.S.) 1226, on necessity of hearing before granting preliminary mandatory injunction.

7 S. D. 510, BEM v. SHOEMAKER, 64 N. W. 544, Later phases of same case in 10 S. D. 453, 74 N. W. 239; 14 S. D. 346, 85 N. W. 598.**7 S. D. 522, KNOTT v. SHERMAN, 64 N. W. 542.****7 S. D. 527, NORTHWESTERN LOAN & BKG. CO. v. MUGGLI, 64 N. W. 1122.****Proper party to bring action.**

Cited in note in 64 L.R.A. 592, 619, as to who is real party in interest within statutes defining parties by whom action must be brought.

7 S. D. 530, LIBERTY TWP. v. HUTCHINSON COUNTY, 64 N. W. 1117.

Dak. Rep.—55.

Property rights in dogs.

Cited in note in 40 L.R.A. 522, on property rights in dogs.

7 S. D. 533, STATE v. TAYLOR, 64 N. W. 548.**Sufficiency of information.**

Cited in *Wroclawsky v. United States*, 105 C. C. A. 524, 183 Fed. 312, holding averment in indictment for counterfeiting that molds were "unlawfully and feloniously made, not equivalent of" without authority from secretary of treasury; *Deadwood v. Allen*, 8 S. D. 618, 67 N. W. 835, holding phrase "divers and sundry other days," following allegation of violation of municipal ordinance on a particular day, surplusage; *State v. Hayes*, 17 S. D. 128, 95 N. W. 296, holding that an information charging the commission of rape is sufficient under the statute if it enables the person charged to understand the charge against him, though the word, *ravish*, is omitted from the information.

Modification of erroneous sentence by appellate court.

Cited in *State v. Wienewski*, 13 N. D. 649, 102 N. W. 883, 3 A. & E. Cas. 907, holding that where the sentence of the trial court is excessive but not void, the supreme court may modify the sentence to make it comply with the statute.

Effect of omission of part of statute adopted from another state.

Cited in *Allibone v. Ames*, 9 S. D. 74, 33, L. R. A. 585, 68 N. W. 165, holding that the omission of an essential portion of a statute of one state on its adoption in another leaves it ineffectual in the latter state.

7 S. D. 551, VALLIER v. BRAKKE, 64 N. W. 1119.

Followed without discussion in *Le Claire v. Wells*, 7 S. D. 426, 64 N. W. 519.

7 S. D. 553, MORROW v. BOARD OF EDUCATION, 64 N. W. 1126.**Complete performance of entire contract.**

Cited in note in 59 Am. St. Rep. 283, on complete performance as essential to cause of action on entire contract.

7 S. D. 558, McCOOK COUNTY v. KAMMOSS, 31 L.R.A. 461, 58 AM. ST. REP. 854, 64 N. W. 1123.**Recovery for support of indigent person.**

Cited in *Duffy v. Yordi*, 149 Cal. 140, 4 L.R.A.(N.S.) 1159, 117 Am. St. Rep. 1252, 84 Pac. 838, 9 A. & E. Ann. Cas. 1017, holding that mother supported by one child cannot maintain action against another child for another support; *McNairy County v. McCain*, 101 Tenn. 74, 41 L.R.A. 862, 45 S. W. 1070, holding the guardian of a lunatic liable to the county out of the funds of the ward for the necessary care and provision which it had been forced to provide for the ward by reason of the guardian's neglect.

Cited in notes in 117 Am. St. Rep. 129, on obligation of child to sup-

port parent; 23 Eng. Rul. Cas. 51, on right to relief of able bodied persons and their families out of the poor rates.

7 S. D. 561, GREENLY v. HOPKINS, 64 N. W. 1128.

Transfer of jurisdiction on appeal.

Cited in *Thomas v. Thomas*, 27 Okla. 801, 35 L.R.A.(N.S.) 133, 113 Pac. 1058; *Ott v. Boring*, 131 Wis. 472, 111 N. W. 833, 11 A. & E. Ann. Cas. 857,—to point that jurisdiction of supreme court terminates, whenever regularly, without inadvertence or fraud, it returns record to court of general jurisdiction.

Dismissal of appeal for improper entry of judgment.

Cited in *Chamberlain v. Hedger*, 10 S. D. 290, 73 N. W. 75, holding that an appeal will be dismissed where no judgment has been properly entered notwithstanding stipulation by attorneys waiving all regularities in perfecting appeal.

7 S. D. 564, DEMPSEY v. BILLINGHURST, 64 N. W. 1124.

7 S. D. 568, STATE EX REL. HURON v. CAMPBELL, 64 N. W. 1125.

Payment of municipal warrants.

Cited in *Shannon v. Huron*, 9 N. D. 356, 69 N. W. 598, holding that city cannot avoid payment of warrants lawfully issued because of delay in presenting for payment, where city authorities fail to notify holder to present them when sufficient funds have been received; *Freeman v. Huron*, 10 S. D. 368, 73 N. W. 260, holding city not authorized to collect revenues and place them in special fund for payment of current expenses to exclusion of legal warrants previously issued and registered; *Stewart v. Custer County*, 14 S. D. 155, 84 N. W. 764, holding that the purchaser of a valid county warrant drawn on the general fund, "not otherwise appropriated" and registered for payment, cannot obtain judgment thereon immediately after its presentation and indorsement as not paid for want of funds; *Rochford v. School Dist. No. 11*, 17 S. D. 542, 97 N. W. 747 (dissenting opinion), as to the sufficiency of a complaint in an action upon a school warrant, which did not state that the warrant had been presented for payment and the reason for refusal to pay.

7 S. D. 574, NARREGANG v. MUSCATINE MORTG. & T. CO. 64 N. W. 1129.

Attachment in action for money received under false pretenses.

Cited in *Pearsons v. Peters*, 19 S. D. 162, 102 N. W. 606, holding that an attachment was properly dissolved where the complaint did not allege that the action was for money obtained by false pretenses, but the affidavit for attachment did and that the debt and damages were incurred for property of plaintiff obtained in payment for land under false pretenses.

Sufficiency of affidavit for attachment.

Distinguished in *Hemmi v. Grover*, 18 N. D. 578, 120 N. W. 561, holding that affidavit for attachment which sets forth one or more grounds of attachment enumerated in code is sufficient.

7 S. D. 578, PIERIE v. BERG, 64 N. W. 1130.**Dissolution of attachment.**

Cited in *Hood v. Fay*, 15 S. D. 84, 87 N. W. 528, refusing to grant a continuance to a plaintiff on a motion to dissolve, in order to secure proof to support the affidavit on which the attachment issued.

Cited in note in 123 Am. St. Rep. 1032, on proceedings to dissolve attachments.

Review of grant or refusal of continuance.

Cited in *State v. Phillips*, 18 S. D. 1, 98 N. W. 171, 5 A. & E. Ann. Cas. 760, holding that the ruling of the trial court granting or refusing a continuance will not be reversed except for an abuse of discretion.

7 S. D. 584, CARPENTER v. CHICAGO, M. & ST. P. R. CO. 64 N. W. 1120.**Accord and satisfaction.**

Cited in *Arnett v. Smith*, 11 N. D. 55, 88 N. W. 1037, holding that it is not enough to establish an accord and satisfaction to show an oral agreement to render satisfaction at a future date, but the accord must be executed by a delivery and reception of the thing agreed to be accepted in satisfaction; *Eggland v. South*, 22 S. D. 467, 118 N. W. 719, holding that under code agreement to accept \$80 in payment of \$160 not accord and satisfaction; *Webster v. McLaren*, 19 N. D. 751, 123 N. W. 395, to point that mere agreement to accept less than due, without consideration, when there is no dispute, is not accord and satisfaction.

7 S. D. 587, MALLOY v. BREWER, 58 AM. ST. REP. 856, 64 N. W. 1120.**Exemption of witness from service of process in a foreign county.**

Cited in note in 76 Am. St. Rep. 539, on exemption from service of civil process.

Distinguished in *Underwood v. Fosha*, 73 Kan. 408, 85 Pac. 564, 9 A. & E. Ann. Cas. 833, holding that one in attendance at court in another county is exempt from service of process therein in an action brought in that county, though he is not under subpoena.

7 S. D. 592, MCGILLYCUDDY v. MORRIS, 65 N. W. 14.**Extension of time within which to settle bill of exceptions.**

Cited in *Gardiner v. Gardiner*, 9 N. D. 192, 82 N. W. 873, holding that statutes permitting extension of time for settling statements of cases should be liberally construed in favor of the discretion vested in the trial court; *Coler v. Sterling*, 15 S. D. 415, 89 N. W. 1022, denying right of either trial court or judge thereof to extend time for serving and settling

bill of exceptions or statement of facts, or to fix another time in which same may be served or settled after expiration of statutory and extended time; *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428, holding that the power of the trial court to extend the time within which to settle a bill of exceptions after the expiration of the sixty days allowed therefor is limited to cases only where good cause is shown and the action of the court may be reviewed by the supreme court; *Bishop & B. Co. v. Schleuning*, 19 S. D. 367, 103 N. W. 387, holding same except that the court's action will not be interfered with on appeal except for an abuse of discretion; *Chamberlain v. Quarnberg*, 23 S. D. 55, 119 N. W. 1026, holding that order extending of time for preparing and serving bill of exceptions "for good cause shown" conclusive on appeal in absence of evidence upon which order was based.

Distinguished in *Davis v. Cook*, 9 S. D. 319, 69 N. W. 18, holding that trial court may further extend time for settlement of bill of exceptions and settle same on its presentation after expiration of the original extension where proposed bill was served on adverse party before expiration and delay in presentation resulted from oral stipulation between the parties.

Right to amend bill of exceptions.

Cited in *Tilton v. Flormann*, 22 S. D. 324, 117 N. W. 377, holding that amendments to bill of exceptions, allowed without good cause shown, must be stricken out.

7 S. D. 599, WESTERN TOWN LOT. CO. v. LANE, 65 N. W. 17.

Excess over limit of indebtedness as a defense to municipal warrants.

Cited in *Van Arsdale v. Olustu School Dist. No. 35*, 23 Okla. 894, 101 Pac. 1121, holding that where the only defense to an action on a school warrant is that the school district is indebted beyond the legal limit, the burden is upon the school district to prove that the limit had been exceeded at the time the debt was created; *Shannon v. Huron*, 9 S. D. 356, 69 N. W. 598, holding city warrants issued for lawful purpose not invalid because city indebtedness exceeded constitutional limit, where unappropriated part of tax levy for ensuing year from which payment could be made exceeded their amount; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 786, 82 N. W. 78, holding that bonds issued for the purpose of refusing an existing indebtedness do not create a new or additional indebtedness within the meaning of constitutional or statutory limitations; *Johnson v. Pawnee County*, 7 Okla. 686, 56 Pac. 701, upholding the validity of county warrants issued in payment of prior indebtedness, although at the time of their issuance the constitutional debt limit had been exceeded, there being no evidence of the indebtedness at the time the debts were contracted; *State Sav. Bank v. Davis*, 22 Wash. 406, 61 Pac. 43, upholding the validity of warrants creating an indebtedness in excess of the constitutional limit, but issued

in pursuance of a prior contract the obligation of which at the time of its execution, did not surpass such limit.

7 S. D. 605, MARS v. ORO FINO MIN. CO. 65 N. W. 19.

Service of process on foreign corporation.

Cited in *Youngstown Bridge Co. v. White*, 105 Ky. 273, 49 S. W. 36, holding the return of service insufficient under Ky. Code, § 732, subd. 33, where it recited merely that the summons was served upon "—— Smith, who was the chief agent" of the corporation.

Cited in note in 4 L.R.A. (N.S.) 462, as to who is managing agent of foreign corporation for purposes of service of process.

Waiver of defective service of summons.

Distinguished in *Reedy v. Howard*, 11 S. D. 160, 76 N. W. 304, holding defective service of summons not waived by asking for dismissal of action as well as quashing of service.

7 S. D. 619, STATE v. SCOTT, 65 N. W. 31.

Jurisdiction of county courts in bastardy proceedings.

Cited in *State v. Hughes*, 8 S. D. 338, 66 N. W. 1076, upholding statutory provisions conferring jurisdiction in bastardy proceedings on county courts.

Venue of proceedings under bastardy act.

Cited in *State v. Lang*, 19 N. D. 679, 125 N. W. 558, holding that proceeding under bastardy act not necessarily be had in county of defendant's residence.

7 S. D. 623, KIRBY v. WESTERN U. TELEG. CO. 30 L.R.A. 621, 65 N. W. 37.

Limitation of liability of telegraph company.

Cited in *Western U. Teleg. Co. v. Greer*, 115 Tenn. 368, 1 L.R.A. (N.S.) 525, 89 S. W. 327, holding that a clause in a contract for the transmission of a telegram exempting the company from liability for damages in the transmission of the same unless claim therefor was made within sixty days after the message is delivered for transmission, is valid.

Cited in note in 56 L.R.A. 745, on contracts for telegrams not written on company's blanks.

Liability of telegraph company for error in message.

Cited in *Strong v. Western U. Teleg. Co.* 18 Idaho, 389, 30 L.R.A. (N.S.) 409, 109 Pac. 910, holding telegraph company liable for mistake in transmission of accepted message.

7 S. D. 639, STATE v. BUNKER, 65 N. W. 33.

Latitude of cross-examination.

Cited in *Schwoebel v. Fugina*, 14 N. D. 375, 104 N. W. 848; *Mathews v. Hanson*, 19 N. D. 692, 124 N. W. 1116,—holding that the ruling of the trial court in regard to the latitude to which the cross-examination may extend will not be interfered with on appeal unless there has been

an abuse of discretion; *State v. Madison*, 23 S. D. 584, 122 N. W. 647, holding that rulings as to cross-examination of witness will not be reversed where no abuse of discretion is shown; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 64 C. C. A. 180, 129 Fed. 668, on the extent to which the cross-examination of a witness may extend.

Preponderance of evidence in bastardy proceedings.

Cited in *State v. Knutson*, 18 S. D. 444, 101 N. W. 33, holding that a preponderance of evidence is sufficient to sustain a verdict in bastardy proceedings.

7 S. D. 644, GUDE v. DAKOTA F. & M. INS. CO. 58 AM. ST. REP. 860, 65 N. W. 27.

Action against foreign corporations by nonresidents.

Cited in note in 70 L.R.A. 531, 534, on right of nonresidents to sue foreign corporations.

Law governing insurance contracts.

Cited in note in 63 L.R.A. 851, on conflict of laws as to insurance contracts.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 8 S. D.

8 S. D. 1, STONE v. CHICAGO, M. & ST. P. R. CO. 65 N. W. 437.

Delivery under bill of lading.

Cited in note in 38 L.R.A. 358, on to whom may delivery be made under bill of lading.

Evidence in trover and conversion.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

8 S. D. 7, FIRST NAT. BANK v. SMITH, 65 N. W. 437.

Availability of ultra vires as defense.

Cited in *Anderson v. First Nat. Bank*, 5 N. D. 451, 67 N. W. 821, denying right of national bank to justify on ground of ultra vires breach of its duty as agent for sale of notes in purchasing the notes itself.

8 S. D. 11, SEARLES v. LAWRENCE, 65 N. W. 34.

Necessity for jury to compute damages on default judgment.

Cited in note in 20 L.R.A.(N.S.) 28, on necessity of jury to compute damages on default judgment.

8 S. D. 19, TOOTLE v. PETRIE, 65 N. W. 43.

Review of verdict.

Cited in *Meyer v. Davenport Elevator Co.* 12 S. D. 172, 80 N. W. 189, holding it allowable on appeal in action at law to determine only whether there is substantial evidence which with inferences fairly deducible will sustain the verdict.

Sufficiency of specification of errors.

Cited in *D. S. B. Johnston Land-Mortg. Co. v. Case*, 13 S. D. 28, 82 N. W. 90, holding that alleged error in denying new trial cannot be considered on appeal except in so far as disclosed by the judgment roll where the settled statement of facts or bill of exceptions used on the motion contained no specifications of the particulars in which the evidence was claimed to be insufficient or of the errors of law occurring at the trial; *Regan v. Whittaker*, 14 S. D. 373, 85 N. W. 863, holding that supreme court will not review the evidence where a motion for new trial for insufficiency of evidence was made on the minutes of the court or on a bill of exceptions and the notice of intention or bill of exceptions does not specify the particulars as to insufficiency; *Wenke v. Hall*, 17 S. D. 305, 98 N. W. 103, holding that specification of errors in a motion for a new trial are not a sufficient compliance with the law requiring the bill of exceptions to contain specification as to the particulars in which the evidence is insufficient to support the findings, and of errors of law occurring at the trial.

Parol evidence to construe letter not yet in evidence.

Cited in *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142, holding evidence of circumstances inadmissible to enable court to construe letters to be subsequently introduced, where no offer is made of what party expects to prove.

8 S. D. 30, DUPPEE v. STANLEY COUNTY, 65 N. W. 426.**Situs of personal property for purposes of taxation.**

Cited in *Meade County v. Hoehn*, 12 S. D. 468, 81 N. W. 886, holding personal property in unorganized county belonging to persons residing in organized county taxable in latter county for all purposes.

Cited in note in 62 Am. St. Rep. 462, on situs of personal property for purposes of taxation.

8 S. D. 33, ZEIMET v. PHILLIPS, 65 N. W. 418.**8 S. D. 36, HORMANN v. SHERIN, 59 AM. ST. REP. 744, 65 N. W. 434.****Order of arrest as prerequisite to body execution.**

Cited in *Griffith v. Hubbard*, 9 S. D. 15, 67 N. W. 850, holding necessity for order of arrest as prerequisite to body execution not disposed of by incorporating in complaint allegations of false pretenses by defendant in procuring sale to him of property for which note was given.

8 S. D. 39, MCKITTRICK v. PARDEE, 65 N. W. 23.**Marking and counting of ballots.**

Cited in *Carville v. Jones*, 38 Mont. 590, 101 Pac. 153, holding that a voter does not comply with the statute in order to have his vote counted where he places the mark after the name of the candidate while the statute requires that it be placed before, and the same where the mark was

placed below the name; *Potts v. Folsom*, 24 Okla. 731, 28 L.R.A. (N.S.) 460, 104 Pac. 353, holding that where the statute provided that a voter might vote for all the candidates of one party by making the mark in the square provided, a person who marked all the names of the candidates of the same party, but one, and then placed the mark in the square provided for that party, voted for the entire party regardless of the individual marks; *Gainer v. Dunn*, 29 R. I. 239, 69 Atl. 851, holding that under a statute similar to that involved in the leading case, a person placing a mark in the square after the party's name votes for all the candidates of such party though he places a mark after one of the candidates of another party; *Baldwin v. Wade*, 50 Colo. 109, 114 Pac. 399 (dissenting opinion), on construction of ballot; *Potts v. Folsom*, 24 Okla. 731, 28 L.R.A. (N.S.) 460, 104 Pac. 353, holding that crosses opposite names of candidates are to be disregarded where cross is made in top circle, thereby voting straight ticket; *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018, holding cross mark on ballot outside of square intended for such mark not compliance with statutory requirements; *Church v. Walker*, 10 S. D. 90, 72 N. W. 101, holding that ballot marked with cross in circle at head of ticket must be counted for other candidate whose name is on such ticket unless erased although cross is made to left of name of opposing candidate on another ticket; *McMahon v. Polk*, 10 S. D. 296, 47 L.R.A. 830, 73 N. W. 77, holding that ballot marked in circle at head of two party tickets cannot be counted for any candidate on their ticket not even as to candidate on one ticket for office for which no candidate is named on other ticket; *Moody v. Davis*, 13 S. D. 86, 82 N. W. 410, holding that ballot marked by cross in circle at head of ticket which contains only name of candidate for county commissioner and also in circle head of other ticket containing names of other candidates for the supreme court judges but not candidate for county commissioner cannot be counted.

Cited in note in 47 L.R.A. 815, 830, 831, 833, 834, 837, 842, on marking official ballots.

Distinguished in *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018, holding effect of cross mark in square at head of party ticket claimed to include all candidates nullified to extent of particular candidates of their parties for whom voter has signified intention of voting by placing marks against their names; *Roberts v. Bope*, 14 N. D. 311, 103 N. W. 935, holding that under the statute a voter could express his choice of candidates by writing his name or pasting a sticker containing the name over the name of the opposing candidate, even though the name so written or pasted is printed upon another part of the ballot; *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346, holding that ballots upon which marks have been made through mistake in the attempted exercise of the right to vote are not void in view of §§ 11, 413, providing that every ballot or part thereof shall be counted where the voter's intention can be determined.

Amendment of abstract on appeal.

Cited in *Neeley v. Roberts*, 17 S. D. 161, 95 N. W. 921, holding that where no motion is made to dismiss the appeal and it is undisputed that

an appeal was taken from the judgment and from the order denying a new trial, the appellant should be allowed to amend his abstract to show from what the appeal was taken.

8 S. D. 47, CARLSON v. SIOUX FALLS WATER CO. 65 N. W. 419.

Assumption of risk.

Cited in *Hightower v. Gray*, 36 Tex. Civ. App. 674, 83 S. W. 254, holding that a servant assumed the risk of injury where in a quarry he went under a hanging rock and struck it with a hammer and was injured by falling particles.

Cited in notes in 44 L.R.A. 75, on the duty of a master to instruct and warn his servants as to the perils of the employment; 17 L.R.A. (N.S.) 80, on servant's assumption of risk from latent danger or defect.

8 S. D. 54, KIRBY v. WESTERN U. TELEG. CO. 65 N. W. 482.

Taxation of costs upon reargument.

Cited in *Crane v. Odegard*, 12 N. D. 135, 96 N. W. 326, holding that under the statute the person prevailing upon a reargument in the supreme court, is entitled to recover as costs, the same amount as is allowed upon the original argument.

Taxation of costs for excessive brief or abstract.

Cited in *McVay v. Tousley*, 20 S. D. 487, 107 N. W. 828, holding that where there is an objection to the taxation of costs for the printing of an abstract because the abstract was excessive, it becomes the duty of the court to determine what portions, if any, of the abstract were unnecessary or improper; *Swenson v. Christopherson*, 10 S. D. 342, 73 N. W. 96, refusing to allow costs to respondent for printing unnecessary matter in additional abstracts or extended quotations from text books and reports in his brief.

8 S. D. 56, CHANDLER v. KENNEDY, 65 N. W. 439.

Effect of stipulation for attorney's fees in negotiable instruments.

Cited in *National Bank of Commerce v. Feeney*, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874; *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89,—holding that a stipulation for attorney's fees in a note does not render it non-negotiable; *Johnson v. Sehar*, 9 S. D. 536, 70 N. W. 838, holding non-negotiable, note providing for payment of "other costs of collection" in addition to attorney's fees; *Cherry v. Sprague*, 187 Mass. 113, 67 L.R.A. 33, 105 Am. St. Rep. 381, 72 N. E. 456, on the validity of a stipulation in a negotiable note providing for attorney's fees.

Cited in note in 125 Am. St. Rep. 212, on agreements and conditions destroying negotiability.

Specification of errors upon motion for new trial or on appeal.

Cited in *Lund v. Upham*, 17 N. D. 210, 116 N. W. 88, holding that the settled case must contain a specification as to what particulars the evidence is insufficient to support the verdict or the sufficiency of the evi-

dence cannot be considered upon motion for new trial or on appeal; *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 634, 67 N. W. 837, holding that bill of exceptions or statement which contains no specifications of errors relied on or particulars in which the evidence is claimed to be insufficient must be disregarded; *D. S. B. Johnston Land-Mortg. Co. v. Case*, 13 S. D. 28, 82 N. W. 90, holding that alleged error in denying new trial cannot be considered on appeal except in so far as disclosed by the judgment roll where the settled statement of facts or bill of exceptions used on the motion contained no specifications of the particulars in which the evidence was claimed to be insufficient or of the errors of law occurring at the trial; *Stringer v. Golden Gate Min. & Mill. Co.* 13 S. D. 470, 83 N. W. 561, refusing to presume on appeal that there was an abuse of discretion in admitting evidence as to plaintiff's loss of time from defendant's failure to remove waste rock from mine where the only objection was that plaintiff could claim no damages for lost time unless they showed their ability to procure employment elsewhere; *Regan v. Whitaker*, 14 S. D. 373, 89 N. W. 863, holding that supreme court will not review the evidence where a motion for new trial for insufficiency of evidence was made on the minutes of the court or on a bill of exceptions and the notice of intention or bill of exceptions does not specify the particulars as to insufficiency; *Nelson v. Jordet*, 15 S. D. 46, 87 N. W. 140, holding that specification of error that the evidence is insufficient to sustain the findings and decisions of the court will not be considered where the statement does not specify the particulars wherein the evidence is insufficient; *Boettcher v. Thompson*, 17 S. D. 177, 95 N. W. 874, holding that on motion for a new trial, where the bill of exceptions does not state in what particulars the evidence is insufficient to support the verdict, such sufficiency cannot be considered; *Wenke v. Hall*, 17 S. D. 305, 96 N. W. 103, holding that specifications of errors in a motion for a new trial are not a sufficient compliance with the law requiring the bill of exceptions to contain specifications as to the particulars in which the evidence is insufficient to support the findings, or of errors of law occurring at the trial; *Schornveiler v. McCaull*, 18 S. D. 70, 99 N. W. 95, holding that on a motion for new trial or on appeal, the bill of exceptions should state the alleged errors relied upon for reversal; *Boettcher v. Thompson*, 21 S. D. 169, 110 N. W. 108, holding that denial of new trial will not be reviewed in absence of specifications in statement of case of particulars of insufficiency of evidence; *Cable Co. v. Rathgeber*, 21 S. D. 418, 113 N. W. 88, holding that waiver, by parties, of findings by court will be presumed in absence of anything in record to overcome it.

Law governing negotiable paper.

Cited in note in 61 L.R.A. 211, on conflict of laws as to negotiable paper.

8 S. D. 64, ANDERSON v. CHILSON, 65 N. W. 435.

Entering judgment at law in equitable action.

Cited in *Craig v. Craig*, 22 S. D. 417, 118 N. W. 712, holding that in

equitable action to declare constructive trust, court cannot render judgment for conversion.

8 S. D. 69, STATE v. ISAACSON, 65 N. W. 430.

Omission of witness's name from indictment.

Cited in *State v. Cambron*, 20 S. D. 282, 105 N. W. 241, holding that the right to receive the testimony of a witness in a trial for a felony, whose name has been omitted from the indictment, depends upon the intentional withholding of the name from the defense.

Experiments as evidence.

Cited in *Davis v. State*, 51 Neb. 301, 70 N. W. 984, holding testimony of a witness that he removed nuts and bolts from a railroad track with the monkey wrench in evidence, which the defendant is alleged to have used, is admissible for the purpose of rebutting the expert testimony that it was impossible to remove the nuts with such a monkey wrench.

Cited in note in 53 Am. St. Rep. 375, 383, on experiments as evidence.

8 S. D. 74, FOLEY-WADSWORTH IMPLEMENT CO. v. PORTEOUS, 65 N. W. 429.

Grounds for attachment.

Cited in *Finch v. Armstrong*, 9 S. D. 255, 68 N. W. 740, holding new ground of attachment created by statute authorizing issuance of attachment for debt incurred for property obtained under false pretenses.

8 S. D. 77, RICHARDS v. MATTESON, 65 N. W. 428.

Presumption of jurisdiction.

Cited in *Scaman v. Galligan*, 8 S. D. 277, 66 N. W. 458, holding jurisdiction of superior court presumed on collateral attack on judgment.

Collateral attack on judgment.

Cited in *Green v. Sabin*, 12 S. D. 496, 81 N. W. 904, holding a judgment of the circuit court on appeal on questions of both law and fact from a county court order not subject to collateral attack, because it remanded the cause with special directions as to the allowances to be made.

Right to custody or control of child.

Cited in notes in 65 L.R.A. 697, on right of mother, or reputed father, of illegitimate child to its custody or control; 30 L.R.A.(N.S.) 152, on validity of adoption without consent of parents.

8 S. D. 81, CALLENDER v. EDMISON, 65 N. W. 425.

8 S. D. 86, DEMPSEY v. BILLINGHURST, 65 N. W. 427.

Rehearing in appellate court after case remanded to lower court.

Cited in *Thomas v. Thomas*, 27 Okla. 784, — L.R.A.(N.S.) —, 113 Pac. 1058, holding that appellate court loses jurisdiction and cannot rehear case after its mandate is regularly transmitted to trial court; *Re Seydel*, 14 S. D. 115, 84 N. W. 397, denying authority of circuit court to rehear

decision reversing order of county court after case has been remanded to latter court.

8 S. D. 87, METCALF v. NELSON, 59 AM. ST. REP. 746, 65 N. W. 911.

Percolating waters.

Cited in *Barclay v. Abraham*, 121 Iowa, 619, 64 L.R.A. 255, 100 Am. St. Rep. 365, 96 N. W. 1080, holding that the presumption is that underground waters are percolating waters unless shown to be furnished by a stream of known and defined channel.

Cited in note in 67 Am. St. Rep. 671, on what are percolating waters.

— Ownership.

Cited in *Willow Creek Irrig. Co. v. Michaelson*, 21 Utah, 248, 51 L.R.A. 280, 81 Am. St. Rep. 687, 60 Pac. 943, holding that a purchaser of public lands has a proprietary interest in percolating water which afterwards appears and forms a stream thereon; *Herriman Irrig. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719, holding waters standing in the ground beneath the surface or passing through it belong to the land and the drying up of springs upon other lands because of the diversion of them by a tunnel upon other lands is no ground for action.

Cited in note in 99 Am. St. Rep. 67, on landowner's right in percolating waters.

8 S. D. 92, PRICE v. HUBBARD, 65 N. W. 436.

Breach of covenants of general warranty as defense to action for purchase price.

Cited in *Strunk v. Smith*, 8 S. D. 407, 66 N. W. 926, holding that action to recover purchase price of land sold by warranty deed cannot be resisted by showing defective title unless possession or quiet enjoyment of purchaser or his grantee has been disturbed; *Zerfing v. Seelig*, 12 S. D. 25, 80 N. W. 140, holding action for purchase price of land sold by warranty deed maintainable, notwithstanding defect in title where presumption of vendor's ability to respond in damages remains unchallenged.

Cited in note in 21 L.R.A.(N.S.) 395, on right of grantee in possession to question right of grantor to collect purchase money.

Distinguished in *Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540, holding that a breach of covenants against encumbrances may be relied upon as a defense in an action on the note and mortgage given for the purchase price until such encumbrance has been removed.

8 S. D. 96, VAN BRUNT & D. CO. v. HARRIGAN, 65 N. W. 421.

8 S. D. 99, FARGO v. JENNINGS, 65 N. W. 433.

Application of payments.

Cited in note in 96 Am. St. Rep. 49, on application of payments.

§ S. D. 101, FIRST NAT. BANK v. SMITH, 65 N. W. 439.**Extent of cross-examination.**

Cited in *Bedtkey v. Bedtkey*, 15 S. D. 310, 89 N. W. 479, holding it discretionary with court to exclude on cross examination any action against father-in-law for slander question as to pendency of divorce suit between herself and husband at time of trial when not attached on any direct examination; *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 112, holding that witness called by plaintiff to prove execution of contract in suit cannot be cross-examined as to matters therein not touched on in examination in chief.

§ S. D. 103, HEUMPHREUS v. FREMONT E. & M. VALLEY R. CO. 65 N. W. 466.**Notice to put one on inquiry.**

Cited in *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522, on sufficiency of notice to put one on inquiry.

Contributory negligence defeating recovery against carrier.

Distinguished in *Illinois C. R. Co. v. Beebe*, 69 Ill. App. 363, holding that a shipper of stock under a contract that he take care of it and ride in the caboose, who goes into a freight car to water the stock by direction of the conductor, is guilty of contributory negligence preventing recovery for injuries by being thrown from the car, if he remains there longer than is necessary properly to care for the stock, but not, if, without his fault, he is not allowed reasonable time to give the stock proper care and has no notice of the intention to start.

§ S. D. 119, ADAMS & W. CO. v. DEYETTE, 31 L.R.A. 497, 59 AM. ST. REP. 751, 65 N. W. 471.**Preferences by insolvent corporation.**

Cited in *City Nat. Bank v. Goshen Woolen Mills Co.* 35 Ind. App. 562, 69 N. E. 206, holding that the directors hold the assets of an insolvent corporation in trust for the creditors, and that a corporation has no more rights to prefer creditors than has an individual; *Furber v. Williams-Fowler Co.* 21 S. D. 228, 8 L.R.A.(N.S.) 1259, 111 N. W. 548, 15 A. & E. Ann. Cas. 1216, holding that insolvent corporation cannot prefer creditors; *Moon Bros. Carriage Co. v. Waxahachie, Grain & Implement Co.* 13 Tex. Civ. App. 103, 35 S. W. 337, holding that the mere insolvency of a corporation does not render its property a trust fund for its creditors, and it may place it beyond the reach of creditors.

Power of corporation to borrow money.

Cited in *Moon Bros. Carriage Co. v. Waxahachie Grain & Implement Co.* 13 Tex. Civ. App. 103, 35 S. W. 337, holding that the borrowing of a corporation is valid within the limit of its statutory power.

Cited in note in 111 Am. St. Rep. 326, on implied power of corporations to borrow money and give evidence of indebtedness and security therefor.

Power of corporation to purchase own or other stock.

Cited in note in 61 L.R.A. 631, on right of corporation to purchase its own stock.

Distinguished in *Tourtelot v. Whited*, 9 N. D. 467, 84 N. W. 8, holding that national banks are not prohibited from dealing in stock of other corporations by the provision of U. S. Rev. Stat. § 5201 (U. S. Comp. Stat. 1901, p. 3494), prohibiting them from making any loan or discount on the shares of their own stock.

8 S. D. 148, SHORT v. CIVIL TWP. 65 N. W. 432.**Condition precedent to action against state on claim.**

Cited in *Lyman County v. State*, 9 S. D. 413, 69 N. W. 601, holding the certificates of a claim against the state for expenses of criminal prosecutions in unorganized counties not a condition precedent to the maintenance of an action against a state for such expenses after the state auditor has refused payment thereof.

Right to bring mandamus.

Distinguished in *Taubman v. Aurora County*, 14 S. D. 206, 84 N. W. 784, holding the owner of a newspaper who files an affidavit with the county commissioners showing that his paper is entitled to be designated as an official newspaper, but who does not appeal from the order of the commissioners refusing to designate it, not entitled to bring mandamus to enforce his rights, as there is an adequate remedy by appeal.

8 S. D. 153, CARTER v. STATE, 65 N. W. 422.**Assignment of public contracts.**

Cited in *Leader Printing Co. v. Lowry*, 9 Okla. 89, 59 Pac. 242, holding that a contract with the territory for printing supplies, unless expressly made so by the terms of the contract or by statute, is not a contract which involves personal trust or confidence to such an extent that it cannot be assigned.

Cited in note in 88 Am. St. Rep. 202, on power of parties to restrict assignability of contract.

Disapproved in *Campbell v. Sumner County*, 64 Kan. 376, 67 Pac. 866, holding that a contract to do public printing is non-assignable.

8 S. D. 160, NORTHWESTERN LOAN & BKG. CO. v. MUGGLI, 65 N. W. 442, Later appeal as to costs in 13 S. D. 103, 82 N. W. 417.**8 S. D. 163, FALL v. JOHNSON, 65 N. W. 909.****8 S. D. 169, HURON WATERWORKS CO. v. HURON, 30 L.R.A. 848, 65 N. W. 816.****Power to regulate water rates.**

Cited in *Knoxville v. Knoxville Water Co.* 107 Tenn. 647, 61 L.R.A. Dak. Rep.—56.

888, 64 S. W. 1075, holding that a city could not deprive itself of the power to regulate water rates, by contract.

8 S. D. 170, AMERICAN SAV. & L. ASSO. v. CAMPBELL, 65 N. W. 815.

8 S. D. 173, COATES v. CHICAGO, M. & ST. P. R. CO. 65 N. W. 1067.

Power of local agent to contract for carriage over connecting lines.

Cited in *McLagan v. Chicago & N. W. R. Co.* 116 Iowa, 183, 89 N. W. 233, holding that where the bill of lading provided for the carriage of the goods to a certain point and the delivery there of the goods to a connecting carrier, the contract was not for continuous carriage, and the local station agent could not bind the carrier as to the rates of the connecting carrier; *Sutton v. Chicago & N. W. R. Co.* 14 S. D. 111, 84 N. W. 396, holding authority of local railroad agent to contract for shipment over continuing lines not to be inferred from his collecting freight for entire distance.

Cited in note in 31 L.R.A.(N.S.) 33, 34, on liability of connecting carrier for loss beyond own line.

8 S. D. 176, CORBETT v. CLOUGH, 65 N. W. 1074.

Original pleadings as an admission after amendment.

Cited in *Bernard v. Pittsburg Coal Co.* 137 Mich. 279, 100 N. W. 396, on the right of the defendant to use superseded amended declaration as an admission on the part of the plaintiff.

Distinguished in *La Rue v. St. Anthony & D. Elevator Co.* 17 S. D. 91, 95 N. W. 292, holding that where it appears that the jury disregarded the admissions in the original answer, which was introduced as an admission on the part of the defendant, the verdict would not be reversed therefor.

Extension of time of payment of a note.

Cited in *Brenneke v. Smallman*, 2 Cal. App. 306, 83 Pac. 302, as an example of the proper language to use extending the time of payment of a note, and holding that a note was not extended by a payment of the interest in advance to a certain time; *Dillaway v. Peterson*, 11 S. D. 210, 76 N. W. 925, holding church trustees executing mortgage to secure their joint note for exclusive benefit of corporation released from personal liability for deficiency where one of them purchased the property and assumed the mortgage and the mortgagee without knowledge of the other obligor's extended time of payment; *Niblack v. Champeny*, 10 S. D. 165, 72 N. W. 402, holding indorsement on back of note that interest is paid and extended sixty days by consent of both parties presumptive evidence of consideration for extension.

Sufficiency of consideration generally.

Cited in *Windhorst v. Bergendahl*, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544; *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656,—holding that written agreement is presumptive evidence of sufficient consideration.

8 S. D. 181, STEWART v. GILRUTH, 65 N. W. 1065.**Validity of purchase by agent from principal.**

Cited in *Van Dusen v. Bigelow*, 13 N. D. 277, 67 L.R.A. 288, 100 N. W. 723, holding that a conveyance by the principal to the agent is voidable at the election of the principal, if the agent did not disclose all within his knowledge as to the value of the principal's property and did not disclose that he was the purchaser and secure the principal's consent.

8 S. D. 186, GOTZIAN v. McCOLLUM, 65 N. W. 1068.**Review of orders granting or refusing new trials.**

Cited in *Distad v. Shanklin*, 11 S. D. 1, 75 N. W. 205, holding that order granting new trial for insufficiency of the evidence will be disturbed only for manifest abuse of discretion; *Finch v. Martin*, 13 S. D. 274, 83 N. W. 263, refusing to disturb discretion of trial court in granting or refusing motion for new trial; *Rochford v. Albaugh*, 16 S. D. 628, 94 N. W. 701, holding that a stronger case must be shown to reverse an order granting a new trial than one denying it; *Jones v. Jones*, 17 S. D. 256, 96 N. W. 88, holding that an order granting or denying a new trial will not be reversed except for an abuse of discretion.

8 S. D. 190, NOYES v. BRACE, 65 N. W. 1071.**Validity of recording statutes.**

Cited in *Ruggles v. Cannedy*, 127 Cal. 290, 46 L.R.A. 371, 53 Pac. 911, 59 Pac. 827, holding that a chattel mortgage withheld from record for a time is void as against creditors whose claims have arisen between the date of its execution and the date of its recordation, even if they have acquired no lien, under Cal. Civ. Code, § 2957, making the record a condition of the validity of such a mortgage as against creditors; *Pringle v. Canfield*, 19 S. D. 506, 104 N. W. 223, holding valid the recording statute providing that a conditional sale of property will vest the title in the vendee as to persons with notice, unless the contract is in writing and recorded.

Cited in note in 137 A. S. R. 492, on effect of failure to execute and record chattel mortgage as prescribed by statute.

"In good faith for value" as applying to "creditors."

Cited in *Campbell v. Richardson*, 6 Okla. 375, 51 Pac. 659, holding that the words "in good faith for value," in Okla. Stat. 1893, § 3270, identical with Dak. Comp. Laws, § 4379, do not apply to "creditors."

8 S. D. 198, KEHOE v. HANSEN, 59 AM. ST. REP. 759, 65 N. W. 1075.**Construction of mechanic's lien law.**

Cited in *Sweem v. Atchison*, T. & S. F. R. Co. 85 Mo. App. 87, holding that loading clay upon cars on a switch not immediately adjoining or contiguous to the roadbed, but to which it is to be transported and used in making repairs, is within Mo. Rev. Stat. 1889, § 6741, giving a lien to such persons as do the work in constructing or improving the roadbed; *Role-*

witch v. Harrington, 20 S. D. 375, 6 L.R.A. (N.S.) 550, 107 N. W. 207, holding that the mechanic's lien law should be liberally construed.

8 S. D. 201, LOFTUS v. FARMERS' SHIPPING ASSO. 65 N. W. 1076.

Action by members in behalf of corporation or society.

Cited in Glover v. Manila Gold Min. & Mill. Co. 19 S. D. 559, 104 N. W. 261, holding that stockholders may bring an action in behalf of the corporation against the managing officers, whose acts are fraudulent and threaten to depreciate the value of the interests of the stockholders, and to deprive them of such; Frederick Mill. Co. v. Frederick Farmers' Alliance Co. 20 S. D. 335, 106 N. W. 298, holding that where the directors are acting intentionally to prejudice the rights of the stockholders, or a meeting of the board of directors cannot be had, the stockholders may apply to the court for relief without making a request to the board to protect their interests.

Cited in note in 97 Am. St. Rep. 35, on actions by stockholders in behalf of corporations.

— Parties.

Cited in Peterson v. Christianson, 18 S. D. 470, 101 N. W. 40, holding that in an action by communicants of one nationality against those of another using a church building alternately for separate services, as provided by the bylaws of the church to restrain the exercise of such use, the corporation is not a necessary party; Whitney v. Hazzard, 18 S. D. 490, 101 N. W. 346, holding that the stockholders may sue in their own names, making the corporation a party defendant, to set aside a decree obtained by fraud, foreclosing a mortgage upon the property of the corporation, where the managing officers of the corporation refuse to act.

Disqualification to vote to increase director's salary.

Cited in Ritchie v. People's Teleph. Co. 22 S. D. 598, 119 N. W. 990, holding that director's wife, also a director, cannot vote on resolution increasing his salary.

8 S. D. 210, FARMERS' BANK v. BANK OF CANTON, 65 N. W. 1070.

8 S. D. 214, DAVEY v. FIRST NAT. BANK, 66 N. W. 122.

8 S. D. 220, OLSON v. HUNTIMER, 66 N. W. 313.

Reversal of judgment to enable recovery of nominal damages.

Cited in Roberts v. Minneapolis Threshing Mach. Co. 8 S. D. 579, 59 Am. St. Rep. 777, 67 N. W. 607, holding that judgment for defendant will not be reversed to allow plaintiff to recover nominal damages unless essential to some legal right involved.

8 S. D. 222, STAPLES v. HURON NAT. BANK, 66 N. W. 314.**Liability of corporation for acts of officers.**

Cited in *Watson v. Proximity Mfg. Co.* 147 N. C. 469, 61 S. E. 273, holding that where an advancement was made to an officer of the corporation who was also practically the sole owner of the corporation, and the latter had been negotiating with the other for the advancement, the corporation will be liable without showing that it was for the benefit of the corporation.

Cited in note in 29 L.R.A.(N.S.) 559, on imputations of knowledge of personally interested officers to bank.

8 S. D. 230, SOUTHARD v. SMITH, 66 N. W. 316.**Estoppel by judgment.**

Cited in *Remilliard v. Authier*, 20 S. D. 290, 4 L.R.A.(N.S.) 295, 105 N. W. 626, holding that in an action to quiet title to land, the title of the plaintiff was put in issue, the plaintiff was estopped thereby from asserting in a subsequent action that he had title as heir, where he did not assert the same in the former action.

Vacating default judgment.

Cited in *McArthur v. Southard*, 10 S. D. 566, 74 N. W. 1031, holding a judgment by default foreclosing a mechanic's lien which purports to bar the interest of all the defendants, including that of a vendor under an executory contract will not be vacated on the vendor's motion after the lapse of a number of years without notice to innocent intervening purchasers under the judgment, although the prayer of the complaint was only for the sale of the interest of the purchasers under such contract.

8 S. D. 240, ANDERSON v. ALSETH, 66 N. W. 320.**Necessity for findings by court.**

Cited in *Farrell v. Edwards*, 8 S. D. 425, 66 N. W. 812, holding the introduction in evidence of a contract attached to and made part of the complaint, the execution of which is admitted in the answer, and the basing of a finding thereon, not prejudicial to defendant; *McKenna v. Whittaker*, 9 S. D. 442, 69 N. W. 587, holding finding on each material issue of fact involved and not recital of merely evidential facts required; *First Nat. Bank v. McCarthy*, 13 S. D. 356, 83 N. W. 423, holding no finding of fact required as to facts alleged in answer which are specifically admitted by reply.

8 S. D. 244, LINDSAY v. PETTIGREW, 66 N. W. 321, Later appeal in 10 S. D. 228, 72 N. W. 574.**Right to set-off judgments.**

Cited in *Garrigan v. Huntimer*, 21 S. D. 269, 111 N. W. 563, sustaining set-off of reciprocal judgments for costs on appeal, without regard to attorney's lien.

8 S. D. 248, HART v. GRANT, 66 N. W. 322.**Affidavit upon information and belief.**

Cited in *Shaw v. Ashford*, 110 Mich. 534, 68 N. W. 281, holding an affidavit which did not appear to be made upon the personal knowledge of deponent insufficient to authorize an arrest; *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283, holding that an affidavit upon information and belief does not authorize the issuance of a search warrant, where it is not otherwise corroborated.

8 S. D. 255, KELSEY v. WELCH, 66 N. W. 390.**Necessity for presenting claim to administrator.**

Cited in *Fish v. De Laray*, 8 S. D. 320, 59 Am. St. Rep. 764, 66 N. W. 465, holding debt secured by mechanic's lien not claim which must be presented to administrator.

8 S. D. 263, DIELMANN v. CITIZENS' NAT. BANK, 66 N. W. 311.**Statute of limitations as affirmative defense.**

Cited in *McConnell v. Spicker*, 15 S. D. 98, 87 N. W. 574, holding the defense to be a personal privilege which is deemed waived if not specially pleaded; *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416, holding burden on plaintiff to show tolling of statute of limitations by absence of defendants from state.

8 S. D. 271, BROWN v. EDMONDS, 59 AM. ST. REP. 762, 66 N. W. 310.**What constitutes wearing apparel.**

Cited in *Phillips v. Phillips*, 151 Ala. 527, 125 Am. St. Rep. 40, 44 So. 391, 15 A. & E. Ann. Cas. 157, holding that the watch and chain of the decedent was wearing apparel within the meaning of the statute providing for the allowance to widow; *Neasham v. McNair*, 103 Iowa, 695, 38 L.R.A. 547, 64 Am. St. Rep. 202, 72 N. W. 773, holding that the purchase price of a diamond shirt stud, procured for personal use and actually used and worn by a husband, is a family expense within Iowa Code, § 2214, charging "family expenses" upon the property of both husband and wife, or either of them; *Re Jones*, 97 Fed. 773, 2 N. B. N. Rep. 296, holding that a gold watch, chain, and charm carried upon the person in the mode of ordinary usage are within Wis. Rev. Stat. § 2982, exempting from execution "all wearing apparel of the debtor and his family;" *Re Evans*, 158 Fed. 153, holding that a watch, fob, cuff links, gold rings, stick pins, etc., were included as wearing apparel within the meaning of the exemption and bankruptcy statutes.

Cited in note in 125 Am. St. Rep. 45, on wearing apparel as exempt.

Costs on rehearing.

Cited in *Crane v. Odegard*, 12 N. D. 135, 96 N. W. 326, holding that the

prevailing party upon reargument is entitled to the same costs as were allowed for the original hearing.

S. S. D. 274, RE CHAPTER 6, SESS. LAWS, 1890, 66 N. W. 310.

Ex parte decisions.

Cited in Re House Resolution No. 30, 10 S. D. 249, 72 N. W. 892, holding that supreme court judges will not give ex parte decision on application of governor as to constitutionality of joint resolution of legislature and appropriation to carry same into operation.

S. S. D. 277, SCAMAN v. GALLIGAN, 66 N. W. 458.

Second execution against property after redemption.

Distinguished in McQueeney v. Toomey, 36 Mont. 282, 122 Am. St. Rep. 358, 92 Pac. 561, 13 A. & E. Ann. Cas. 316, holding that under the statutes, land having been redeemed from a sale on execution, the judgment creditor cannot again levy upon the same to the amount of his deficiency judgment.

Collateral attack on judgment.

Cited in Green v. Sabin, 12 S. D. 496, 81 N. W. 904, holding a judgment of the circuit court on appeal on questions of law and fact from a county court order not subject to collateral attack, because it remanded the cause to the county court with special directions as to the allowance to be made.

S. S. D. 287, SMAIL v. GILRUTH, 66 N. W. 452.

Change of venue.

Cited in George v. Kotan, 18 S. D. 437, 101 N. W. 31, holding that under the statutes, where the unchallenged affidavit of the maker of the note stated that the plaintiff had no interest in the suit, but was a party to the suit for the purpose of laying the venue of the action in another county, the defendant was entitled to a change of venue.

Distinguished in Senn v. Connelly, 23 S. D. 158, 120 N. W. 1097, upholding refusal of change of venue of action against original obligor and his guarantor, brought in guarantor's county.

S. S. D. 292, IOWA STATE SAV. BANK v. JACOBSON, 66 N. W. 453.

Sufficiency of affidavit for publication of summons.

Cited in Davis v. Cook, 9 S. D. 319, 69 N. W. 18, holding defendant's nonresidence sufficiently shown by plaintiff's attorney for order for publication stating that defendant is not a resident of the state but resides in specified city in another state "as deponent is informed" by attorney by firm of bankers in such city and state positively that he is "now" at such city; Bothell v. Hoellwarth, 10 S. D. 491, 74 N. W. 231, holding insufficient, statement in affidavit for order of publication that defendant "cannot after due diligence be found within the state" without showing what efforts had been made; Woods v. Pollard, 14 S. D. 44, 84 N. W. 214, hold-

ing due diligence to find defendant within state showing by affidavit for publication stating that defendant cannot after due diligence be found within state, that summons was placed for service in hands of sheriff whose return is referred to, that affiant has known defendant for a number of years and that he sold his residence in state where affiant resided and severed his business connections and removed his family to a specified place in another state where he is at present as affiant is informed by various persons.

Sufficiency of publication of process.

Cited with special approval in *Cook v. Lockerby*, 16 N. D. 19, 111 N. W. 628, holding that publication of a notice of sale in foreclosure proceedings for seven successive issues of a weekly newspaper is sufficient under a statute requiring publication once each week for six successive weeks.

Cited in *McHenry v. Bracken*, 93 Minn. 510, 101 N. W. 960, holding that proof of publication of summons in a weekly newspaper for six successive weeks is sufficient under the statute requiring publication once each week for six successive weeks; *Harrison v. Wallis*, 44 Misc. 492, 90 N. Y. Supp. 44, holding that a publication six times a week from January 17th, to February 14th, was sufficient under a statute providing for publication for four successive weeks.

Attachment or publication to precede the other.

Cited in *Hartzell v. Vigen*, 6 N. D. 117, 35 L.R.A. 451, 66 Am. St. Rep. 589, 69 N. W. 203, holding seizure of property at institution of suit not necessary to give court jurisdiction of "subject of the action;" *Little v. Christie*, 69 S. C. 57, 48 S. E. 89 (dissenting opinion), as to whether attachment should precede publication of summons against a non-resident.

8 S. D. 300, DAVIS v. MATTHEWS, 66 N. W. 456.

Authority of attorney to employ stenographer.

Cited in *Pilcher v. Sioux City Safe Deposit & T. Co.* 12 S. D. 52, 80 N. W. 151, holding that an attorney authorized to take whatever action may be necessary to foreclose a trust deed, which authorized the trustee in case of default to apply for the appointment of a receiver, has authority, where a receiver is appointed by the state court after he has commenced an action in the Federal court, to employ a stenographer to take the testimony in the action in the state court, although he is not expressly retained as attorney in such court.

8 S. D. 304, CONNER v. KNOTT, 66 N. W. 461, Later appeal in 10 S. D. 384, 73 N. W. 264.

Evidence admissible under general denial in claim and delivery.

Cited in *Plano Mfg. Co. v. Person*, 12 S. D. 448, 81 N. W. 897, holding evidence that chattel mortgagor sued in claim and delivery could not read and that plaintiff's agent in reading the mortgage to him read nothing about mortgaging the property sued for admissible under general denial.

8 S. D. 308, BURDICK v. MARSHALL, 66 N. W. 462.

8 S. D. 315, STATE v. REDDINGTON, 66 N. W. 464.

Waiver and estoppel to plead former jeopardy.

Cited in note in 135 Am. St. Rep. 75, on waiver and estoppel of defendant to plead former jeopardy.

8 S. D. 320, FISH v. DE LARAY, 59 AM. ST. REP. 764, 66 N. W. 465.

8 S. D. 322, GADE v. COLLINS, 66 N. W. 466.

Review of sufficiency of evidence to support findings or verdict.

Cited in Hagaman v. Gillis, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below; Church v. Walker, 10 S. D. 90, 72 N. W. 101, holding evidence not reviewable on appeal where no motion for new trial was made; Sinklin v. Illinois C. R. Co. 10 S. D. 560, 74 N. W. 1029, holding sufficiency of evidence to justify verdict not reviewable on appeal after dismissal of appeal from order denying new trial because taken before such order was entered; Bank of Iowa & Dakota v. Price, 12 S. D. 184, 80 N. W. 195, holding that sufficiency of evidence to sustain findings of the court will not be considered on appeal where appellant's abstract fails to show that any notice of motion for new trial was ever severed, or that such a motion was ever made or argued, or that any order denying such a motion was ever made or entered; Mettel v. Gales, 12 S. D. 632, 82 N. W. 181, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial; Northwestern Elevator Co. v. Lee, 13 S. D. 450, 83 N. W. 565, holding sufficiency of evidence to establish plaintiff's ownership of wheat levied on not reviewable on appeal where issue of ownership was not brought to attention of trial court by motion for new trial; Bourne v. Johnson, 10 S. D. 36, 71 N. W. 140; Parrish v. Mahany, 10 S. D. 276, 66 Am. St. Rep. 715, 73 N. W. 97; Blackman v. Hot Springs, 14 S. D. 497, 85 N. W. 996,—holding sufficiency of evidence to justify findings not reviewable on appeal from judgment alone; State ex rel. Brown v. City of Pierre, 15 S. D. 559, 90 N. W. 1047, holding that evidence cannot be reviewed on appeal from judgment alone where record affirmatively shows that a motion for a new trial was heard and denied after rendition of the judgment; Reder v. Bellemore, 16 S. D. 356, 92 N. W. 1065, holding that it will be presumed in the absence of all testimony introduced at the trial, that the findings of the court below are based upon sufficient evidence; Stephens v. Faus, 20 S. D. 367, 106 N. W. 56; Foss v. Van Wagenen, 20 S. D. 39, 104 N. W. 605,—holding that the sufficiency of the evidence to support the findings cannot be reviewed upon appeal from a judgment alone taken before the motion for new trial was made.

Review of errors occurring after judgment.

Cited in Aultman, M. & Co. v. Becker, 10 S. D. 58, 71 N. W. 753, holding that appeal from a judgment only does not bring up for review errors occurring after the judgment.

Denial of new trial as res judicata.

Cited in Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276, holding denial of new trial not res judicata as to errors apparent on judgment roll.

8 S. D. 327, STATE v. NEWSON, 66 N. W. 468.

Power to compromise judgment on forfeited undertaking.

Cited in State v. Davis, 11 S. D. 111, 74 Am. St. Rep. 780, 75 N. W. 897, holding a board of county commissioners empowered to compromise a judgment on a forfeited undertaking from which an appeal is being taken.

8 S. D. 330, BOWMAN v. KNOTT, 66 N. W. 457.

8 S. D. 332, IOWA INVEST. CO. v. SHEPARD, 66 N. W. 451.

Sufficiency of notice of foreclosure sale.

Cited in McCardia v. Billings, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008, holding sufficient notice of sale in foreclosure under power if sale correctly states facts pertaining to record which, if examined would conclusively show errors in notice.

8 S. D. 335, SHICKLE-HARRISON & H. IRON CO. v. RAPID CITY, 66 N. W. 499.

8 S. D. 337, SPARKS v. STURGIS CREAMERY CO. 66 N. W. 500.

8 S. D. 338, STATE v. HUGHES, 66 N. W. 1076.

Impeachment of witness.

Cited in note in 82 Am. St. Rep. 40, on evidence to show credibility or bias of witness.

8 S. D. 343, SHERMAN v. PORT HURON ENGINE & THRESHER CO. 66 N. W. 1077, Later appeal in 13 S. D. 95, 82 N. W. 413.

Duties and powers of collecting banks.

Cited in note in 77 Am. St. Rep. 626, on duties of banks acting as collecting agents.

Distinguished in Sherman v. Port Huron Engine & Thresher Co. 13 S. D. 95, 82 N. W. 413, sustaining right of collecting bank to employ subagent where note is not payable at place where bank is located.

8 S. D. 350, LEIGHTON v. SERVESON, 66 N. W. 938.

Lien of attorney.

Cited in Stoddard v. Lord, 36 Or. 412, 59 Pac. 710, holding that when an attorney's lien for compensation attaches to money in the hands of the adverse party, it is in effect an equitable assignment pro tanto by the client

to his attorney of so much thereof as may be necessary to satisfy his demand for services performed in securing the fund.

— **Enforcement of, against sureties on appeal bond.**

Cited in *Coombe v. Knox*, 28 Mont. 202, 72 Pac. 641, holding that the sureties on an appeal bond were proper parties in an action to enforce an attorney's lien.

3 S. D. 353, BUSH v. FROELICK, 66 N. W. 939, Later appeal as to costs in 14 S. D. 62, 84 N. W. 230.

Joinder of causes of action.

Cited in *Sheets v. Prosser*, 16 N. D. 180, 112 N. W. 72, holding that a cause of action for equitable relief from a forfeited mechanic's lien and one for the statutory penalty for failure to release the lien upon demand, may be joined.

3 S. D. 359, SUNDBACK v. GILBERT, 66 N. W. 941.

When petition for specific performance is demurrable.

Cited in *Wolf v. New Orleans Tailor-Made Pants Co.* 52 La. Ann. 1357, 27 So. 893, holding a petition for specific performance demurrable which recite that the plaintiffs were conducting a commercial business under a certain firm name, but not showing that they collectively represented and brought the partnership into court, in a suit on its behalf.

Presumption as to legality of acts.

Cited in *Swenson v. Swenson*, 17 S. D. 558, 97 N. W. 845, holding that where it is necessary under the statute that an acceptance of a trust be in writing and subscribed by the trustee or agent, and it does not appear whether the acceptance was by parol or in writing, it will be presumed to have been in writing.

3 S. D. 363, SMITH v. HAWLEY, 66 N. W. 942.

Books of account as evidence.

Cited in note in 53 L.R.A. 523, on use of person's books of account as evidence upon issues between other parties.

3 S. D. 369, STATE v. LA CROIX, 66 N. W. 944.

Discretion of trial court in securing a jury.

Cited in *Stevens v. Union R. Co.* 26 R. I. 90, 66 L.R.A. 465, 58 Atl. 492, holding that the allowance of a number of peremptory challenges to the jury in excess of those allowed by statute, is not grounds for reversal where no prejudice is shown to the opposing party; *State v. Hall*, 16 S. D. 4. 65 L.R.A. 151, 91 N. W. 325, holding that a channel to the panel of jurors on a special venire because of the bias of the officer selecting them, rests in the discretion of the trial court and the ruling thereon will not be reversed except for an abuse of discretion.

Sufficiency of indictment.

Cited in *State v. Peebles*, 178 Mo. 485, 77 S. W. 518, holding no material variance between information, charging burglarizing of warehouse, and

proof of entry into one part and taking of goods from another part, separated by partial partition; *State v. Shanley*, 20 S. D. 18, 104 N. W. 522, holding that the defendant cannot complain that the indictment did not set forth the offense in different counts as allowable by statute, unless he is misled in making his defense or is placed in jeopardy of a second prosecution.

Sufficiency of objection to evidence.

Cited in *McQueen v. Bank of Edgemont*, 20 S. D. 378, 107 N. W. 208, holding that an objection to testimony that it would create prejudice against the defendant and sympathy for the plaintiff and was clearly irrelevant, is insufficient; *Davis v. Holy Terror Min. Co.* 20 S. D. 399, 107 N. W. 374, holding that an objection to evidence that it is incompetent is insufficient to justify a review of the objection and ruling on appeal; *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341, holding that a general objection to evidence is insufficient to warrant a review of the same on appeal unless it appears that the objection could not have been obviated if it had been specifically pointed out.

8 S. D. 375, TANDERUP v. HANSEN, 66 N. W. 1073.

Decision on former appeal as the law of the case on second appeal.

Cited in *First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646, holding that in so far as the record made at the former trial in no way differs from that before the court on a second appeal, the questions as there decided have become the law of the case; *Waterhouse v. Jos. Schlitz Brewing Co.* 16 S. D. 592, 94 N. W. 587, holding that the sufficiency of the complaint cannot be questioned upon a subsequent appeal, where it was determined upon a former appeal; *Wright v. Lee*, 10 S. D. 263, 72 N. W. 895, holding decision on appeal law of the case on a second appeal; *Parker v. Randolph*, 10 S. D. 402, 73 N. W. 906, holding that questions decided on appeal will not ordinarily be reversed on latter appeal where facts are substantially the same; *Bem v. Shoemaker*, 10 S. D. 453, 74 N. W. 239, holding that point decided on appeal cannot be questioned in later appeal involving any branch of the case; *State v. Ruth*, 14 S. D. 92, 84 N. W. 394; *Sherman v. Port Huron Engine & Thresher Co.* 13 S. D. 95, 82 N. W. 413,—holding that law announced on first appeal will even though erroneously stated be adhered to on second appeal in same action; *Dunn v. National Bank of Canton*, 15 S. D. 454, 90 N. W. 1045, holding that decision on former appeal determines law of the case at all subsequent stages where no new issues are introduced.

Cited in note in 34 L.R.A. 338, on conclusiveness of prior decisions on subsequent appeals.

Specification of grounds justifying direction of verdict.

Cited in *Cooper v. Merchants' & Mfrs. Nat. Bank*, 25 Ind. App. 341, 57 N. E. 569, raising, but not deciding, the question as to whether a motion to direct a verdict must specify the grounds on which it is made; *Howie v. Bratrud*, 14 S. D. 648, 86 N. W. 747, holding motion to direct verdict for defendant because evidence is "insufficient to show or consti-

tute a cause of action," insufficient in failing to point out specifically the grounds relied on; *Smalley v. Rio Grande Western R. Co.* 34 Utah, 423, 98 Pac. 311, holding that upon a motion for a directed verdict, the moving party or the court should state the particular ground or grounds which justify it.

Review of sufficiency of evidence.

Cited in *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192, holding sufficiency of evidence to establish fact essential to recovery by successful party not reviewable on appeal when no motion for new trial was made below.

Sufficiency of objection to evidence.

Cited in *State v. Finder*, 10 S. D. 103, 72 N. W. 97, holding objection to exhibition of injured hand on ground that it did not affirmatively appear that the hand was not injured prior to the assault complained of not saved by general objection that proper foundation had not been laid.

8 S. D. 381, *McHARD v. WILLIAMS*, 59 AM. ST. REP. 766, 66 N. W. 930.

Proper counter claim.

Cited in *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90, holding that a mortgagor of chattels may counterclaim for their conversion by the mortgagee when sued upon the note secured by the mortgage; *Minneapolis Threshing Mach. Co. v. Darnall*, 13 S. D. 279, 83 N. W. 266, sustaining right of defendant in claim and delivery by mortgagee to recover possession of mortgaged chattels to set up as a counterclaim damages from plaintiff's failure to procure insurance as agreed by him; *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372, holding conversion of machinery by mortgagee proper counterclaim in action on notes secured by mortgage.

Joinder of causes of action.

Cited in *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447, holding that an action to restrain a city from selling plaintiff's premises for a sidewalk tax may be joined with a cause of action for damages from changing the grade of the street.

8 S. D. 385, *BOWERS v. GRAVES & V. CO.* 66 N. W. 931.

Nature of cropping contract.

Cited in *Cedarberg v. Guernsey*, 12 S. D. 77, 80 N. W. 159, holding that the cropping contract there involved did not create a partnership; *Cull v. San Francisco & F. Land. Co.* 124 Cal. 591, 57 Pac. 456, holding that there is no element of a contract of employment in a contract for the cropping of land on shares, where the owner agrees to contribute to the joint adventure only the use of his land; *Withed v. St. Anthony & D. Elevator Co.* 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238, holding that the interest which the owner of mortgaged land has in the crop raised thereon during the redemption period under a contract

with the tenant by which he receives it in lieu of rent constitutes rent to which the purchaser on foreclosure is entitled under N. D. Rev. Codes, § 5549.

Measure of damages for breach of contract.

Cited in *Nebraska & D. Land & Live Stock Co. v. Burris*, 10 S. D. 430, 73 N. W. 919, holding testimony as to the value of crops that might be raised on land if the soil was properly irrigated admissible to show damages from failure to furnish water to irrigate the land.

Cited in note in 53 L.R.A. 104, on loss of profits as an element of damages for breach of contract.

— To lease land.

Cited in *Kjelsberg v. Chilberg*, 100 C. C. A. 529, 177 Fed. 109, holding that in an action for breach of contract to lease mining property, it was proper to show the profits made by others on the same property during the same time and under similar means to be employed by the plaintiffs, to show the damages arising from the breach; *Crews v. Cortez*, 102 Tex. 111, — L.R.A.(N.S.) —, 113 S. W. 523, holding that in an action for a breach of a lease of land on shares, the tenant was entitled to recover his share of the crop less what he would have expended in harvesting it and in performing his contract, where he was compelled to abandon the lease after the crop was sown.

What constitutes partnership.

Cited in note in 115 Am. St. Rep. 439, on what constitutes a partnership.

8 S. D. 391, FIRST NAT. BANK v. KOECHER, 66 N. W. 933.

Sufficiency of description in chattel mortgage.

Cited in *Coughran v. Sundback*, 9 S. D. 483, 70 N. W. 644, holding sufficient, description of property in chattel mortgage as all the crops of a designated year to be "raised on the N. E. 4 Sec. 6 tp. 102, R. 48, consisting of 90 acres;" *Advance Thresher Co. v. Schmidt*, 9 S. D. 489, 70 N. W. 646, holding sufficient, description of property in chattel mortgage as "my $\frac{1}{2}$ share of all crops raised upon the S. W. 4 Sec. 31-104-54 . . . consisting of wheat, oats, grain, and other grains as raised" on such land for designated years when taken in connection with mortgagor's name and the town, county, and state of residence; *Commercial State Bank v. Interstate Elevator Co.* 14 S. D. 276, 86 Am. St. Rep. 760, 85 N. W. 219, holding insufficient, description of growing wheat in mortgage as consisting of a specified number of acres in mortgagor's possession in a specified county of the state without giving township or section; *Longbeam v. Huston*, 20 S. D. 254, 105 N. W. 743, holding that a chattel mortgage describing the horses as a bald faced mare, five years old, weighing about 1400 pounds, and one black mare, seven years old, weight 1200 pounds, in possession of the mortgagor, sufficiently described the property as between the parties, where the mortgagor had no other horses of such description.

8 S. D. 394, BENNETT v. CHICAGO, M. & ST. P. R. CO. 66 N. W. 934.

Review of evidence upon appeal.

Cited in *Neyer v. Davenport Elevator Co.* 12 S. D. 172, 80 N. W. 189, holding it allowable on appeal in action at law to determine only whether there is substantial evidence which with inferences fairly deducible will sustain the verdict; *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192, holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; *Charles E. Bryant & Co. v. Arnold*, 19 S. D. 106, 102 N. W. 303, holding that conflicting testimony will not be reviewed upon appeal except to determine whether there is probative evidence to sustain the verdict.

8 S. D. 398, HOWARD v. DWIGHT, 66 N. W. 935.

Fraud in sale as question for jury.

Cited in *Church v. Foley*, 10 S. D. 74, 71 N. W. 759, in which the court stated that they were inclined to the opinion that the question of immediate delivery and continued change of possession of a stock of goods sold to a creditor should have been submitted to the jury if a request therefor had been made, instead of a motion by each party for the direction of a verdict in his favor.

8 S. D. 407, STRUNK v. SMITH, 66 N. W. 926.

Time as of the essence of the contract.

Cited in *Standard Lumber Co. v. Miller & V. Lumber Co.* 21 Okla. 617, 96 Pac. 761, holding that under the statute, in order that time may be of the essence of the contract, it must expressly stipulate that effect or it must expressly appear from the terms of the contract, and cannot be made so by implication.

Distinguished in *Hanschka v. Vodopich*, 20 S. D. 551, 108 N. W. 28, holding that time is necessarily the essence of an option contract, and where it is made so by the terms of the contract it is sufficient though it does not follow the precise words of the statute.

Parol evidence to vary written contract.

Cited in *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding parol evidence of executory agreement inadmissible to vary terms of written contract.

8 S. D. 412, HILTON v. ADVANCE THRESHER CO. 66 N. W. 816.

Restoration of benefits received as condition precedent to rescission.

Cited in *Creveling v. Banta*, 138 Iowa, 47, 115 N. W. 598, holding that it is not necessary to justify a rescission that restoration in kind be possible to the person electing to rescind, when this has been rendered impossible by the acts of the other party in carrying out a fraudulent enterprise; *Baye v. Paola Ref. Co.* 79 Kan. 755, 25 L.R.A. (N.S.) 1302, 131

Am. St. Rep. 746, 101 Pac. 658, holding that although the plaintiff has rendered impossible the restoration in specie of all that he has received in the transaction, he may be granted relief in an action for the rescission of an oil lease on the ground of fraud, where he pays the value of the property and substantial justice is done thereby; *Hale v. Kobbert*, 109 Iowa, 128, 80 N. W. 308, holding that the mere inability of a party to a contract to restore the other party to his former condition does not defeat his right to rescind the contract for the wrongful act of the latter, where such inability arises from a defect existing at the time of the contract.

§ S. D. 419, TURNER v. COUGHRAN, 66 N. W. 810.

§ S. D. 421, BARNES v. CLEMENT, 66 N. W. 810, Later appeal in 12 S. D. 270, 81 N. W. 301.

Right of parties to stipulate damages.

Cited in *Smith v. Detroit & D. Gold Min. Co.* 17 S. D. 413, 97 N. W. 17, holding that the parties may fix the damages to result from the breach of a contract to purchase a mining claim, since it would in that case be difficult to determine the actual damage.

Cited in note in 103 Am. St. Rep. 62, on agreements purporting to liquidate damages.

§ S. D. 425, FARRELL v. EDWARDS, 66 N. W. 812.

§ S. D. 431, PEART v. CHICAGO, M. & ST. P. R. CO. 66 N. W. 814.

Applied without special discussion in *Roblin v. Palmer*, 9 S. D. 36, 67 N. W. 949.

Error in instructions.

Cited in *Rood v. Dutcher*, 23 S. D. 70, 120 N. W. 772, 20 A. & E. Ann. Cas. 480, holding it reversible error to give requested instruction in language substantially different from that requested.

Distinguished in *State v. Hellekson*, 13 S. D. 242, 83 N. W. 254, holding that the failure of the trial court to indorse on a request to charge his ruling is not ground for reversal.

§ S. D. 435, FREEMAN v. HURON, 66 N. W. 928.

Wilful resistance to order of court as contempt.

Cited in *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283, holding that a person cannot be held for a contempt of court in wilfully resisting a search warrant, where he had no notice of the same.

Nature of contempt proceedings for violation of injunction order.

Cited in *State ex rel. Jones v. Conn*, 37 Or. 596, 62 Pac. 289, holding that a proceeding for contempt for violation of an injunction order is in its nature criminal.

Cited in note in 13 L.R.A.(N.S.) 594, on character of contempt for violation of injunction to protect private right.

Name in which contempt proceedings should be instituted.

Distinguished in *State ex rel. Hammer v. Downing*, 40 Or. 309, 58 Pac. 863, 66 Pac. 917, holding that under Hill's (Or.) Ann. Laws, § 655, contempt proceedings should be instituted, if criminal, in the name of the state; if civil, in the name of the state upon the relation of a private party.

Affidavits on information and belief.

Cited in *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283, holding that a search warrant cannot be issued upon an affidavit based upon information and belief and not otherwise corroborated; *State ex rel. Harvey v. Newton*, 16 N. D. 151, 112 N. W. 52, 14 A. & E. Ann. Cas. 1035, holding that an affidavit upon information and belief is wholly insufficient upon which to base constructive criminal contempt proceedings; *Herdman v. State*, 54 Neb. 626, 11 Am. Crim. Rep. 298, 74 N. W. 1097, holding that an affidavit filed as a basis for contempt proceedings must state positive knowledge, and it is insufficient if made on information and belief.

Excuse for default on contract.

Cited in *Burkhardt v. Georgia School Twp.* 9 S. D. 315, 69 N. W. 16, holding notice of an issuance of an injunction against the removal of a schoolhouse justification for default of the one contracting to remove it.

§ S. D. 440, YANKTON v. DOUGLASS, 66 N. W. 923.

Power of municipality to punish act which is statutory offense.

Cited in note in 17 L.R.A.(N.S.) 54, on power of municipality to punish act also an offense under state law.

What is a "tippling house."

Cited in *Oklahoma ex rel. Oklahoma City v. Robertson*, 19 Okla. 149, 92 Pac. 144, holding that a tippling house is a place where intoxicating liquors are sold or given away and drank, and where people tipple or drink intoxicating liquors at the place.

§ S. D. 449, HURON v. BANK OF VOLGA, 59 AM. ST. REP. 769, 66 N. W. 815.

Enjoining maintenance of a public nuisance.

Cited in *State ex rel. Lyon v. Columbia Water Power Co.* 82 S. C. 181, 22 L.R.A.(N.S.) 435, 129 Am. St. Rep. 876, 63 S. E. 884, 17 A. & E. Ann. Cas. 343, holding that a court of equity may interfere to prevent the erection of a public nuisance by the obstruction of a navigable stream; *Britton v. Guy*, 17 S. D. 588, 97 S. W. 1045, holding that a municipality may enjoin the illegal sale of intoxicating liquors within its limits where such sale is made a public nuisance by statute; *Pence v. Bryant*, 54 W. Va. 263, 46 S. E. 275, holding that the county or municipality, or a private individual who has suffered some special injury, may maintain an action to enjoin the maintenance of a public nuisance through the obstruction of a public highway, without first having recourse to a law court.

Dak. Rep.—57.

Cited in notes in 36 L.R.A. 609, on power of municipal corporations to define, prevent and abate nuisances; 51 L.R.A. 660, on right of a municipality to maintain suit, to enjoin or abate a public nuisance.

8 S. D. 452, DEWELL v. HUGHES COUNTY, 66 N. W. 1079.

8 S. D. 456, BELATTI v. PIERCE, 66 N. W. 1088.

Right of trial by jury.

Cited in *Albien v. Smith*, 19 S. D. 421, 103 N. W. 655, holding that under the provisions of the constitution relative to the right of trial by jury in actions for the recovery of specific real or personal property, the defendant does not waive his right to a trial by jury in such case by moving for a directed verdict at the conclusion of the plaintiff's evidence where he afterward proves his case; *Re McClellan*, 20 S. D. 498, 107 N. W. 681, holding that the court did not err in refusing a trial by jury to persons who petitioned for letters of administration.

8 S. D. 458, AULTMAN CO. v. FERGUSON, 66 N. W. 1081.

Consolidation of actions.

Cited in *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447, holding that an action to restrain a sale of property for a sidewalk tax may be enjoined in an action for damages occasioned by a change of grade.

8 S. D. 464, BRADY v. KREUGER, 59 AM. ST. REP. 771, 66 N. W. 1083.

Interest of divorced wife in the homestead of the husband.

Cited in *Bedal v. Sake*, 10 Idaho, 270, 66 L.R.A. 60, 77 Pac. 638, holding that a wife who had gone to a foreign jurisdiction and had there obtained a decree for divorce and had married again, had waived all right in the homestead, even though it was community property; *Goldsborough v. Hewitt*, 23 Okla. 66, 128 Am. St. Rep. 795, 99 Pac. 907, holding that where the decree of divorce is silent as to the homestead, the husband's homestead remains his property discharged of all homestead rights or claims of the other spouse; *Bedal v. Sake*, 10 Idaho, 270, 66 L.R.A. 60, 77 Pac. 638, holding that wife, after obtaining divorce, cannot recover her interest in homestead of herself and former husband.

Cited in note in 16 L.R.A.(N.S.) 114, on continuance of family as condition of continuance of homestead where a condition of inception.

Distinguished in *Harding v. Harding*, 16 S. D. 406, 102 Am. St. Rep. 694, 92 N. W. 1080, holding that where no mention of the homestead was made in a decree for divorce allowing alimony to the wife, the court could afterwards modify its decree requiring the payment of a fixed sum, and make the same a lien upon the homestead.

Creation and enforcement of liens to secure alimony.

Cited in note in 102 Am. St. Rep. 709, on power of courts to create and enforce liens to secure payment of alimony.

Interests of partners in partnership realty.

Cited in *McPherson v. Swift*, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76, holding that partnership realty is subject to same rules as personalty as regards interest of partners.

Ejectment by tenant in common.

Cited in *Mather v. Dunn*, 11 S. D. 196, 74 Am. St. Rep. 788, 76 N. W. 922, holding a tenant in common entitled to recover possession of the entire property as against one having no title.

8 S. D. 471, *LOVELL v. McCAUGHEY*, 66 N. W. 1085.

8 S. D. 476, *SCHLEGEL v. Sisson*, 66 N. W. 1087.

Right to appeal from order appointing receiver.

Cited in *Gales v. Bank of Plankinton*, 13 S. D. 622, 84 N. W. 192, holding prior attaching creditors not aggrieved so as to entitle them to appeal from order appointing receiver for insolvent bank with provision that the receiver is not authorized to interfere with sheriff's possession of the property attached.

8 S. D. 479, *WEBSTER v. WHITE*, 66 N. W. 1145.

Followed without discussion in *Bowman v. McGilvray*, 8 S. D. 490, 66 N. W. 1149; *Olander v. Jacobson*, 8 S. D. 491, 66 N. W. 1149.

Opinion evidence as to amount of damages.

Cited in *Tenney v. Rapid City*, 17 S. D. 283, 96 N. W. 96, holding that in an action for personal injuries it was error for the court to permit the plaintiff to state in her opinion what damages she had sustained.

Presumption as to correctness of findings of court or referee.

Cited in *Hulst v. Benevolent Hall Asso.* 9 S. D. 144, 68 N. W. 200, holding that finding by referee against substantial compliance with building contract will not be disturbed on appeal unless against the preponderance of evidence; *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589; *Breden v. Martens*, 21 S. D. 357, 112 N. W. 960; *International Harvester Co. v. McKeever*, 21 S. D. 91, 109 N. W. 642,—holding that findings of court will not be reversed, unless evidence clearly preponderates against them; *Hill v. Whale Min. Co.* 15 S. D. 574, 90 N. W. 853, holding that findings on disputed questions of fact are presumptively right; *Re McCellan*, 20 S. D. 498, 107 N. W. 681; *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207,—holding that the findings of the court or referee are presumptively correct on appeal and must stand unless there is a clear preponderance of evidence against them.

8 S. D. 490, *BOWMAN v. McGILVRAY*, 66 N. W. 1149.

8 S. D. 491, *OLANDER v. JACOBSON*, 66 N. W. 1149.

8 S. D. 491, IOWA LAND CO. v. DOUGLAS COUNTY, 67 N. W. 52.

Tax as "debt."

Cited in *Danforth v. McCook County*, 11 S. D. 258, 74 Am. St. Rep. 808, 76 N. W. 940, holding that a tax is not a "debt," within U. S. Laws 1878 [20 Stat. at L. 114], chap. 190, § 4, exempting timber culture claims from the satisfaction of any debt or debts contracted before the issuing of the final certificate therefor; *Brule County v. King*, 11 S. D. 294, 77 N. W. 107, holding taxes not recoverable as such by action, as they are not debts; *Hanson v. Franklin*, 19 N. D. 259, 123 N. W. 386, holding tax not debt or in nature of debt.

Statutes of limitations as applicable to tax sales.

Cited in *Fisk v. Keokuk*, 144 Iowa, 187, 122 N. W. 896, holding general statutes of limitation inapplicable to tax sales.

8 S. D. 507, NIXON v. REID, 32 L.R.A. 315, 67 N. W. 57.

8 S. D. 517, STATE v. AYERS, 67 N. W. 611.

Validity of criminal prosecution based upon an information.

Cited in *Re McNaught*, 1 Okla. Crim. Rep. 528, 99 Pac. 241, holding that a prosecution for a felony based upon information instead of an indictment, and conviction therein, is due process of law, and valid.

Sufficiency of title to act.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that a statute entitled, "An act to provide for the licensing, restriction and sale of intoxicating liquors, etc.," is valid, not embracing more than one subject in that it gives a right of action to the wife for damages from the sale of intoxicating liquor to the husband, and prohibiting the sale to minors, or persons in the habit of becoming intoxicated.

8 S. D. 522, FURROW v. ZOLLARS, 67 N. W. 612.

8 S. D. 525, STATE EX REL. WOOD v. SHELDON, 67 N. W. 613.

Followed without discussion in *State ex rel. Wood v. Smedley*, 8 S. D. 531, 67 N. W. 1151.

When office becomes vacant.

Cited in *State ex rel. Lavin v. Bacon*, 14 S. D. 284, 85 N. W. 225, holding that office of member of board of charities and corrections becomes vacant at end of term where no successor has been appointed.

Duty of governor to fill vacancies.

Cited in *State ex rel. Lavin v. Bacon*, 14 S. D. 284, 85 N. W. 225, holding it duty of governor to appoint without concurring action of senate, members of board of charities and corrections in place of members whose term of office has expired where successors have not been appointed and confirmed during legislative session.

Term of office when filling vacancies.

Cited in *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605, sustaining power of legislature to pass law providing that members of state board of charities and corrections appoint to fill vacancies shall hold only until next legislative session.

8 S. D. 531, STATE EX REL. WOOD v. SMEDLEY, 67 N. W. 1151.

8 S. D. 531, JEWELL NURSERY CO. v. STATE, 67 N. W. 629.

8 S. D. 534, CATHOLICON HOT SPRINGS CO. v. FERGUSON, 67 N. W. 615.

8 S. D. 538, FALL RIVER COUNTY v. MINNEKAHTA STATE BANK, 67 N. W. 617.

8 S. D. 544, SCHMITZ v. HAWKEYE GOLD MIN. CO. 67 N. W. 618.

Contradiction of written instrument by parol evidence.

Cited in *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536, holding that where the unambiguous terms of a written contract do not show that the person was acting as an agent for an undisclosed principal, this cannot be shown by parol.

Waiver of protest by parol.

Cited in *Dewey v. Sibert*, 21 S. D. 480, 113 N. W. 721, 16 A. & E. Ann. Cas. 151, holding that protest may be waived by parol after indorsement.

8 S. D. 547, STATE v. SMITH, 67 N. W. 619.

Construction of conflicting provisions of the Codes.

Cited in *Landauer v. Sioux Falls Improv. Co.* 10 S. D. 205, 72 N. W. 467, holding that in case of contradiction between the Code of Civil Procedure and the Civil Code, as to the period of limitation on a sealed instrument, the provisions of each Code must prevail as to all matters arising thereunder out of the same subject-matter; *Gibson v. Allen*, 19 S. D. 617, 104 N. W. 275, holding that the provisions of the code abolishing distinctions between sealed and unsealed instruments, must be read in connection with the provisions of the code of Civil Procedure making the statute of limitations as to sealed instruments, twenty years, and that the distinction is not abolished between the two in applying the statute of limitations.

Nonprejudicial error in instructions.

Cited in *State v. Thornton*, 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196, holding reference in charge to crime with which "defendant is charged" not misleading because of reference by witness to defendant's arrest for another crime; *Rhea v. United States*, 6 Okla. 249, 50 Pac. 992, holding by equally divided court that an instruction that the jury should determine

how much weight and credit it should give to the testimony of defendant, by taking into consideration the testimony of the other witnesses and the facts and circumstances in proof in the case, is not prejudicially erroneous. Error in excluding evidence as cured by subsequent admission.

Cited in *Winn v. Sanborn*, 10 S. D. 642, 75 N. W. 201, holding error in excluding question cured by subsequently permitting substantially same question to be answered.

8 S. D. 554, *HUNTER v. KARCHER*, 67 N. W. 621.

8 S. D. 556, *McKENNETT v. BARRINGER*, 67 N. W. 622.

8 S. D. 558, *KEEN v. FAIRVIEW TWP.* 67 N. W. 623.

Followed without discussion in *Keen v. Fairview Twp.* 8 S. D. 617, 67 N. W. 1151.

Patent of public lands subject to the Section Line Highway Act.

Cited in *Great Northern R. Co. v. Viborg*, 17 S. D. 374, 97 N. W. 6; *Cosgriff v. Tri-State Teleph. & Teleg. Co.* 15 N. D. 210, 5 L.R.A.(N.S.) 1142, 107 N. W. 525,—holding that those taking patents to public lands after the section lines had been designated as roads and had been used as such by the public, took the lands subject to such easement of a public highway; *Riverside Twp. v. Newton*, 11 S. D. 120, 75 N. W. 899, sustaining right to open highway for use along section lines without allowing compensation to adjoining owners.

Cited in note in 24 L.R.A.(N.S.) 765, on establishment of highways over public land subsequent to entry by one who has not perfected title.

What constitutes dedication and acceptance.

Cited in *Hughes v. Veal*, 84 Kan. 534, 114 Pac. 1081, holding that location of road by proper officers and use by public constitute dedication and acceptance.

8 S. D. 567, *THOMPSON v. ULRIKSON*, 67 N. W. 626.

Necessity for specification of errors in bill of exceptions.

Cited in *Peart v. Chicago, M. & St. P. R. Co.* 8 S. D. 634, 67 N. W. 837, holding that bill of exceptions or statement which contains no specifications of errors relied on or particulars in which the evidence is claimed to be insufficient must be disregarded.

8 S. D. 570, *JENSEN v. BOWLES*, 67 N. W. 627.

8 S. D. 575, *ERPENBACH v. CHICAGO, M. & ST. P. R. CO.* 67 N. W. 606.

Waiver of undertaking on appeal from justice's judgment.

Distinguished in *Brown v. Chicago, M. & St. P. R. Co.* 10 S. D. 633, 66 Am. St. Rep. 730, 75 N. W. 198, holding that undertaking on appeal from justice's judgment cannot be waived by parties.

8 S. D. 579, ROBERTS v. MINNEAPOLIS THRESHING MACH. CO. 59 AM. ST. REP. 777, 67 N. W. 607.

Declarations and acts of agents.

Cited in note in 131 Am. St. Rep. 318, on declarations and acts of agents.

Reversal of judgment to enable recovery of nominal damages.

Cited in Hallstead v. Perrige, 87 Neb. 128, 126 N. W. 1078, holding that erroneous judgment will not be reversed where only nominal damages are recoverable.

8 S. D. 586, BEDFORD v. KISSICK, 67 N. W. 609.

8 S. D. 590, YANKTON v. DOUGLASS, 67 N. W. 630.

8 S. D. 592, BONNELL v. VAN CISE, 67 N. W. 685.

Appeal bond as jurisdictional prerequisite.

Cited in Regan v. Superior Ct. 14 Cal. App. 572, 114 Pac. 72, holding appeal nullity, unless undertaking is filed within thirty days after rendition of judgment; Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616, holding that the filing of an undertaking on appeal is a jurisdictional essential; Coburn v. Brown County, 10 S. D. 552, 74 N. W. 1026, holding appeal a mere nullity in absence of any undertaking, deposit or waiver thereof, although notice of appeal was properly served and filed; Brown v. Chicago, M. & St. P. R. Co. 10 S. D. 633, 66 Am. St. Rep. 730, 75 N. W. 198, holding that the filing of an undertaking on appeal from a justice's judgment cannot be waived; Donovan v. Woodcock, 18 S. D. 29, 99 N. W. 82, holding that where the sureties upon a bond on appeal fail to justify within the ten days provided by statute after the respondent has excepted to their sufficiency, the appeal is a nullity.

Distinguished in Mather v. Darst, 11 S. D. 480, 78 N. W. 954, refusing to dismiss appeal because no undertaking has been served.

Jurisdiction of motion to dismiss appeal.

Cited in Murray v. Whitmore, 9 S. D. 288, 68 N. W. 745, holding that motion to dismiss appeal may be entertained though transcript was not on file when the motion was introduced for hearing.

8 S. D. 596, REID v. KELLOGG, 67 N. W. 687.

Question for jury.

Cited in Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055, holding that where the evidence is undisputed or not conflicting, but such that honest, impartial minds might draw differing inferences or conclusions from it, the question is one of fact, not of law; Comeau v. Hurley, 22 S. D. 79, 115 N. W. 521; Schott v. Swan, 21 S. D. 639, 114 N. W. 1005,—holding it province of jury to weigh and reconcile conflicting testimony and sufficiency of evidence only question on appeal.

—Authority of agent as.

Cited in St. Louis Gunning Adv. Co. v. Wanamaker & Brown, 115 Mo. App. 270, 90 S. W. 737, holding that the questions as to the apparent pow-

ers of an agent in advertising the goods of his principal so as to enable the agent to make sales depends upon the necessity therefor, which is a question for the jury.

Authority of agent to receive payment.

Cited in *Harrison v. LeGore*, 109 Iowa, 618, 80 N. W. 670, holding that one who placed loans for a nonresident and collected and remitted the payments thereon, is, as to one who knows of the said course of dealing, an agent of the other, and the payment of the principal of a mortgage to him is a payment thereof, although he does not have the papers and releases; *Phoenix Ins. Co. v. Walter*, 51 Neb. 182, 70 N. W. 938, holding that the payment of the amount due on a mortgage is good although made to one who had no specific authority from and was not the agent in fact of the mortgagee in collecting amounts due on its mortgages but who by reason of the conduct of the mortgagee had ostensible authority to receive the money; *McVay v. Bridgman*, 21 S. D. 374, 112 N. W. 1138, holding that payment to agent of transferee of note and deed of trust who did not take assignment thereof, discharged debt, though agent failed to account for money; *Campbell v. Gowans*, 35 Utah, 268, 23 L.R.A.(N.S.) 414, 100 Pac. 397, 19 A. & E. Ann. Cas. 660, holding that the fact that the note and mortgage are not in the hands of the agent is not conclusive evidence against his authority to receive payment thereon and bind the principal, but only evidence to be considered in determining his authority.

Cited in note in 23 L.R.A.(N.S.) 417, on effect of agent's nonperformance of security upon question of authority to receive payment.

Presumption as to correctness of findings of court or referee.

Cited in *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589; *Breedea v. Martens*, 21 S. D. 357, 112 N. W. 960; *International Harvester Co v. McKeever*, 21 S. D. 91, 109 N. W. 642,—holding that findings of court will not be disturbed, unless evidence clearly preponderates against them; *Hill v. Whale Min. Co.* 15 S. D. 574, 90 N. W. 853, holding that findings on disputed questions of fact are presumptively right; *Re McCellan*, 20 S. D. 498, 107 N. W. 681, holding that the findings of the court or of the referee are presumptively correct on appeal, and will not be disturbed unless clearly preponderated against by the evidence.

8 S. D. 604, *GRAHAM v. SELBIE*, 67 N. W. 831, Related action in 18 S. D. 365, 100 N. W. 755.

Followed without discussion in *Graham v. Selbie*, 8 S. D. 616, 67 N. W. 1151.

Resulting trusts.

Distinguished in *Oberlender v. Butcher*, 67 Neb. 410, 93 N. W. 764, holding that the rule that no trust arises in land purchased for another's benefit unless the purchase money is furnished at the time nor if the claimant is a partial contributor, unless there is an agreement that he shall have an aliquot part of the premises, has no application to express trusts or those arising by agreement.

8 S. D. 616, **GRAHAM v. SELBIE**, 67 N. W. 1151, Related action
18 S. D. 365, 100 N. W. 755.

8 S. D. 617, **KEEN v. FAIRVIEW TWP.** 67 N. W. 1151.

8 S. D. 618, **DEADWOOD v. ALLEN**, 67 N. W. 835, Rehearing
denied in 9 S. D. 221, 68 N. W. 333.

Followed without discussion in **Deadwood v. Allen**, 8 S. D. 623, 67 N. W.
1150.

8 S. D. 623, **DEADWOOD v. ALLEN**, 67 N. W. 1150.

8 S. D. 623, **KIRBY v. SCANLAN**, 67 N. W. 828.

8 S. D. 624, **PEART v. CHICAGO, M. & ST. P. R. CO.** 67 N. W.
837.

Reversible error as to instructions.

Distinguished in **State v. Hellekson**, 13 S. D. 242, 83 N. W. 254, holding
court's failure to mark "refused" or "given" on requested instruction which
was not changed not ground for reversal.

— Modification of.

Cited in **Connor v. Corson**, 13 S. D. 618, 84 N. W. 191, holding that a
requested instruction marked "given" in the margin is not modified by the
act of the court in writing out the further instruction on a separate sheet
of paper in a plainly different handwriting and pinning it to the paper con-
taining the requested instruction; **Hedlum v. Holy Terror Min. Co.** 14 S.
D. 369, 80 N. W. 861, holding that the record will be returned to the court
below to correct the error, if any, where the bill of exceptions as settled
shows reversible error in that the court read a requested instruction in
language substantially different from that requested, and the affidavit of
the trial judge shows that his attention was not called to the portion of
the bill of exceptions relating to the modification of the instruction, and
that he did not notice that the bill showed such modification; **Rood v.**
Dutcher, 23 S. D. 70, 120 N. W. 772, 20 A. & E. Ann. Cas. 480, holding
it reversible error to give requested instruction in language substantially
different from that requested.

Specification of errors in abstracts.

Cited in **Plymouth County Bank v. Gilman**, 9 S. D. 278, 62 Am. St. Rep.
868, 68 N. W. 735, holding that respondent's motion to strike out appel-
lant's bill of exceptions and all evidence in his abstract for failure to
specify particular errors relied on will not be considered in absence of ad-
ditional abstract by respondent; **Bailey Loan Co. v. Seward**, 9 S. D. 326,
69 N. W. 58, holding that objection to consideration of appellant's assign-
ments of error on the ground that the bill of exceptions contains no specifi-
cations of the errors relied on cannot be entertained where the omission
does not appear from either of the abstracts.

When bill of exceptions is unnecessary.

Cited in Daley v. Forsythe, 9 S. D. 34, 67 N. W. 948, holding no bill of exceptions necessary on appeal from denial of motion for order foreclosing it for making motion for new trial for newly discovered evidence.

8 S. D. 639, SCOTT v. TOOMEY, 67 N. W. 838.**Priority in water rights.**

Cited in Driskill v. Rebbe, 22 S. D. 242, 117 N. W. 135, holding locator of water rights on unoccupied public land entitled to priority over subsequent settler.

What constitutes running stream.

Cited in Deadwood C. R. Co. v. Barker, 14 S. D. 558, 86 N. W. 619, holding water found in gravel on or just above bed rock with any fissure in such rock and no well defined bank and which has not been traced beyond point where it disperses in a channel not a running stream.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 9 S. D.

9 S. D. 1, LARSON v. LARSON, 67 N. W. 842.

Power to strike out pleadings.

Cited in notes in 115 Am. St. Rep. 954, on power of courts to strike out answers sufficient in form and substance to present valid defense; 4 L.R.A.(N.S.) 1186, on power to punish disobedience to orders in case by striking pleadings.

Sufficiency of service of order to put party in contempt.

Cited in *Scott v. Scott*, 9 S. D. 125, 68 N. W. 194, holding service on attorney of order requiring payment of temporary alimony not sufficient to put party in contempt for nonpayment.

9 S. D. 5, HUTCHINSON v. CHICAGO, M. & ST. P. R. CO. 67 N. W. 853.

When question of negligence is for jury.

Cited in *Sinkling v. Illinois C. R. Co.* 10 S. D. 560, 74 N. W. 1029, holding that the question of contributory negligence was for the jury where the owner of the animal killed by a railroad train turned it loose in close proximity to a railroad track shortly before the time when a train was daily accustomed to pass; *Schimke v. Chicago, M. & St. P. R. Co.* 11 S. D. 471, 78 N. W. 951, holding question whether railroad employees in charge of train killing animals on track are chargeable with negligence, for jury, where evidence is so conflicting that different impartial minds might reasonably reach different conclusions.

Right of jury to disregard testimony.

Cited in *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192, holding the jury not required to believe evidence of railroad em-

ployees as to freedom from negligence, where evidence is introduced rebutting the same.

9 S. D. 8, KIRBY v. JAMESON, 67 N. W. 854.

"Assignee" of negotiable paper.

Cited in *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63, holding indorsees of negotiable paper for value and without notice was exempt from operation of statute which declared contracts of foreign corporations and their assigns which had not complied with statutory requirements before doing business in the state.

9 S. D. 12, WHITE v. HUGHES COUNTY, 67 N. W. 855.

Court's inherent power to provide its own assistants.

Cited in *State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 101 Pac. 962, holding Supreme Court has inherent power to employ a stenographer and control the disbursement of a sum appropriated for such employment.

9 S. D. 15, GRIFFITH v. HUBBARD, 67 N. W. 850.

Right to body execution.

Cited in *Lyon v. Bertolero*, 23 S. D. 82, 120 N. W. 766, holding that immaterial allegations of complaint cannot be made basis of body execution.

Materiality of allegations of false pretenses.

Distinguished in *Jewett Bros. v. Benton*, 18 S. D. 575, 101 N. W. 715, holding in an action on an account rendered for goods sold and delivered, that allegations of the complaint that the debt was incurred under false pretenses and credit secured thereby presents issuable facts when denied in the answer.

Default judgments beyond scope of relief asked.

Cited in note in 11 L.R.A. (N.S.) 806, on default judgments beyond scope of relief asked.

9 S. D. 24, CHANDLER v. HUGHES COUNTY, 67 N. W. 946.

Recovery by de jure of salary paid de facto officer.

Cited in *Brown v. Tama County*, 122 Iowa, 745, 98 N. W. 562, holding de jure superintendent of schools could not recover from the county salary said to a de facto officer serving under color of title during contest proceedings; *Fuller v. Roberts County*, 9 S. D. 216, 68 N. W. 308, holding county or municipality paying salary to de facto officer who performed duties of office under color of title while right thereto was in litigation not liable therefor to one subsequently establishing title to office; *Rasmussen v. Carbon County*, 8 Wyo. 277, 45 L.R.A. 295, 56 Pac. 1098, holding a county treasurer, duly elected but failing to qualify by filing a bond within a reasonable time, not entitled to the back salary paid to a treasurer de facto occupying and performing the duties of the office prior to the filing of the bond by the treasurer de jure, taking possession upon the adjudication of his election.

Cited in note in 16 L.R.A.(N.S.) 794, on payment to de facto as defense to action for salary by de jure officer.

9 S. D. 29, SINGER MFG. CO. v. PECK, 67 N. W. 947.

Personal liability of members of corporation.

Distinguished in Rust-Owen Lumber Co. v. Wellman, 10 S. D. 122, 72 N. W. 89, holding members of corporation who so conduct their business as to cause one selling materials to them to believe that they are constructing a bridge as individuals or copartners personally liable notwithstanding their corporation.

Conditions prerequisite to corporate existence of joint stock company.

Cited in Boyd v. McKee, 99 Va. 72, 37 S. E. 810, holding that under Va. Code, §§ 1145 et seq., subscription of the capital stock is not a prerequisite to the corporate existence of a joint stock company.

9 S. D. 34, DALEY v. FORSYTHE, 67 N. W. 948, Decision on the merits in 10 S. D. 464, 74 N. W. 201.

Review of discretionary rulings.

Cited in Phenix Ins. Co. v. Perkins, 19 S. D. 59, 101 N. W. 1110, holding that an order refusing a temporary injunction may be reversed where it shows on its face that no discretion was exercised but was refused on the ground that plaintiff had no cause of action.

9 S. D. 36, ROBLIN v. PALMER, 67 N. W. 949.

Reversal of judgment for failure to find fact.

Cited in Brown v. Brown, 12 S. D. 506, 81 N. W. 883, holding that judgment whose recitals show nontrial of issue of fact and that all facts essential to only point on which decision turn were settled by stipulation will not be disturbed for failure to find fact; Carney v. Twitchell, 22 S. D. 521, 118 N. W. 1030, holding that failure to file decision within 30 days after submission of cause will not affect judgment.

Title acquired by unrecorded deed.

Cited in Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308, holding purchaser of real estate at sheriff's sale under attachment proceedings acquires no title though lis pendens notice was filed as against deed recorded subsequent to the attachment but delivered prior thereto; Hale v. Grigsby, 12 S. D. 198, 80 N. W. 199, holding person for whom land is held in trust entitled thereto as against one having attachment against trustee levied thereon on notice of lis pendens filed after conveyance to him by trustee but before recording of deed; Murphy v. Plankinton Bank, 13 S. D. 501, 83 N. W. 575, holding purchaser of land from purchaser at attachment sale not purchaser or encumbrancer in good faith without notice for value within recording laws; Kohn v. Lapham, 13 S. D. 78, 82 N. W. 408, holding real estate mortgage executed before but recorded after commencement of attachment suit and filing of notice of pendency superior to attaching creditor's lien; Hickox v. Eastman, 21 S. D. 591, 114 N. W.

706, holding property reconveyed to grantor for purpose of making corrections in description, not subject to attachment by his creditors; Haynie v. Bennett, 22 S. D. 65, 115 N. W. 515, holding title under unrecorded deed superior to rights of execution purchaser under attachment levied after deed was made; Bliss v. Tidrick, 25 S. D. 533, 32 L.R.A. (N.S.) 854, 127 N. W. 852, to point that purchaser at attachment sale under attachment levied subsequent to attachment debtor's transfer of property is not purchaser for value.

9 S. D. 40, EDMISON v. ZBOROWSKI, 68 N. W. 288, Later phase of same case in 13 S. D. 182, 82 N. W. 387.

Effect upon title of liens payable out of purchase price.

Cited in Woodman v. Blue Grass Land Co. 125 Wis. 489, 104 N. W. 920, holding a title which was otherwise perfect was not made unmarketable by a lien which was payable out of the purchase money simultaneously with delivery of the deed.

9 S. D. 48, POLLOCK v. POLLOCK, 68 N. W. 176.

Collateral attack on foreign divorce.

Cited in Sammons v. Pike, 108 Minn. 291, 23 L.R.A. (N.S.) 1254, 133 Am. St. Rep. 425, 120 N. W. 540, holding a decree of divorce granted by courts having no jurisdiction because of want of domicile may be impeached collaterally in the courts of another state.

Jurisdictional domicile for divorce.

Cited in Reeves v. Reeves, 24 S. D. 435, 25 L.R.A. (N.S.) 574, 123 N. W. 869, holding evidence sufficient to show jurisdictional domicile in action for divorce.

Duty to support child as affected by divorce decree.

Distinguished in Glynn v. Glynn, 8 N. D. 233, 77 N. W. 594, holding common law duties of father not changed by divorce decree in his favor directing him to provide, care for, maintain, and educate minor son without awarding his custody or directing payment of specified amount.

9 S. D. 57, RE McCAIN, 68 N. W. 163.

Mandamus to compel acceptance of bids for public work.

Cited in Trapp v. Newport, 115 Ky. 840, 74 S. W. 1109, holding mandamus would not lie to compel city council to award work to the lowest bidder under ordinance directing that "lowest and best" bidder should be awarded the work, where alternative materials were specified and lowest bidder bid on only one kind of material.

Review by habeas corpus.

Cited in Ex parte Tinsley, 37 Tex. Crim. Rep. 517, 66 Am. St. Rep. 818, 40 S. W. 306, holding habeas corpus would not review an erroneous but not void judgment; Re Taber, 13 S. D. 62, 82 N. W. 398, holding commitment for contempt in disobeying court order assailable by writ of habeas corpus.

Resistance to void order of court.

Cited in *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 A. & E. Ann. Cas. 650, 14 Am. Crim. Rep. 283, holding it was not contempt to resist a search warrant void for want of authority in the court to issue it; *Chambers v. Oehler*, 107 Iowa, 155, 77 N. W. 853, holding a party disobeying a subpoena issued without authority by a justice of the peace not guilty of contempt.

9 S. D. 61, HAGAMAN v. GILLIS, 68 N. W. 192.**Availability of statute of frauds.**

Cited in note in 127 Am. St. Rep. 767, on persons to whom statute of frauds is available.

Review of evidence on appeal from judgment.

Cited in *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding sufficiency of evidence was not reviewable upon appeal from the judgment where it was entered before the order denying a motion for a new trial; *Northwestern Elevator Co. v. Lee*, 13 S. D. 450, 83 N. W. 565, holding sufficiency of evidence to establish plaintiff's ownership of wheat levied on not reviewable on appeal where issue of ownership was not brought to attention of trial court by motion for new trial.

9 S. D. 69, WALTER A. WOOD MOWING & REAPING MACH. CO. v. LEE, 68 N. W. 170.**9 S. D. 74, ALLIBONE v. AMES, 33 L.R.A. 585, 68 N. W. 165.****Loan or deposit.**

Cited in *Hunt v. Hopley*, 120 Iowa, 695, 95 N. W. 205, holding public school treasurer had not "loaned" public money in making a general deposit of such funds; *State ex rel. Carroll v. Corning State Sav. Bank*, 136 Iowa, 79, 113 N. W. 500, holding deposit of money drawing interest but withdrawable at any time was not a loan.

Deposit of public funds.

Cited with approval in *Nebraska v. First Nat. Bank*, 88 Fed. 947, declaring money received by a bank in pursuance of its bid to become a state depository under the laws of Nebraska, and held by it subject to check, secured by bond and bearing interest on daily balances, a trust fund recoverable in toto upon the bank's insolvency.

Cited in *State ex rel. Roberts v. Lawrence*, 80 Kan. 707, 103 Pac. 839, holding county treasurer was permitting a "use" of public money within statutory prohibition, by making a general deposit in a bank not named as depository by board of county commissioners; *Baker v. Williams Bkg. Co.* 42 Or. 213, 70 Pac. 711, holding public officer forbidden to loan might deposit public funds in a bank for safe keeping, provided they were at all times subject to his order, and were at all times subject to withdrawal; *Nebraska v. Hayden*, 89 Fed. 46, holding a petition alleging the deposit with a bank of certificates of deposit and an amended petition alleging

the receipt of payment of such certificates and a deposit of the proceeds, substantially identical in legal effect.

Distinguished in *State v. Midland State Bank*, 52 Neb. 1, 66 Am. St. Rep. 484, 71 N. W. 1011, holding that a bank which, with notice of their character, receives a general deposit of public funds by a public officer in his own name, becomes a trustee thereof for the benefit of the public.

Bank paper as the equivalent of money.

Cited in *Montgomery County v. Cochran*, 57 C. C. A. 261, 121 Fed. 17, holding certificate of deposit was money within the meaning of a treasurer's bond.

9 S. D. 82, BETCHER v. GRANT COUNTY, 68 N. W. 163.

Compulsory reference of long accounts.

Cited in *Dreveskracht v. First State Bank*, 16 N. D. 555, 113 N. W. 1032, holding an account which is only collaterally involved will not require a compulsory reference under statute providing for such reference when trial involves the examination of a long account; *Kelly v. Oksall*, 17 S. D. 185, 95 N. W. 913, holding compulsory reference unauthorized where the trial would involve only the examination of the by-laws and books of a mutual hail insurance company with reference to the validity of an assessment for loss; *Ewart v. Kass*, 17 S. D. 220, 95 N. W. 915, holding that a number of items of damage and counterclaim did not constitute a referable account.

9 S. D. 84, STATE v. RUTH, 68 N. W. 189.

Liability of ministerial officers for neglect of duty.

Cited in *Rising v. Dickinson*, 18 N. D. 478, 23 L.R.A. (N.S.) 127, 133 Am. St. Rep. 779, 121 N. W. 616, 20 A. & E. Ann. Cas. 424, holding register of deeds liable for failure to record mortgage in a numerical index required by law to be kept by him.

Cited in note in 95 Am. St. Rep. 74, on liability of ministerial officers for nonperformance and misperformance of official duties.

9 S. D. 94, SEYMOUR v. CLEVELAND, 68 N. W. 171.

Color of title.

Cited in *Parker v. Vinson*, 11 S. D. 381, 77 N. W. 1023, holding tax deeds void on face color of title entitling one making improvements in reliance thereon to recover therefor; *Skelly v. Warren*, 17 S. D. 25, 94 N. W. 408, holding transfer of right to occupy was not color of title.

Cited in note in 15 L.R.A. (N.S.) 1215, 1236, 1261, on necessity of color of title, not expressly made a condition by statute, in adverse possession.

Allowance for improvements.

Cited in *Coleman v. Stalnacke*, 15 S. D. 242, 88 N. W. 107, holding one holding land under contract for purchase not entitled to claim value of improvements.

Cited in note in 81 Am. St. Rep. 170, on what are betterments, and allowance therefor.

9 S. D. 102, LIVINGSTON v. SCHOOL DIST. NO. 7, 68 N. W. 167.**Liability for public debt on division of territory.**

Cited in *Custer County Bank v. Custer County*, 18 S. D. 274, 100 N. W. 424, holding road district was not relieved of liability on its warrants by reason of division of territory; *Stuart v. Kirley*, 12 S. D. 245, 81 N. W. 147, holding a statutory provision for changing the boundaries of a specified county by including unorganized counties therein not illegal for failure to provide for apportioning the indebtedness for such counties.

9 S. D. 110, WOOD v. STEINAU, 68 N. W. 160.**Who may maintain trover.**

Cited in note in 9 N. D. 632, on question of who may maintain trover.

Prejudicial error in instructions.

Cited in *Grissel v. Bank of Woonsocket*, 12 S. D. 93, 80 N. W. 161, holding reference by court to cashier's secret intent and directing attention of jury thereto prejudicial error.

9 S. D. 116, JOHNSON v. BRAUCH, 62 AM. ST. REP. 857, 68 N. W. 173.**Conveyance from husband to wife.**

Cited in note in 133 Am. St. Rep. 611, on conveyance from husband to wife.

Right to purchase and enforce tax title.

Cited in notes in 75 Am. St. Rep. 237, on who may purchase and enforce a tax title; 116 Am. St. Rep. 368, on cotenant's right to acquire and enforce tax titles; 19 L.R.A.(N.S.) 593, on right of cotenant to purchase in own right at a sale under encumbrance created by one through whom cotenants derive title.

Estoppel to claim title.

Cited in *Millican v. McNeill*, 102 Tex. 189, 21 L.R.A.(N.S.) 60, 132 Am. St. Rep. 863, 114 S. W. 106, 20 A. & E. Ann. Cas. 74, on the estoppel of a grantor having a partial or qualified title but making a full warranty to afterwards assert any title coming through him; *Bliss v. Tidrick*, 25 S. D. 533, 32 L.R.A.(N.S.) 854, 127 N. W. 852, holding that administrator who conveys testator's property by deed containing warranty of title, estopped to deny validity of conveyance so far as his private interest is concerned, though deed void on its face.

Cited in note in 21 L.R.A.(N.S.) 60, on estoppel of one executing deed as executor or administrator to set up existing title in himself.

Causes for which decedent's realty may be sold.

Cited in note in 79 Am. St. Rep. 88, on causes for which decedent's real estate may be sold.

9 S. D. 125, SCOTT v. SCOTT, 68 N. W. 194.**Power to strike out pleadings.**

Cited in note in 115 Am. St. Rep. 954, on power of courts to strike out answers sufficient in form and substance to prevent valid defense.

Dak. Rep.—58.

9 S. D. 126, DOWDLE v. CORNUE, 68 N. W. 194.**Public roads on section lines.**

Cited in *Shanline v. Wiltsie*, 70 Kan. 177, 78 Pac. 436, 3 A. & E. Ann. Cas. 140, holding that where a road was laid out along the section line though the actual traveled road departed somewhat therefrom without intention of abandoning the legal roadway such roadway will not be abandoned.

Original government monuments as evidence of boundary line.

Cited in *Propper v. Wohlwend*, 16 N. D. 110, 112 N. W. 967, holding original monuments as placed by government surveyor control over all other evidence, including plats and field notes, in boundary line disputes where the location of such monuments can be established; *McGray v. Monarch Elevator Co.* 16 S. D. 109, 91 N. W. 457, holding in boundary line disputes, the original monuments and mounds as established by the government surveyor will prevail and it is the court's duty to ascertain if possible their location; *Tyler v. Haggart*, 19 S. D. 167, 102 N. W. 682, holding original corner as established by government surveyor must control when its location can be determined; *Unzelman v. Shelton*, 19 S. D. 389, 103 N. W. 646, holding actual location of corner as established by government surveyor, will prevail over field notes.

Proof of location of lost monuments.

Cited in *Nystrom v. Lee*, 16 N. D. 561, 114 N. W. 478, holding any evidence may be used in proving the location of lost or obliterated monuments which tends to establish such location.

Failure to argue assignments of error.

Cited in *Scott v. Gage*, 16 S. D. 285, 92 N. W. 37, holding where counsel has not discussed assignments of error in his brief such assignments will not be considered; *Edgemont Implement Co. v. N. S. Tubbs Sheep Co.* 22 S. D. 142, 115 N. W. 1130, holding that assignments of error not discussed in appellant's brief will not be considered.

Review of questions not presented to trial court.

Cited in *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341; *Loftus v. Agrant*, 18 S. D. 55, 99 N. W. 90,—holding questions will not be reviewed on appeal which were not presented to the trial court.

9 S. D. 130, EVANS v. FALL RIVER COUNTY, 68 N. W. 195.**Notice requisite to due process.**

Cited in *State ex rel. La Follette v. Chicago, M. & St. P. R. Co.* 16 S. D. 517, 94 N. W. 406, holding furnishing defendants with a copy of the complaint without a demand that they answer it was not notice essential to due process of law; *Turner v. Hand County*, 11 S. D. 348, 77 N. W. 589, holding notice and an opportunity to be heard essential to the validity of an assessment for an artesian well.

Distinguished in *Tripp v. Yankton*, 10 S. D. 516, 74 N. W. 447, holding property owner not deprived of property without due process of law where ordinance for construction of sidewalk thereon provided for due notice of hearing at which he appeared and orally stated his objections.

9 S. D. 137, STACY v. SMITH, 68 N. W. 198.

Followed without discussion in *Stacy v. Liddy*, 9 S. D. 157, 68 N. W. 1103; *Hayes v. Gleason*, 9 S. D. 158, 68 N. W. 1103.

Sales under powers.

Cited in note in 92 Am. St. Rep. 584, on sales under powers in mortgages and trust deeds.

Inadequacy of price as defense to note given for deficiency on foreclosure.

Distinguished in *Hollister v. Buchanan*, 11 S. D. 280, 77 N. W. 103, holding purchase on foreclosure for inadequate price not defense in action on note secured to recover deficiency in absence of motion to set aside sale.

9 S. D. 144, HULST v. BENEVOLENT HALL ASSO. 68 N. W. 200.**Substantial performance of contract.**

Cited in *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding inadvertent omission of minor things easily supplied at slight cost was not a failure to substantially perform the contract.

Cited in notes in 134 Am. St. Rep. 683, 695; 24 L.R.A. (N.S.) 338, 350,—on recovery upon substantial performance of building contract.

Distinguished in *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, rejecting the substantial compliance rule as applied to a contract to cut and deliver hay where failure to fully perform was not due to fault of either party.

Review of court findings.

Followed in *Re McCellan*, 20 S. D. 498, 197 N. W. 681; *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207,—holding findings of trial court or referee presumptively right on conflicting evidence.

Cited in *International Harvester Co. v. McKeever*, 21 S. D. 91, 109 N. W. 642; *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960; *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589,—holding that findings by court on disputed question of fact will not be disturbed unless evidence clearly preponderates against them; *Hill v. Whale Min. Co.* 15 S. D. 574, 90 N. W. 853, holding that findings on disputed questions of fact are presumptively right.

Specification of errors in motion for new trial.

Cited in *Sutterfield v. Magowan*, 12 S. D. 139, 80 N. W. 180, holding that motion for new trial for insufficiency of evidence, errors of law at trial and newly discovered evidence does not cover failure of referee's report to contain statement of all exceptions, rulings and material evidence taken before him.

9 S. D. 149, STATE EX REL. CRANMER v. THORSON, 33 L.R.A. 582, 68 N. W. 202.**Equitable interference with public duties of public officers.**

Cited with approval in dissenting opinion in *Segars v. Parrott*, 54 S. C. 1, 30 S. E. 1005, 31 S. E. 677, 865, in support of the proposition that sub-

stantial injury must threaten to warrant the issuance of an injunction against the performance of duties imposed upon public officers by an unconstitutional statute.

— As to elections.

Cited in *People ex rel. O'Reilly v. Mills*, 30 Colo. 262, 70 Pac. 322, holding supreme court could not enjoin secretary of state from publishing notices of submission of proposed constitutional amendments to voters; *Dugan v. Emporia*, 84 Kan. 429, 114 Pac. 235, holding that irregularities in petition or invalidity of act to be performed if adopted are not grounds for enjoining the calling and holding of election under initiative and referendum statute; *Norris v. Cross*, 25 Okla. 287, 105 Pac. 1000, holding that secretary of state may be compelled by mandamus to file referendum petition; *Threadgill v. Cross*, 26 Okla. 403, 138 Am. St. Rep. 964, 109 Pac. 558, holding it no defense to mandamus proceedings to compel secretary of state to file initiative petition that question to be submitted will be void if adopted; *State ex rel. Crawford v. Dunbar*, 48 Or. 109, 85 Pac. 337, holding equity could not compel secretary of state to strike certain words from the ballot title of a proposed amendment to a local option law.

9 S. D. 157, **STACY v. LIDDY**, 68 N. W. 1103.

9 S. D. 158, **HAYES v. GLEASON**, 68 N. W. 1103.

9 S. D. 159, **DAKOTA LOAN & T. CO. v. CODINGTON COUNTY**, 68 N. W. 314.

Injunction to restrain collection of illegal tax.

Cited in *Macomb v. Lake County*, 9 S. D. 466, 70 N. W. 652, holding that action will lie against county by owner of bank stock assessed at full value without statutory deduction to cancel assessment and restrain collection of the tax; *Lee v. Mellette*, 15 S. D. 586, 90 N. W. 855, sustaining right to injunction to restrain collection of special tax where there was total want of authority to levy same.

Cited in note in 48 L. ed. U. S. 181, on necessity of payment of tax due where injunction is sought against illegal taxation.

9 S. D. 165, **GROSSO v. LEAD**, 68 N. W. 310.

9 S. D. 168, **MEYER v. BEAVER**, 68 N. W. 310.

Claim of exemptions by wife.

Cited in *Thompson v. Donahoe*, 16 S. D. 244, 92 N. W. 27, holding wife's claim of exemptions after husband's refusal to do so entitled husband to sue for recovery of possession of property after wrongful levy; *Ecker v. Lindskog*, 12 S. D. 428, 48 L.R.A. 155, 81 N. W. 905, holding that selection of exempt property may be made by wife where husband is incompetent because adjudged insane.

9 S. D. 172, **WILMARTH v. RITSCHLAG**, 68 N. W. 312.

9 S. D. 174, ESTEY v. BIRNBAUM, 68 N. W. 290.**Check or order as payment.**

Cited in *Manitoba Mortg. & Invest. Co. v. Weiss*, 18 S. D. 459, 112 Am. St. Rep. 799, 101 N. W. 37, 5 A. & E. Ann. Cas. 858, holding drawees of check converted provisional payment into absolute payment by negligence in presenting check for payment.

Reading testimony given at former trial.

Cited in *State v. Heffernan*, 22 S. D. 513, 25 L.R.A.(N.S.) 868, 118 N. W. 1027, holding it was prejudicial to read from stenographer's transcript the testimony of witnesses at preliminary examination who were not present at the trial.

Declarations and acts of agent.

Cited in note in 131 Am. St. Rep. 337, on declarations and acts of agents.

9 S. D. 179, BROOKS v. BIGELOW, 68 N. W. 286.**When statute limiting time to appeal is set in motion.**

Cited in *Keogh v. Snow*, 9 N. D. 458, 83 N. W. 864, holding that statute limiting time to appeal from an order is set in motion by service of a copy of such order.

9 S. D. 181, MILLIRON v. MILLIRON, 62 AM. ST. REP. 863, 68 N. W. 286.**Separate maintenance.**

Cited in *Livingston v. Superior Ct.* 117 Cal. 633, 38 L.R.A. 175, 49 Pac. 836, holding equity could decree separate maintenance, to a husband from the wife under statute providing that husband and wife contract toward each other obligations of mutual support; *Behrle v. Behrle*, 120 Mo. App. 677, 97 S. W. 1005, holding equity could decree suit money to wife suing for separate maintenance.

Cited in note in 77 Am. St. Rep. 245, on wife's right to maintain separate suit for maintenance independent of suit for divorce.

— Statutes.

Cited in *Long v. Long*, 78 Mo. App. 32, holding that failure to provide for temporary support of abandoned wife pending action for separate maintenance and inclusion of such a provision in chapter on divorce raises no presumption that legislature intended to deny such support in the former class of cases.

— Evidence.

Cited in *Olsen v. Olsen*, 3 Alaska, 616, holding income of wife a material factor in determining the proper allowance of alimony.

9 S. D. 184, MINNESOTA THRESHER MFG. CO. v. SCHAAACK, 68 N. W. 287.**9 S. D. 187, MCGILLIVRAY v. MCGILLIVRAY, 68 N. W. 316.**

9 S. D. 192, BRIGHT v. ECKER, 68 N. W. 326.

Sufficiency of complaint on appeal.

Cited in *Chase v. Atchison T. & S. F. R. Co.* 70 Kan. 546, 79 Pac. 153, holding it was the duty of the appellate court to sustain a petition where sufficient facts were found therein to sustain any cause of action where petition was not attached in lower court.

9 S. D. 197, KIRBY v. RAMSEY, 68 N. W. 328, Later application for certiorari in 10 S. D. 38, 71 N. W. 140.

Finality of order confirming judicial sale.

Cited in *Crouch v. Dakota, W. & M. R. Co.* 18 S. D. 540, 101 N. W. 722, holding order of confirmation settled no question of fact or proposition of law as against owner of property sold.

Construction of statute adopted from other state.

Cited in *Russell v. Whitcomb*, 14 S. D. 426, 85 N. W. 860, holding that construction of adopted statute by courts of own state will be presumed to have been adopted on adopting statute.

9 S. D. 202, PARROTT v. HOT SPRINGS, 68 N. W. 329.

Waiver of statement on motion for new trial.

Distinguished in *Plano Mfg. Co. v. Jones*, 8 N. D. 315, 79 N. W. 338, holding the omission to file a statement of the case on a motion for a new trial with the clerk a mere technical error which is waived by the appearance of counsel and their argument on the motion based on such statement.

9 S. D. 206, TREBILCOCK v. BIG MISSOURI MIN. CO. 68 N. W. 330.

Conveyance in fraud of creditors.

Cited in *First Nat. Bank v. McMillan*, 9 S. D. 227, 68 N. W. 537, holding sale or assignment for creditors in good faith not ground for attachment though fraudulent and void in law; *Park v. Armstrong*, 9 S. D. 269, 68 N. W. 739, holding failure to immediately file chattel mortgage not ground for attachment on ground of disposing of property with intent to defraud creditors; *German Bank v. Folds*, 9 S. D. 295, 68 N. W. 747, holding execution of general assignment for creditors not ground for attachment.

— Subsequent creditors.

Cited in *Aldous v. Oliverson*, 17 S. D. 190, 95 N. W. 917, holding subsequent creditor was not prejudiced by conveyance from husband to wife where it was duly recorded and not made with intent to defraud subsequent creditors.

9 S. D. 213, CORNWALL v. MCKINNEY, 68 N. W. 333.**9 S. D. 216, FULLER v. ROBERTS COUNTY, 68 N. W. 308.**

Followed without discussion in *Fuller v. Roberts County*, 9 S. D. 220, 68 N. W. 1103.

Payment of salary to de facto officer.

Cited in *Stearns v. Sims*, 24 Okla. 623, 24 L.R.A.(N.S.) 475, 104 Pac. 44, holding payment by a municipality to a de facto officer was a complete defense in an action by the de jure officer to recover salary paid during his suspension pending suit on charges against him; *Rasmussen v. Carbon County*, 8 Wyo. 277, 45 L.R.A. 295, 56 N. W. 1098, holding a county treasurer, duly elected but failing to qualify by filing his bond within a reasonable time, not entitled to the back salary paid to the treasurer de facto occupying and performing the duties of the office prior to the filing of the bond by the treasurer de jure upon the adjudication of his election.

Cited in note in 16 L.R.A.(N.S.) 795, on payment to de facto as defense to action for salary by de jure officer.

9 S. D. 220, **FULLER v. ROBERTS COUNTY**, 68 N. W. 1103.

9 S. D. 221, **DEADWOOD v. ALLEN**, 68 N. W. 333.

Constitutionality of imprisonment for debt.

Cited in note in 34 L.R.A. 654, on constitutionality of imprisonment for debt.

9 S. D. 222, **DELL RAPIDS v. IRVING**, 68 N. W. 313.

9 S. D. 227, **FIRST NAT. BANK v. McMILLAN**, 68 N. W. 537.

Fraudulent disposal of property which will support attachment.

Cited in *Park v. Armstrong*, 9 S. D. 269, 68 N. W. 739, holding failure to immediately file chattel mortgage not ground for attachment on ground of disposing of property with intent to defraud creditors; *German Bank v. Folds*, 9 S. D. 295, 68 N. W. 747, holding execution of general assignment for creditors not ground for attachment.

9 S. D. 230, **MORGAN v. STATE**, 68 N. W. 538, Final hearing in 11 S. D. 396, 78 N. W. 19.

Liability for expenses of criminal prosecutions in unorganized counties.

Cited in *Morgan v. State*, 11 S. D. 396, 78 N. W. 19, holding state liable to county officers for fees incurred in criminal prosecutions in unorganized counties attached to their county for judicial purposes where itemized account of such costs was properly certified, examined, and presented to state auditor who refused to issue warrant therefor for lack of appropriation.

Prerequisites to action to recover state tax collected in unorganized counties.

Cited in *State v. Pennington County*, 13 S. D. 430, 83 N. W. 563, holding that a claim by the state against a county for state and judicial taxes on property in an unorganized county attached thereto for purposes of tax-

ation need not be presented to the county commissioners before suing therefor.

9 S. D. 234, VAN CISE v. CARTER, 68 N. W. 539.

Sufficiency of description in tax sale.

Cited in *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212; *Brown v. Reeves*, 31 Ind. App. 517, 68 N. E. 604,—holding an abbreviated and unintelligible description was deficient in a sale of land for taxes and did not pass title; *Turner v. Hand County*, 11 S. D. 348, 77 N. W. 589, holding void, tax sale of property where land is described in tax list as the “s 2 s e & s 2 s w” of specified section, township, and range.

9 S. D. 240, HUDSON v. ARCHER, 68 N. W. 541.

Profits as measure of damage.

Cited in *Young v. Metcalf Land Co.* 18 N. D. 441, 122 N. W. 1101 (dissenting opinion), on loss of profits as measure of broker's damages where sale is prevented by owner.

9 S. D. 251, PIERRE SAV. BANK v. ELLIS, 68 N. W. 545.

9 S. D. 252, LOWER v. WILSON, 62 AM. ST. REP. 865, 68 N. W. 545.

Waiver of jurisdiction.

Cited in note in 16 L.R.A. (N.S.) 182, on contest on merits after special appearance, as waiver of objections to jurisdiction over person.

9 S. D. 255, FINCH v. ARMSTRONG, 68 N. W. 740.

Followed without discussion in *Finch v. Armstrong*, 9 S. D. 273, 68 N. W. 1103; *Miller v. Armstrong*, 9 S. D. 272, 68 N. W. 1103.

Attachment for debt arising out of fraud or false pretenses.

Cited in *Sonnesyn v. Akin*, 12 N. D. 227, 97 N. W. 557, holding the addition of grounds for attachment did not enlarge the meaning of the several grounds enumerated in the previous statute; *Pearsons v. Peters*, 19 S. D. 162, 102 N. W. 606 (dissenting opinion), on nature of actions in which attachment may be had on ground of false pretenses; *German Bank v. Folds*, 9 S. D. 295, 68 N. W. 747, holding incurring of debt for property obtained under false pretenses ground for attachment; *Western Twine Co. v. Scott*, 11 S. D. 27, 75 N. W. 273, holding that although an action may be brought on a claim before it is due, when the debt was incurred for property obtained under false pretenses, the complaint must allege that the debt was so incurred.

Burden of proof on motion to discharge attachment.

Cited in *Park v. Armstrong*, 9 S. D. 269, 68 N. W. 739, holding burden on plaintiff on motion to discharge attachment to show a specific intent to defraud relied upon as ground for attachment.

Cited in note in 123 Am. St. Rep. 1058, on proceedings to dissolve attachments.

● S. D. 265, **ASK v. ARMSTRONG**, 68 N. W. 743.

● S. D. 267, **BRADLEY, M. & CO. v. ARMSTRONG**, 68 N. W. 733.

Right of foreign corporation to maintain action.

Cited in *Acme Mercantile Agency v. Rochford*, 10 S. D. 203, 66 Am. St. Rep. 714, 72 N. W. 466, holding that the complaint in an action by a foreign corporation need not affirmatively aver compliance with the statutory conditions on which a foreign corporation may maintain an action within the state; *Iowa Falls Mfg. Co. v. Farrar*, 19 S. D. 632, 104 N. W. 449, holding foreign corporation's failure to comply with statute before starting an action was a complete defense in an action to foreclose a mechanic's lien; *Thompson v. Scroyer*, 20 S. D. 72, 104 N. W. 854; *Bishop & B. Co. v. Schleuning*, 20 S. D. 71, 104 N. W. 854,—holding that foreign corporation could not maintain an action until it had complied with the laws of the state.

● S. D. 269, **PARK v. ARMSTRONG**, 68 N. W. 739.

Followed without discussion in *Wyman v. Armstrong*, 9 S. D. 272, 68 N. W. 1103; *Finch v. Armstrong*, 9 S. D. 273, 68 N. W. 1103; *Miller v. Armstrong*, S. D. 272, 68 N. W. 1103.

Fraudulent disposal of property to support attachment.

Cited in *Finch v. Armstrong*, 9 S. D. 255, 68 N. W. 740, on the point that the finding of the trial court in defendant's favor on the issue of fraudulent intent should be sustained; *German Bank v. Folds*, 9 S. D. 295, 68 N. W. 747, holding execution of general assignment for creditors not ground for attachment.

● S. D. 272, **MILLER v. ARMSTRONG**, 68 N. W. 1103.

● S. D. 272, **WYMAN v. ARMSTRONG**, 68 N. W. 1103.

● S. D. 273, **FINCH v. ARMSTRONG**, 68 N. W. 1103.

● S. D. 273, **BROWN v. EDMONDS**, 68 N. W. 734.

Creditor's bill to reach land in name of judgment debtor's wife.

Cited in *Minneapolis Threshing Mach. Co. v. Hanrahan*, 9 S. D. 520, 70 N. W. 656, sustaining right of judgment creditor who has exhausted legal remedies to maintain action in equity to subject to payment of the debt, land in name of judgment debtor's wife.

● S. D. 273, **PLYMOUTH COUNTY BANK v. GILMAN**, 62 AM. ST. REP. 868, 68 N. W. 735.

Duties of collecting banks.

Cited in note in 77 Am. St. Rep. 623, 626, on duties of banks acting as collecting agents.

Shifting of burden of proof and right to open and close.

Cited in note in 61 L.R.A. 519, on effect of admission to change burden of proof and right to open and close.

9 S. D. 285, TSCHETTER v. HEISER, 68 N. W. 744.**Jurisdiction of appeal from justice's court.**

Cited in Aldrich v. Ramcoe, 21 S. D. 52, 109 N. W. 641, to point that in absence of statement of case containing grounds upon which appellant relies, circuit court has no jurisdiction of appeal from justice's court on question of law alone.

Questions considered on appeal from conviction in justice's court.

Cited in Chamberlain v. Putnam, 10 S. D. 360, 73 N. W. 201, holding only such questions as are presented by justice's statement reviewable on appeal on questions of law alone from conviction before police justice.

9 S. D. 288, MURRAY v. WHITMORE, 68 N. W. 745.**Error in denying new trial.**

Cited in Breeden v. Martens, 21 S. D. 357, 112 N. W. 960, holding denial of new trial for newly discovered evidence, where diligence and materiality is challenged, will not be reversed unless abuse of discretion is shown.

9 S. D. 291, SCHOOL DIST. NO. 74 v. LINCOLN COUNTY, 68 N. W. 746.**Authority to create new school districts.**

Cited in School Dist. No. 56 v. School Dist. No. 27, 9 S. D. 336, 69 N. W. 17, holding special board of county commissioners and county superintendent of schools authorized to create new school district out of existing districts in particular county.

9 S. D. 295, GERMAN BANK v. FOLDS, 68 N. W. 747.**9 S. D. 297, STATE EX REL. ADKINS v. LIEN, 68 N. W. 748,**

Later phase of same case in 10 S. D. 436, 73 N. W. 909.

Right of private relator to mandamus.

Cited in State ex rel. Schilling v. Menzie, 17 S. D. 535, 97 N. W. 745, holding any taxpayer or elector may apply for and obtain a writ of mandamus to compel county to perform a public duty.

Duty to submit question of relocation of county seat.

Explained and distinguished in State ex rel. Cosper v. Porter, 13 S. D. 126, 82 N. W. 415, upholding statutory provision against resubmitting question of election of county seat of organized county until lapse of four years where no place receives necessary vote.

9 S. D. 301, NOVOTNY v. DANFORTH, 68 N. W. 749.**Limitation of cross-examination.**

Cited in Luin v. Chicago Grill Co. 138 Iowa, 268, 115 N. W. 1024, hold-

ing cross examination was not limited to defenses set up in the answer where it tended to contradict the prima facie case made out in the direct examination; *Lemon v. Little*, 21 S. D. 628, 114 N. W. 1001, holding it proper on cross examination to interrogate plaintiff as to facts tending to show no cause of action.

Right to lateral or subjacent support.

Cited in note in 68 L.R.A. 680, on liability for removal of lateral or subjacent support of land in its natural condition.

Rebuttal of presumption of notice.

Cited in *School Dist. No. 56 v. School Dist. No. 27*, 9 S. D. 336, 69 N. W. 17, holding the prima facie evidence of the giving of notice of a proposed change in the boundaries of school districts, arising from the introduction of a remonstrance to the special board, not overcome by testimony of the district officers that no notice was served on the board officially.

9 S. D. 310, McDONALD v. PARIS, 68 N. W. 737.

Undertaking on appeal as jurisdictional.

Cited in *Crowley Launch & Tugboat Co. v. Superior Ct.* 10 Cal. App. 342, 101 Pac. 935, holding superior court had no jurisdiction of an appeal where sureties failed to justify within the time required by law; *Minton v. Ozias*, 115 Iowa, 148, 88 N. W. 336, holding that on appeal from a justice of the peace the appellate court has no jurisdiction to permit the appellant to file a bond with sufficient sureties, in substitution of a previous bond which is totally deficient for want of sureties; *Deardoff v. Thorstensen*, 16 N. D. 355, 113 N. W. 616, holding district court had no jurisdiction in an appeal where the notice and undertaking were not filed within the statutory period; *Wasem v. Bellach*, 17 S. D. 506, 97 N. W. 718, holding jurisdiction was conferred by an undertaking which did not contain an express stipulation to pay the costs of the appeal and that such undertaking might be amended or a new bond filed.

Waiver of undertaking on appeal.

Cited in *Brown v. Chicago, M. & St. P. R. Co.* 10 S. D. 633, 66 Am. St. Rep. 730, 75 N. W. 198, holding that undertaking from appeal on justice's judgment cannot be waived by parties; *Brown v. Brown*, 12 S. D. 380, 81 N. W. 627, holding failure to file appeal undertaking for costs on appeal from justice's judgment not waived by appearance without objection and proceeding to trial.

Right to file undertaking on appeal after expiration of statutory period.

Cited in *Richardson v. Campbell*, 9 N. D. 100, 81 N. W. 31, denying authority of district court to permit service of undertaking on appeal from justice's judgment after expiration of statutory period; *Smith v. Coffin*, 9 S. D. 502, 70 N. W. 636, denying authority of circuit court on motion to dismiss appeal from justice of peace, to permit undertaking to be filed after expiration of the thirty days allowed by statute from service of notice of appeal.

9 S. D. 315, BURKHARDT v. GEORGIA SCHOOL TWP. 69 N. W. 16.

Injunction as excuse for nonfulfillment of obligation.

Distinguished in *South Memphis Land Co. v. McLean Hardwood Lumber Co.* 102 C. C. A. 563, 179 Fed. 417, holding injunction forbidding building a railroad across another railroad at grade did not relieve persons from guaranty to build such railroad where it was not shown that crossing could not be made other than grade crossing.

Burden of proving false statements.

Cited in *Redfield School Dist. No. 12 v. Redfield Independent School Dist. No. 20*, 14 S. D. 229, 85 N. W. 180, holding burden of proving falsity of statement in order annexing adjacent territory to organized city for purposes of education that a petition had been presented to board of education by majority of electors of the adjacent territory upon one asserting such falsity.

9 S. D. 319, DAVIS v. COOK, 69 N. W. 18.

Extension of time for settling bill of exceptions.

Distinguished in *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428, holding it improper to extend time for settlement for bill of exceptions for sixty days where there was a long delay in preparing bill and no good cause was shown for delay of seven months between completion of transcript and procuring of order to show cause.

Amendment of motion for new trial.

Cited in *Bunker v. Taylor*, 10 S. D. 526, 74 N. W. 450, holding that a notice of intention to move for new trial may be amended so as to state the particular errors relied on.

Motions invoking discretion of court.

Distinguished in *Coughran v. Markley*, 15 S. D. 37, 87 N. W. 2, holding that motion to vacate judgment eight years after rendition of sale on sole ground of court's lack of jurisdiction because of improper granting of order for publication, does not invoke exercise of court's discretion.

Sufficiency of affidavit for publication of summons.

Cited in *Peterson v. Peterson*, 15 S. D. 462, 90 N. W. 136, holding exercise of due diligence to find defendant within state sufficiently shown by plaintiff's affidavit for publication as against motion to affect decree of divorce by default where it states that defendant cannot, after due diligence and diligent search and inquiry be found within state and is not now within state but has a specified postoffice address in another designated state the means of knowledge being letters received by him within last three days from such place.

Distinguished in *Bothell v. Hoellwarth*, 10 S. D. 491, 74 N. W. 231, holding that no presumptions can be indulged in support of an affidavit for services by publication on a direct attack by motion to set aside an order of publication.

9 S. D. 326, BAILEY LOAN CO. v. SEWARD, 69 N. W. 58.**Surety or guarantor.**

Cited in *Cole Mfg. Co. v. Morton*, 24 Mont. 58, 60 Pac. 587, holding parties who executed an indemnity bond to a principal to secure the faithful performance of duties by an agent, to be sureties, and not guarantors, within Mont. Civ. Code, §§ 3600, 3670, and liable to be sued jointly with the principal.

Parol evidence to show contract of suretyship.

Cited in *Windhorst v. Bergendahl*, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544, holding parol evidence admissible to show apparent joint maker of note to be surety.

9 S. D. 336, SCHOOL DIST. NO. 56 v. SCHOOL DIST. NO. 27, 69 N. W. 17.**9 S. D. 341, SAFE DEPOSIT & T. CO. v. WICKHEM, 62 AM. ST. REP. 873, 69 N. W. 14.****Disability of mortgagee to take tax title.**

Cited in *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14, holding mortgagee with right to pay taxes and add same to encumbrance could not acquire tax title to mortgaged property; *Allison v. Corson*, 32 C. C. A. 12, 60 U. S. App. 381, 88 Fed. 587, granting a temporary injunction at the suit of a first mortgagee to restrain a second mortgagee and his assignee from making or receiving a tax deed under a tax certificate, taken by the second mortgagee upon a sale for delinquent taxes levied after the date of the first mortgage.

Cited in note in 75 Am. St. Rep. 245, on who may purchase and enforce a tax title.

9 S. D. 345, LIVINGSTON v. SCHOOL DIST. NO. 7, 69 N. W. 15,

Later action on quantum meruit in 11 S. D. 150, 76 N. W. 301.

Validity of township bonds where debt limit is exceeded.

Cited in *Dring v. St. Lawrence Twp.* 23 S. D. 624, 122 N. W. 664, holding township bonds void, where, when issued, existing indebtedness of township exceeded constitutional limitation.

9 S. D. 349, RE RINGROSE, 69 N. W. 584.**Mandamus to enforce right to seat in board of trade.**

Cited in *People ex rel. Dickinson v. Chicago Bd. of Trade*, 193 Ill. 577, 62 N. E. 196, holding that the supreme court will not enforce by mandamus the private right of a party to a seat upon the Chicago Board of Trade.

9 S. D. 351, HAZELTINE v. BROWN, 69 N. W. 579.**Right to file new undertaking for one defective.**

Distinguished in *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595, holding that new undertaking may be filed in order to stay proceedings where the appeal was taken in good faith and the original

undertaking was defective unless the defects or omissions were such as to render it void.

9 S. D. 356, SHANNON v. HURON, 69 N. W. 598.

Power of city to issue bonds.

Distinguished in *Huron v. Second Ward Sav. Bank*, 49 L.R.A. 534, 30 C. C. A. 38, 57 U. S. App. 593, 86 Fed. 272, holding that power to issue bonds for the purpose of paying or refunding the indebtedness of a city is given by a charter granting power "to borrow money, and for that purpose to issue bonds."

Issuance of warrant as creating indebtedness.

Cited in *Bryan v. Menefee*, 21 Okla. 1, 95 Pac. 471, holding a warrant issued by the proper officer under a valid appropriation where money was in state treasury was not an "evidence of indebtedness" within the constitution; *Lawrence County v. Meade County*, 10 S. D. 175, 72 N. W. 405, holding the prohibition of the act of Congress of July 30, 1886, against any county becoming indebted to an amount exceeding 4 per cent of the value of its taxable property, does not invalidate warrants subsequently issued for an amount not exceeding the tax levy of the year by a county whose indebtedness at the passage of such act exceeded the 4 per cent limit, although the indebtedness has not been reduced to such limit; *Chicago & N. W. R. Co. v. Faulk County et al.*, 15 S. D. 501, 9 N. W. 140, holding that county warrants issued against designated funds in anticipation of uncollected revenue are not debts in such sense that they may be included in a sinking fund levy under S. D. Laws, 1897, chap. 28, § 71, for the payment of interest on "all outstanding debts;" *Darling v. Taylor*, 7 N. D. 538, 75 N. W. 766, holding the existing county indebtedness not increased by the issuance of county warrants for current expenses in anticipation of the collection of a tax already levied; *Lake County v. Keene Five-Cents Sav. Bank*, 47 C. C. A. 464, 108 Fed. 505, holding a county prima facie liable upon bonds exchanged by it for county warrants issued after the constitutional debt limit had been reached, if any of such warrants could have been valid; *Williamson v. Aldrich*, 21 S. D. 13, 108 N. W. 1063, to point that execution and exchange of refunding bonds for equal amount of valid outstanding indebtedness does not operate to increase city's liability.

Burden of proof.

Cited in *Johnson v. Pawnee County*, 7 Okla. 686, 56 Pac. 701, placing the burden upon a county to show that warrants issued after the constitutional debt limit had been reached were not issued for the purpose of meeting current expenses and in anticipation of adequate taxes already levied.

Payment of municipal indebtedness.

Cited in *Freeman v. Huron*, 10 S. D. 368, 73 N. W. 260, holding city not authorized to collect revenues and place them in special fund for payment of current expenses to exclusion of legal warrants previously issued and registered.

● S. D. 364, LOCKE v. HUBBARD, 69 N. W. 588.**Appealable orders.**

Cited in *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, holding an order dismissing an action for failure of proof not appealable; *Hanberg v. National Bank*, 8 N. D. 329, 79 N. W. 336, holding a judgment on an order to show cause why an action should not be dismissed not appealable; *Chamberlain v. Hedger*, 10 S. D. 290, 73 N. W. 75, holding that no appeal can be taken from an order denying a new trial until the proper entry of the judgment and order; *State ex rel. Morgan v. Lamm*, 9 S. D. 418, 69 N. W. 592, holding the filing of an order dissolving an injunction and placing it among the papers on file in the case by the clerk of the court not such an entry of record as will authorize an appeal therefrom.

Oral evidence to contradict recitals of execution.

Cited in *Morris v. Hubbard*, 10 S. D. 259, 72 N. W. 894, holding oral evidence by clerk incompetent to contradict recitals of execution as to issuance of judgment.

Entry of judgment as prerequisite for sale of attached property.

Distinguished in *Jochem v. Cooley*, 100 C. C. A. 155, 176 Fed. 719, holding sale of attached real estate was voidable, not void, where directed and made before transcript of judgment from another county was entered in county where real estate was located.

Validity of execution issued before judgment is docketed.

Distinguished in *McDonald v. Fuller*, 11 S. D. 355, 74 Am. St. Rep. 815, 77 N. W. 581, holding valid, execution issued to other county before but not delivered to sheriff for service until after docketing of judgment in county to which it runs.

● S. D. 375, DUNCAN v. NEWCOMER, 69 N. W. 580.**Taxation of public land entries.**

Cited in *Campbell v. Spears*, 120 Iowa, 670, 94 N. W. 1126, holding sale of land for taxes was void where made on assessment and levy made before title passed from United States by patent.

Cited in note in 132 Am. St. Rep. 338, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

● S. D. 380, SWEATMAN v. DEADWOOD, 69 N. W. 582.**Estoppel to claim title to land.**

Cited in *Wampol v. Kountz*, 14 S. D. 334, 86 Am. St. Rep. 765, 85 N. W. 595, holding one who, for thirteen years after learning of the forgery by her father of a deed of her land, keeps the matter a family secret, estopped to claim title thereto as against a purchaser in good faith subsequent to such discovery.

● S. D. 387, GERMOND v. HERMOSA ICE CO. 69 N. W. 578.

9 S. D. 389, MALE v. LONGSTAFF, 69 N. W. 577.**Foreclosure by advertisement and sale.**

Cited in *Shelby v. Bowden*, 16 S. D. 531, 94 N. W. 416, holding foreclosure by advertisement which was regular in other respects was not invalidated by the negligent omission of the register of deeds to record a clause in the mortgage containing a power of sale.

9 S. D. 390, RE HAMMILL, 69 N. W. 577.**Res adjudicata in habeas corpus proceedings.**

Cited in *Re Hamilton*, 66 Kan. 754, 71 Pac. 817, holding all matters in issue arising upon the same state of facts determined in a prior proceeding will be regarded as settled and concluded where raised in habeas corpus proceedings in which no question of personal liberty arises.

Cited in note in 13 L.R.A.(N.S.) 771, on exclusiveness of jurisdiction of highest court to issue remedial writs for prerogative purposes.

Disapproved in *Carruth v. Taylor*, 8 N. D. 166, 77 N. W. 617, holding final order in habeas corpus proceeding not appealable.

9 S. D. 392, WOODS v. SHELDON, 69 N. W. 602.**Control of ministerial acts of governor.**

Cited in *State ex rel. Atty. Gen. v. Huston*, 27 Okla. 606, 34 L.R.A.(N.S.) 380, 113 Pac. 190, holding that district courts have no jurisdiction to control ministerial acts of governor.

Cited in note in 6 L.R.A.(N.S.) 771, on mandamus to governor.

Adjournment of proceedings to lay out road.

Cited in *Issenhuth v. Baum*, 11 S. D. 223, 76 N. W. 928, holding that the township supervisors in laying out a road have inherent power to adjourn from time to time unless restricted by statute.

9 S. D. 412, NOVOTNY v. DANFORTH, 69 N. W. 585.**Costs of settling bill of exceptions.**

Distinguished in *Pettis v. Green River Asphalt Co.* 71 Neb. 513, 101 N. W. 333, holding under statutes costs of settling bill of exceptions were trial costs and not appeal costs; *Elfring v. New Birdsall Co.* 17 S. D. 350, 96 N. W. 703, holding under proper construction of later statute stenographer's charges were not proper appeal costs.

9 S. D. 413, LYMAN COUNTY v. STATE, 69 N. W. 601, Decision on the merits in 11 S. D. 391, 78 N. W. 17.**Condition precedent to recovery against state.**

Cited in *Lyman County v. State*, 11 S. D. 391, 78 N. W. 17, holding that a claimant is not entitled to recover against the state, until it shows itself to be aggrieved by refusal of the state auditor to allow his claim.

9 S. D. 418, **STATE EX REL. MORGAN v. LAMM**, 69 N. W. 592.

Meaning of "filed."

Cited in *Thompson v. Southern Exp. Co.* 147 N. C. 343, 61 S. E. 182, holding verbal claim for loss of property by carrier was insufficient under statute requiring adjustment of such claims within a specific time after "filing claim."

Finality of order for appeal.

Cited in *Chamberlain v. Hedger*, 10 S. D. 290, 73 N. W. 75; *Coburn v. Brown County*, 10 S. D. 552, 74 N. W. 1026; *Sinkling v. Illinois C. R. Co.* 10 S. D. 560; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181; *Martin v. Smith*, 11 S. D. 437, 78 N. W. 1001,—holding that appeal will not lie until judgment or order sought to be appealed from has been entered as a permanent record of the trial court; *Hughes v. Stearns*, 13 S. D. 627, 84 N. W. 196, holding that appeal from judgment and order denying new trial will not be dismissed because taken before such order was entered on record; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding an appeal from an order would not lie where such order was not "attested" before appeal was taken.

9 S. D. 420, **CARTER v. STATE**, 69 N. W. 593.

9 S. D. 427, **SKINNER v. HOLT**, 62 AM. ST. REP. 878, 69 N. W. 595.

Jurisdiction conferred by a defective undertaking on appeal.

Cited in *Parker v. Gibson*, 78 Kan. 90, 96 Pac. 35, holding an undertaking on appeal, regular except as to omission of a statutory condition was sufficient to confer jurisdiction on appellate court.

Supplying defects on omissions in appeal bond.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, holding that defects or omissions in appeal bond may be supplied by amendment on new undertaking.

Legislative power of exemption.

Distinguished in *Holden v. Stratton*, 198 U. S. 208, 49 L. ed. 1020, 25 Sup. Ct. Rep. 656, holding under a different constitution that the legislature was not excluded from exempting other things than those enumerated in the constitution.

9 S. D. 436, **STATE v. CASEY**, 69 N. W. 585.

9 S. D. 438, **STATE v. WALKER**, 69 N. W. 586.

9 S. D. 440, **LAWRENSEN v. McDONALD**, 69 N. W. 586.

9 S. D. 442, **McKENNA v. WHITTAKER**, 69 N. W. 587.

Approved without special discussion in *Commercial Bank v. Jackson*, 9 S. D. 605, 70 N. W. 846.

Dak. Rep.—59.

Finding sufficient to support judgment.

Distinguished in *Naddy v. Dietze*, 15 S. D. 26, 86 N. W. 753, holding express finding as to abandonment of plaintiff's mining claim unnecessary to support judgment for defendant where court expressly finds that plaintiff was not the owner nor entitled to possession of the property.

Duty of court to make findings.

Cited in *McPherson v. Swift*, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76, to point that it is error for trial court to refuse or fail to find upon any material issue of fact; *Taylor v. Vandenberg*, 15 S. D. 480, 90 N. W. 142, reversing a judgment by the trial court in an action without a jury when the court omitted to make findings upon issues raised by the pleadings, although expressly requested so to do, and even though it was clear to the appellate court that there was evidence from which the trial court could have made findings in support of its judgment.

Review of court findings.

Cited in *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589; *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207; *Re McCellan*, 20 S. D. 498, 107 N. W. 681; *Lee v. Dwyer*, 20 S. D. 464, 107 N. W. 674; *International Harvester Co. v. McKeever*, 21 S. D. 91, 109 N. W. 642; *Breedon v. Martens*, 21 S. D. 357, 112 N. W. 960,—holding that findings of trial court will not be disturbed unless evidence clearly preponderates against them; *Hill v. Whale Min. Co.* 15 S. D. 574, 90 N. W. 853, holding that findings on disputed questions of fact are presumptively right.

9 S. D. 447, **GERMAN BANK v. FOLDS**, 69 N. W. 823.

9 S. D. 449, **BRIGHT v. ECKER**, 69 N. W. 824.

Sufficiency of general objection on appeal.

Cited in *Plano Mfg. Co. v. Person*, 12 S. D. 448, 81 N. W. 897, holding an objection that evidence is incompetent, immaterial, and irrelevant insufficient to raise the objection on appeal that it was inadmissible under the pleadings; *Olson v. Burlington C. R. & N. R. Co.* 12 S. D. 326, 81 N. W. 634, holding an objection to the admission of evidence of a rough model of a casting of a car coupler, that it is "incompetent and immaterial," insufficient for consideration on appeal; *Kolka v. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558, holding the objection that evidence is incompetent, irrelevant, and immaterial too general for consideration on appeal; *International Harvester Co. v. McKeever*, 21 S. D. 91, 109 N. W. 642, holding sustaining of general objection to question involving conversation between attorney and client not reversible error, where offer disclosing what testimony would be is not made.

9 S. D. 453, **HARRIS v. STATE**, 69 N. W. 825.

9 S. D. 457, **RE HOUGHTON**, 70 N. W. 634.

- **S. D. 459, EDWARD P. ALLIS CO. v. MADISON ELECTRIC LIGHT, HEAT & P. CO. 70 N. W. 650.**

Loss of mechanics lien by taking other security.

Cited in *Charles Betcher Co. v. Cleveland*, 13 S. D. 347, 83 N. W. 366, holding mechanic's lien on land held by married woman under contract for purchase not defeated by husband's joinder in notes secured by mortgage for the material used.

- **S. D. 466, MACOMB v. LAKE COUNTY, 70 N. W. 652, Later appeal as to costs in 13 S. D. 103, 82 N. W. 417, Related action 17 S. D. 253, 96 N. W. 702.**

Tender of valid part before enjoining illegal tax.

Cited in *Douglas v. Fargo*, 13 N. D. 467, 101 N. W. 919, holding equity will not enjoin the collection of tax where part of it was levied legally and part illegally until payment of the legal tax is tendered.

- **S. D. 471, KIRBY v. HOWIE, 70 N. W. 640.**

- **S. D. 479, FALLIHEE v. WITTMAYER, 70 N. W. 642.**

Constitutional exemption of homesteads as respects mechanics' lien.

Cited in *Volker v. Scowcroft Lumber Co. v. Vance*, 32 Utah, 74, 125 Am. St. Rep. 828, 88 Pac. 896, holding homestead was not subject to materialman's lien secured by virtue of statute where the constitution provided that homestead should be exempt from execution sales of every kind; *Morgan v. Beuthein*, 10 S. D. 650, 66 Am. St. Rep. 733, 75 N. W. 204; *L. Lamb Lumber Co. v. Roberts*, 23 S. D. 191, 121 N. W. 93,—holding homestead not subject to mechanic's lien law.

Necessity that wife join in mortgage on homestead.

Cited in *Northwestern Loan & Bkg. Co. v. Jonasen*, 11 S. D. 566, 79 N. W. 840, holding that mortgage executed by fee owner of homestead to secure purchase price must be signed by wife.

- **S. D. 482, COUGHRAN v. SUNDBACK, 70 N. W. 644, Later appeal in action on appeal bond in 13 S. D. 115, 79 Am. St. Rep. 886, 82 N. W. 507.**

When replevin is sustainable.

Cited in note in 80 Am. St. Rep. 748, 761, 762, as to when replevin or claim and delivery is sustainable.

Proper party to bring action.

Cited in *Moore v. Calvert*, 8 Okla. 358, 58 Pac. 627, sustaining a replevy of wheat by a mortgagee against a sheriff who, without tendering the amount of the mortgage debt levied on the wheat under an execution against the mortgagor after possession had been taken by the mortgagee.

Cited in notes in 9 N. D. 631, on question, who may maintain trover; 64 L.R.A. 618, as to who is real party in interest within statutes defining parties by whom action must be brought.

Sufficiency of description of chattels mortgaged.

Cited in *Advance Thresher Co. v. Schmidt*, 9 S. D. 489, 70 N. W. 646, holding sufficient, description, of property in chattel mortgage as "my one $\frac{1}{2}$ share of all crops raised upon the S. W. 4 Sec. 31-104-54 . . . consisting of wheat, oats, grain, and other grains as raised" on such land for designated years when taken in connection with mortgagor's name and the town, county, and state of residence; *First Nat. Bank v. Peavy Elevator Co.* 10 S. D. 167, 72 N. W. 402, holding sufficient a description in a seed lien account as "lands owned, occupied, rented, or used" by the person to whom the seed was furnished lying in a specified county and state "to wit, the N. E. $\frac{1}{4}$ of section 9, in township 104 north of range 36 west, and N. E. $\frac{1}{4}$ 18-104-56;" *Alferitz v. Ingalls*, 83 Fed. 964, holding sufficiently definite a chattel mortgage in which the property is described as "8000 sheep, and the increase thereof . . . now in the county of Merced, state of California."

Distinguished in *Commercial State Bank v. Interstate Elevator Co.* 14 S. D. 276, 86 Am. St. Rep. 760, 85 N. W. 219, holding insufficient, description of growing wheat in mortgage as consisting of a specified number of acres in mortgagor's possession in a specified county of the state without giving township or section.

9 S. D. 489, ADVANCE THRESHER CO. v. SCHMIDT, 70 N. W. 646.**Sufficiency of description of chattels mortgaged.**

Cited in *First Nat. Bank v. Peavy Elevator Co.* 10 S. D. 167, 72 N. W. 402, holding sufficient a description of the lands in a seed lien account as lands occupied by the person to whom the seed was furnished in a specified county and state, "to wit, the N. E. $\frac{1}{4}$ of section 9, in township 104 north, of range 36 west, and N. E. $\frac{1}{4}$ 18-104-56."

Distinguished in *Commercial State Bank v. Interstate Elevator Co.* 14 S. D. 276, 86 Am. St. Rep. 760, 85 N. W. 219, holding insufficient, description of growing wheat in mortgage as consisting of a specified number of acres in mortgagor's possession in a specified county of the state without giving township or section.

Who may maintain trover.

Cited in note in 9 N. D. 631, on question, who may maintain trover.

9 S. D. 492, FIRST NAT. EXCH. BANK v. SHERMAN, 70 N. W. 647.**Sufficiency of objection to admission of evidence.**

Cited in *State v. Finder*, 10 S. D. 103, 72 N. W. 97, holding objection to exhibition of injured hand on ground that it did not affirmatively appear that the hand was not injured prior to the assault complained of, not saved by general objection that proper foundation had not been laid; *State v. Sexton*, 10 S. D. 127, 72 N. W. 84, holding general objection as "incompetent and immaterial" to question to medical expert as to whether he knows what medical authorities consider the shortest time at which

a fully developed child can be born insufficient where medical authorities had already been introduced without valid objection.

Theory of case on appeal.

Followed in *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428; *Thomas v. Wilcox*, 18 S. D. 625, 101 N. W. 1072, refusing to review on theory not advanced on trial.

Cited in *Parrish v. Mahany*, 12 S. D. 278, 76 Am. St. Rep. 604, 81 N. W. 295, on the point that a judgment will not be reversed on appeal on a theory not advanced or relied on below, which was not discussed in the case cited.

9 S. D. 495, NORTHWESTERN MORTG. TRUST CO. v. BRADLEY, 70 N. W. 648.

Usury as defense.

Cited in *Grove v. Great Northern Loan Co.* 17 N. D. 352, 116 N. W. 345, holding foreclosure was not invalidated by usurious character of mortgage; *Meadors v. Johnson*, 27 Okla. 544, 112 Pac. 1121, to point that foreclosure proceeding cannot be attacked for usury.

Inadequacy of price as defense to note for deficiency on foreclosure.

Cited in *Hollister v. Buchanan*, 11 S. D. 280, 77 N. W. 103, holding purchase on foreclosure for inadequate price not defense in action on note secured to recover deficiency in absence of motion to set aside sale.

Noncompliance with statute as invalidating foreclosure sale.

Cited in *Thompson v. Browne*, 10 S. D. 344, 73 N. W. 194, holding voidable only, sale under power in mortgage failing to comply with statutory requirement for sale of land in parcels.

9 S. D. 497, CARROLL v. NISBET, 70 N. W. 634.

Assignment of error sufficient to entitle to review of evidence.

Cited in *Roberts v. Ruh*, 22 S. D. 13, 114 N. W. 1097, holding that it may be determined whether there was sufficient evidence to be submitted to jury, where refusal to direct verdict is properly assigned as error, though ruling on motion for new trial not assigned as error.

Law governing chattel mortgages.

Cited in note in 64 L.R.A. 364, on conflict of laws as to chattel mortgages.

Evidence in trover and conversion.

Cited in note in 9 N. D. 635, on question of evidence in actions for trover and conversion.

9 S. D. 501, HESTON v. MAYHEW, 70 N. W. 635.

9 S. D. 502, SMITH v. COFFIN, 70 N. W. 636.

Appealable orders.

Cited in *Brown v. Brown*, 12 S. D. 380, 81 N. W. 627, holding order denying motion to dismiss appeal from justice's judgment appealable and sub-

ject to review as an intermediate order on appeal from judgment entered on verdict rendered in circuit court after granting of such order.

Undertaking as jurisdictional on appeal.

Cited in *Lough v. White*, 14 N. D. 353, 104 N. W. 518, holding appellate court had no jurisdiction where undertaking was not served within time fixed for taking appeal; *Deardoff v. Thorstensen*, 16 N. D. 355, 113 N. W. 616, holding failure to file notice and undertaking within statutory time deprive appellate court of jurisdiction; *Miller v. Lewis*, 17 S. D. 448, 97 N. W. 364, holding undertaking which contained no provision for payment of costs on appeal could not confer jurisdiction; *Brown v. Chicago, M. & St. P. R. Co.* 10 S. D. 633, 66 Am. St. Rep. 730, 75 N. W. 198, holding that undertaking from appeal on justice's judgment cannot be waived by parties; *Richardson v. Campbell*, 9 N. D. 100, 81 N. W. 31, denying authority of district court to permit service of undertaking on appeal from justice's judgment after expiration of statutory period.

Distinguished in *Wasem v. Bellach*, 17 S. D. 506, 97 N. W. 718, holding undertaking which contained no express stipulation to pay costs on appeal gave court jurisdiction of appeal.

9 S. D. 506, MODDIE v. BREILAND, 70 N. W. 637.

Material alteration of written instrument.

Cited in *Cosgrove v. Fanebust*, 10 S. D. 213, 72 N. W. 469, holding proof of execution of note or mortgage showing material alteration on face sufficient foundation for its admission without preliminary inquiry as to time of alteration; *Sherman v. Port Huron Engine & Thresher Co.* 13 S. D. 95, 82 N. W. 413, holding that note offered in evidence should not be excluded on ground of alleged alteration.

Cited in note in 86 Am. St. Rep. 128, on unauthorized alteration of written instruments.

Presumption as to erasures in tax deed.

Cited in *Northwestern Mortg. Trust Co. v. Levtzow*, 23 S. D. 562, 122 N. W. 600, holding that erasure in tax deed will be presumed to have been made prior to or contemporaneous with its execution.

Notice of intention to move for new trial.

Cited in *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281, holding that notice of intention to move for new trial must be served on adverse party and statutory grounds relied on must be designated therein.

9 S. D. 511, FOLEY-WADSWORTH IMPLEMENT CO. v. SOLOMON, 70 N. W. 639.

Material alteration of written instruments.

Cited in note in 86 Am. St. Rep. 133, on unauthorized alteration of written instruments.

Distinguished in *Landauer v. Sioux Falls Improv. Co.* 10 S. D. 205, 72 N. W. 467, holding an instruction that the appearance of a guaranty indorsed on a note was sufficient to put the purchaser on inquiry as to material

alteration apparent on its face not fatally erroneous, whether the alteration was intrinsically suspicious or not.

Burden of proof as to alteration of note.

Cited in *Cosgrove v. Fanebust*, 10 S. D. 213, 72 N. W. 469, holding burden of proving addition, after delivery, of provision as to rate of interest after maturity, written immediately after last printed line, upon makers.

9 S. D. 514, **DOWDLE v. CORNUE**, 70 N. W. 632.

9 S. D. 515, **SAFE DEPOSIT & T. CO. v. WICKHEM**, 70 N. W. 654.

Disability of mortgagee to take tax titles.

Cited in *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14, holding mortgagee could not acquire title as against mortgagor by tax deed where mortgage permitted him to pay taxes assessed and add amount so paid to his claim; *Allison v. Corson*, 32 C. C. A. 12, 60 U. S. App. 387, 88 Fed. 581, granting a temporary injunction at the suit of a first mortgagee to restrain a second mortgagee or his assignee from making or receiving a tax deed under a tax certificate, taken by the second mortgagee upon a sale for delinquent taxes levied after the date of the first mortgage.

9 S. D. 518, **SONNENBERG v. STEINBACH**, 62 AM. ST. REP. 885, 70 N. W. 655.

Nonjoinder of parties in dual capacity.

Cited in *Clark v. Schindler*, 43 Ind. App. 269, 87 N. E. 44, holding one who was heir and also executrix must be sued in both capacities.

9 S. D. 520, **MINNEAPOLIS THRESHING MACH. CO. v. HANRAHAN**, 70 N. W. 656.

Conditions precedent to creditor's bill.

Cited in note in 23 L.R.A.(N.S.) 66, on conditions precedent to equitable remedies of creditors.

9 S. D. 524, **BROWNE v. HASELTINE**, 70 N. W. 648.

9 S. D. 527, **RANDALL v. BURK TWP.** 70 N. W. 1134.

9 S. D. 528, **RANDALL v. BURK TWP.** 70 N. W. 1134.

9 S. D. 528, **STATE v. DORMAN**, 70 N. W. 848.

Involuntary character of trespass as defense.

Cited in *People v. Christian*, 144 Mich. 247, 107 N. W. 919, holding lack of intent to trespass was no defense in action under a statute declaring it a felony to enter and cut timber on certain state lands; *State v. Shevlin-Carpenter Co.* 99 Minn. 158, 108 N. W. 935, 9 A. & E. Ann. Cas. 634, upholding statute imposing criminal punishment and double damages upon

one who casually or involuntarily trespasses upon certain state lands cutting timber thereon.

Right to cut timber on public lands.

Cited in note in 70 L.R.A. 880, on right to cut timber on public land.

9 S. D. 534, RANDALL v. BURK TWP. 70 N. W. 837.

Fellowed without discussion in *Randall v. Burk Twp.* 9 S. D. 527, 70 N. W. 1134 (a); *Randall v. Burk Twp.* 9 S. D. 528, 70 N. W. 1134 (b).

9 S. D. 536, JOHNSON v. SCHAR, 70 N. W. 838.

Negotiability of note.

Cited in *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89, holding note was rendered non-negotiable by words which provided for "other costs in case the holder is obliged to enforce payment at law" in addition to attorney's fees.

Cited in note in 125 Am. St. Rep. 209, on agreements and conditions destroying negotiability.

9 S. D. 542, DES MOINES MFG. & SUPPLY CO. v. TILFORD MILL. CO. 70 N. W. 839.

Presumption as to authority of president of corporation.

Cited in note in 7 L.R.A.(N.S.) 378, on presumption that contract within powers of corporation is within authority of president.

Mechanics' lien on unauthorized contract.

Distinguished in *Tom Sweeney Hardware Co. v. Gardner*, 18 S. D. 166, 99 N. W. 1105, holding co-tenants interest was chargeable with mechanics' lien where he knew, assented to and approved of repairs made on common property.

9 S. D. 550, NATIONAL BANK v. FEENEY, 46 L.R.A. 732, 70 N. W. 874, Rehearing denied in 11 S. D. 109, 75 N. W. 896, but reversed on second rehearing in 12 S. D. 156, 76 Am. St. Rep. 594, 80 N. W. 186.

Allegation of value in replevin complaint.

Cited in *Johnson v. Hillenbrand*, 18 S. D. 446, 101 N. W. 33, holding in an action to recover possession of personal property it was sufficient to allege in the complaint the value of plaintiff's interest therein or damages sustained by the wrongful detention.

Negotiability of note.

Cited in *Garnett v. Myers*, 65 Neb. 280, 91 N. W. 400, holding provisions in mortgage to pay taxes did not destroy the negotiability of a note, where the mortgage containing them was given to secure its payment and was to be construed with it.

Cited in note in 125 Am. St. Rep. 212, on agreements and conditions destroying negotiability.

Referred to in *Cherry v. Sprague*, 187 Mass. 113, 67 L.R.A. 33, 105 Am.

St. Rep. 381, 72 N. E. 456, as a case cited by counsel to evidence the law of South Dakota.

Imputing knowledge of officer to corporation.

Cited in notes in 2 L.R.A.(N.S.) 994, as to how far corporation charged with knowledge of managing officer engaged in illegal act; 29 L.R.A.(N.S.) 560, 563, on imputations of knowledge of personally interested officers to bank.

- 9 S. D. 560, **LA CROSSE BOOT & SHOE MFG. CO. v. MONS ANDERSON CO.** 70 N. W. 877, Later appeal in 13 S. D. 301, 83 N. W. 331, which is reversed on rehearing in 14 S. D. 597, 86 N. W. 641.

Liability of purchaser from trustee for disposition of purchase price.

Cited in *Rua v. Watson*, 13 S. D. 453, 83 N. W. 572, holding that a purchaser of lands from one to whom it had been conveyed by a deed to him and his "heirs and assigns forever," although with the addition of the word "trustee" after his name, is not liable as to the disposition made of the purchase price by his immediate grantor.

Evidence in trover and conversion.

Cited in note in 9 N. D. 635, on question of evidence in actions for trover and conversion.

- 9 S. D. 564, **STATE v. DAVIDSON**, 70 N. W. 879.

Contradiction of witnesses.

Cited in *Boche v. State*, 84 Neb. 845, 122 N. W. 72, on the impropriety of contradiction as to a collateral matter brought out in examination.

- 9 S. D. 572, **TAYLOR v. BANK OF VOLGA**, 70 N. W. 834.

Right to intervene.

Cited in *Walker v. Sanders*, 103 Minn. 124, 114 N. W. 649, 123 Am. St. Rep. 276, holding anyone having beneficial interest in the matter in suit had a right to intervene.

Cited in note in 123 Am. St. Rep. 289, on intervention.

— Other remedies.

Cited in *Potlatch Lumber Co. v. Runkel*, 16 Idaho, 192, 23 L.R.A.(N.S.) 536, 101 Pac. 396, 18 A. & E. Ann. Cas. 591, holding right to intervene by one whose property was wrongfully attached was not barred by the fact that he had other remedies; *Faricy v. St. Paul Invest. & Sav. Soc.* 110 Minn. 311, 125 N. W. 676, holding right to intervene was not barred by reason that intervener had other remedies to protect his interests.

- 9 S. D. 576, **SEIBERLING v. MORTINSON**, 70 N. W. 835.

What constitutes counterclaim.

Cited in *Huron v. Meyers*, 13 S. D. 420, 83 N. W. 553, holding facts constituting counterclaim though not specifically designated as such set out.

by answer alleging that defendant while treasurer of plaintiff city, paid out on warrants and turned over to successor specified amount and delivered to plaintiff negotiable coupons of specified amount received and retained by city and that there is due and owing him above all legal claims and demands of plaintiff specified amount for overpayments.

9 S. D. 577, DAKOTA HOT SPRINGS CO. v. YOUNG, 70 N. W. 842.

Unlawful detainer.

Cited in note in 120 Am. St. Rep. 51, on unlawful detainer.

9 S. D. 582, BANK OF IOWA & DAKOTA v. PRICE, 70 N. W. 836,
Later appeals in 12 S. D. 184, 80 N. W. 195; 13 S. D. 561,
79 Am. St. Rep. 907, 83 N. W. 591.

9 S. D. 585, GRIGSBY v. DAY, 70 N. W. 881.

What constitutes partnership.

Cited in Dillaway v. Peterson, 11 S. D. 210, 76 N. W. 925, holding one loaning money to another for purchase of property mortgage on which is assumed by purchaser and taking second mortgage to secure loan to expense of carrying which he is to contribute in share of profits from sale but without power to dispose of property not a partner in the transaction; Cedarberg v. Guernsey, 12 S. D. 77, 80 N. W. 159, holding partnership not created by cropper's contract.

Cited in notes in 115 Am. St. Rep. 420, 439, on what constitutes a partnership; 18 L.R.A.(N.S.) 971, 980, 981, 1013, 1032, 1036, 1074, 1089; 19 Eng. Rul. Cas. 402,—on agreement for sharing profits as constituting a partnership.

Presumption as to value of corporate stock.

Cited in Patterson v. Plummer, 10 N. D. 95, 86 N. W. 111, holding corporate stock presumptively worth par.

9 S. D. 596, TROTTER v. MUTUAL RESERVE FUND LIFE ASSO.
62 AM. ST. REP. 887, 70 N. W. 843.

Pleading release.

Cited in Hedlun v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31; Isabella Gold Min. Co. v. Glenn, 37 Colo. 165, 86 Pac. 349,—holding that a release should be specially pleaded; St. Louis & S. F. R. Co. v. Richards, 23 Okla. 256, 23 L.R.A.(N.S.) 1032, 102 Pac. 92, on release as a defense and not to be avoided by anticipation.

Effect on admission in complaint of denial.

Cited in McLaughlin v. Alexander, 2 S. D. 226, 49 N. W. 99, holding that allegations of complaint clearly admitted in one defense need not be proved on trial denied in another defense of same answer.

Surplusage in pleadings.

Cited in Frum v. Weaver, 13 S. D. 457, 83 N. W. 579, holding allegations

as to tax title in complaint alleging plaintiff's ownership and right to immediate possession of land which defendants are holding and occupying as a homestead claiming same right and interest therein under a treasurer's sale deed without plaintiff's consent, surplusage.

Right to maintain action in interest of estate.

Cited in *Friese v. Friese*, 12 N. D. 82, 95 N. W. 446, holding under ordinary circumstances legatees cannot sue debtor for payment debt due estate.

Cited in note in 22 L.R.A.(N.S.) 457, 458, on right of next of kin to maintain action in interest of estate.

Rights of heir in personality.

Cited in note in 112 Am. St. Rep. 732, on rights of heir in personal property of ancestor.

§ S. D. 603, NOYES v. BRACE, 70 N. W. 846.

Theory on appeal.

Cited in *Parrish v. Mahany*, 12 S. D. 278, 76 Am. St. Rep. 604, 81 N. W. 295; *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341; *Thomas v. Wilcox*, 18 S. D. 625, 101 N. W. 1072; *Selbie v. Graham*, 18 S. D. 365, 100 N. W. 755; *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428,—holding appellate court will not adopt a theory not advanced and relied upon in the trial court; *Graham v. Selbie*, 10 S. D. 546, 74 N. W. 439, holding that theory that transaction concerning premises in controversy was a joint or partnership venture cannot be first urged on appeal; *Deindorfer v. Bachmor*, 12 S. D. 285, 81 N. W. 297, refusing to first consider on appeal objection that mortgage was void because executed on homestead prior to final proof; *Whiffen v. Hollister*, 12 S. D. 68, 80 N. W. 156, holding objection that evidence of contract is inadmissible under pleadings not available on appeal where only objection in trial court was that the contract was void because not in writing; *Orman v. Ryan Bros.* 25 Colo. 333, 55 N. W. 168, refusing to permit an appellee, whose judgment upon a contract alleged, by him to be conditional has been reversed on appeal, to maintain on rehearing for the purpose of setting aside the reversal, that the contract is unconditional; *Wilson v. Huron Bd. of Edu.* 12 S. D. 535, 81 N. W. 952 (dissenting opinion), on the point that the appellate court should not adopt a different theory as to the effect of the answer from that adopted below.

§ S. D. 605, COMMERCIAL BANK v. JACKSON, 70 N. W. 846.

Presumption as to statute of another state.

Cited in *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255, holding where it was pleaded the law of a state in which note was executed was presumed to be identical with that of the state hearing the action, as to the effect of a contract of extension in releasing a surety.

§ S. D. 608, GARVIE v. GREENE, 70 N. W. 847.

Effect of motion to set aside service of summons.

Cited in *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591, holding motion to

quash service of summons did not extend the time for appearing or answering.

Limitations as meritorious defense.

Cited in Lilly-Brckett Co. v. Sonnemann, 157 Cal. 192, 106 Pac. 715, holding that statute of limitation is defense which may be set up after default is vacated; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381, holding one may be relieved from default to plead statute of limitations; Houts v. Bartle, 14 S. D. 322, 85 N. W. 591, holding it not an abuse of judicial discretion to permit the statute of limitations to be set up in an amended answer.

Cited in note in 61 L.R.A. 746, on right to open default judgment to let in defense of limitations.

9 S. D. 611, BUTLER v. ASH, 70 N. W. 833.

9 S. D. 614, CITIZENS' BANK v. CORKINGS, 63 AM. ST. REP. 891, 70 N. W. 1059.

Real party at interest.

Cited in Brannon v. White Lake Twp. 17 S. D. 83, 95 N. W. 284, holding party was entitled to maintain action in his own name as trustee of an express trust where he purchased a warrant for and with funds of his principal; Dewey v. Komar, 21 S. D. 117, 110 N. W. 90, holding reason for debtor's assignment of accounts matter of no concern to strangers.

Proceedings to dissolve attachments.

Cited in note in 123 Am. St. Rep. 1045, on proceedings to dissolve attachments.

9 S. D. 618, DIBBLE v. CASTLE CHIEF GOLD MIN. CO. 70 N. W. 1055.

Relocation of abandoned or forfeited mining claim.

Cited in note in 68 L.R.A. 847, on relocation of mining claim as abandoned or forfeited.

9 S. D. 623, KIRBY v. WESTERN WHEELED SCRAPER CO. 70 N. W. 1052.

Necessity for ascertaining agent's authority.

Cited in Fargo v. Cravens, 9 S. D. 646, 70 N. W. 1053, holding that one dealing with an assumed agent must ascertain at his peril the existence of the agency and the extent of the authority.

9 S. D. 625, MILES v. ARP, 70 N. W. 1050.

9 S. D. 628, STATE v. KING, 70 N. W. 1046.

Followed without special discussion in State v. Thornton, 10 S. D. 349, 41 L.R.A. 530, 73 N. W. 196.

Corroboration of accomplice.

Cited in State v. Levers, 12 S. D. 265, 81 N. W. 294, holding testimony

of accomplice that defendant suggested getting money from neighboring town not sufficiently corroborated by evidence that some of stolen property was found concealed in barn belonging to defendant's principal and that defendant told officer that accomplice was a thief and suggested to latter to pay for rig before spending money.

Witness not named in indictment.

Cited in *State v. Cambron*, 20 S. D. 282, 105 N. W. 241, holding state might use witness whose name did not appear on the indictment where name was not intentionally withheld from defense; *State v. Albertson*, 20 N. D. 512, 128 N. W. 1122, holding it not error to admit testimony of witnesses not indorsed on information; *State v. Matejousky*, 22 S. D. 30, 115 N. W. 96; *State v. Frazer*, 23 S. D. 304, 121 N. W. 790,—holding that witnesses whose names are not indorsed on information may be allowed to testify where not shown that witness was known to state's attorney when information was filed.

9 S. D. 634, NORTHWESTERN CORDAGE CO. v. GALBRAITH, 70 N. W. 1048.

Denials on information and belief.

Cited in notes in 133 Am. St. Rep. 122, as to when denials on information and belief are permissible; 30 L.R.A.(N.S.) 778, on denials upon information and belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge.

Evidence in trover and conversion.

Cited in note in 9 N. D. 633, on subject of pleading in actions for trover and conversion.

9 S. D. 636, ELDER v. HORSESHOE MIN. & MILL. CO. 62 AM. ST. REP. 895, 70 N. W. 1060, Later appeal in 15 S. D. 124, 102 Am. St. Rep. 681, 87 N. W. 586, 21 Mor. Min. Rep. 510.

Notice to heirs to contribute to assessment work on mine.

Reaffirmed on writ of error from second appeal in *Elder v. Horseshoe Min. & Mill. Co.* 194 U. S. 248, 48 L. ed. 964, 24 Sup. Ct. Rep. 643, holding notice to contribute to annual assessment work on mine was sufficient when addressed simply to "heirs" without name.

Proof of administration to fix heir's ownership.

Cited in *Mears v. Smith*, 19 S. D. 79, 102 N. W. 295, holding an heir could not recover on a note payable to his father without a showing that administration proceedings were at an end.

Abandonment and forfeiture of mining claims.

Cited in note in 87 Am. St. Rep. 408, on abandonment and forfeiture of mining claims.

9 S. D. 646, FARGO v. CRAVENS, 70 N. W. 1053.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 10 S. D.

10 S. D. 1, KING v. WAITE, 70 N. W. 1056.

10 S. D. 9, SHEARER v. HUTCHINSON COUNTY, 70 N. W. 1051.

10 S. D. 13, WYLLY v. GRIGSBY, 70 N. W. 1049.

When resulting trust arises.

Distinguished in *Luscombe v. Grigaby*, 11 S. D. 408, 78 N. W. 357, holding that an agent to foreclose a mortgage, who takes the title to the property himself, instead of the principal, holds the same in trust for the latter.

10 S. D. 16, STATE EX REL. ADAMS v. HERREID, 71 N. W. 319,
Decision on the merits in 10 S. D. 109, 72 N. W. 93.

Separate submission of constitutional amendments.

Cited in *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93, holding constitutional requirement that each amendment to constitution must be so submitted that it can be voted on separately one of substantial merit.

10 S. D. 18, SAWYER v. MAYHEW, 71 N. W. 141.

When mandamus will issue.

Cited in notes in 98 Am. St. Rep. 879, on mandamus as proper remedy against public officers; 125 Am. St. Rep. 520, on duties, performance of which may be compelled by mandamus.

10 S. D. 24, ROCHFORD v. FLEMING, 71 N. W. 317.

10 S. D. 30, KNOTT v. KIRBY, 71 N. W. 138.**10 S. D. 33, MORROW v. LETCHER, 71 N. W. 139.**

Review of order of trial court granting or refusing a new trial.

Cited in *Thomas v. Fullerton*, 13 S. D. 199, 83 N. W. 45; *Troy Mining Co. v. Thomas*, 15 S. D. 238, 88 N. W. 106,—holding that order granting new trial for insufficiency of the evidence will be disturbed only for the manifest abuse of discretion; *Rochford v. Albaugh*, 16 S. D. 628, 94 N. W. 701, holding that the granting of a new trial rests in the discretion of the trial court and its ruling will not be disturbed except for an abuse of discretion, and a stronger case is required to reverse an order granting a new trial, than in denying one.

Limited by *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589, holding that order granting new trial for insufficiency of evidence will be disturbed only for manifest abuse of discretion.

10 S. D. 35, BENEDICT v. SMITH, 71 N. W. 139.

Dismissal of appeal where no abstract or brief is filed.

Cited in *Giles v. Hawkeye Gold-Min. Co.* 11 S. D. 222, 76 N. W. 928; *Welch v. Synoground*, 17 S. D. 514, 97 N. W. 720; *Russell v. Deadwood Development Co.* 16 S. D. 644, 94 N. W. 693,—holding that where there are no briefs or abstracts filed on an appeal, it will be presumed that there are no questions upon which a decision is desired and the appeal will be dismissed; *Erickson v. Stevenson*, 21 S. D. 96, 110 N. W. 36; *State ex rel. Christianson v. Allison*, 21 S. D. 4, 108 N. W. 556,—affirming judgment because neither abstracts nor brief was filed by appellant.

10 S. D. 36, BOURNE v. JOHNSON, 71 N. W. 140.

Review of sufficiency of evidence to support findings or verdict.

Cited in *Parrish v. Mahany*, 10 S. D. 276, 66 Am. St. Rep. 715, 73 N. W. 97, holding sufficiency of evidence to justify referee's findings not reviewable on appeal from judgment alone; *Metzel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial; *Bank of Iowa & Dakota v. Price*, 12 S. D. 184, 80 N. W. 195, holding that sufficiency of evidence to sustain findings of the court will not be considered on appeal where appellant's abstract fails to show that any notice of motion for new trial was ever served, or that such a motion was ever made or argued, or that any order denying such a motion was ever made or entered; *Blackman v. Hot Springs*, 14 S. D. 497, 85 N. W. 996, holding sufficiency of evidence to justify findings not reviewable on appeal from judgment alone; *Reder v. Bellemore*, 16 S. D. 356, 92 N. W. 1065, holding that upon appeal from the judgment alone, it will be presumed in the absence of all testimony introduced on the trial, that the findings of the trial court are based upon sufficient evidence; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605,—holding that upon an appeal from the judgment alone entered before the motion for a new trial

is made, the sufficiency of the evidence to support the findings cannot be reviewed.

10 S. D. 38, KIRBY v. CIRCUIT CT. 71 N. W. 140, Later appeal as to costs in 10 S. D. 196, 72 N. W. 461.

10 S. D. 42, EDWARD THOMPSON CO. v. GUNDERSON, 71 N. W. 764.

Bailiff's presence with jury as ground for reversal.

Cited in *Williams v. Chicago & N. W. R. Co.* 11 S. D. 463, 78 N. W. 949, holding bailiff's entry of jury room on cold night to warm himself not ground for new trial where case was not discussed in his presence.

Affidavits of jurors to impeach their verdicts.

Cited in *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117, 1 A. & E. Ann. Cas. 268, 12 Am. Crim. Rep. 619, holding that affidavits of jurors cannot be received by the court to impeach their verdicts; *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527, holding affidavit of jurors that one juror was intoxicated during trial inadmissible to impeach verdict; *State v. Andre*, 14 S. D. 215, 84 N. W. 783, holding that affidavit of juror in criminal case as to misconduct of jury in use of intoxicating liquors cannot be used on motion for new trial to impeach the verdict.

Cited in note in 31 L.R.A.(N.S.) 930, 933, on admissibility of affidavit of juror to show misconduct outside jury room not inhering in verdict.

10 S. D. 44, LOVETT v. FERGUSON, 71 N. W. 765.

Legality of submission of constitutional amendment.

Followed in *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93, holding that method of proceeding by legislature in proposing, agreeing to, or submitting constitutional amendment to people is left largely to their discretion.

Cited in *McConaughy v. Secretary of State*, 106 Minn. 392, 119 N. W. 408, holding that whether a constitutional amendment has been legally submitted to, and adopted by, the people, is a judicial question to be determined by the courts; *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93, holding election on constitutional amendment not invalidated by noncompliance with statutory requirement for printing proposed amendment on each ticket on ballot.

Cited in note in 10 L.R.A.(N.S.) 153, on effect of noncompliance with prescribed method of amending constitution.

Right to declare constitutional amendment invalid on technical grounds.

Followed in *State ex rel. Adams v. Herried*, 10 S. D. 109, 72 N. W. 93, holding that action of legislature and will of people as expressed by vote on constitutional amendment should not be disregarded on purely technical grounds.

Dak. Rep.—60.

10 S. D. 58, AULTMAN M. & CO. v. BECKER, 71 N. W. 753.

Review of errors on appeal from judgment alone.

Cited in *Nowell v. International Trust Co.* 94 C. C. A. 589, 169 Fed. 497, holding that where the appeal is from the final decree alone, an order subsequently made denying the motion to set the decree aside, cannot be reviewed by the appellate court; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding that upon an appeal from the judgment alone, entered before the motion for a new trial is made, the sufficiency of the evidence to support the findings cannot be reviewed; *Parrish v. Mahany*, 10 S. D. 276, 66 Am. St. Rep. 715, 73 N. W. 97, holding sufficiency of evidence to justify referee's findings not reviewable on appeal from judgment alone.

**10 S. D. 60, TILLOTSON v. POTTER COUNTY, 71 N. W. 754.
Later appeal in 13 S. D. 460, 83 N. W. 623.**

Hiring assistants for county treasurer.

Cited in *Jacobson v. Ransom County*, 15 N. Dak. 69, 105 N. W. 1107, holding that the necessity for the hiring of clerks and the salaries to be paid them in assisting county treasurer, rests in the discretion of the county commissioners and their action will not be reviewed by the courts; *Tillotson v. Potter County*, 13 S. D. 460, 83 N. W. 623, holding that resolution by county commissioners for employment of deputy for county treasurer at specific salary does not authorize successor of such county treasurer to employ deputy at such salary unless clearly intended to apply to future treasurers.

10 S. D. 63, BELATTI v. PIERCE, 71 N. W. 755.**10 S. D. 64, HARDING v. NORWICH UNION F. INS. SOC. 71 N. W. 755.**

Who are general fire insurance agents.

Cited in *Vesey v. Commercial Union Assur. Co.* 18 S. D. 632, 101 N. W. 1074, holding that insurance agents authorized to solicit applications for fire insurance, write and deliver policies of insurance and to do any and all acts customary to be done by fire insurance agents, were general agents of the insurance company.

Acts of insurance agents as binding on company.

Cited in *Slobodisky v. Phoenix Ins. Co.* 53 Neb. 816, 74 N. W. 270, holding authority of insurance agents to waive, and waiver by them of, a cash payment of the premium on the policy in suit inferable where they had authority to countersign, issue, and deliver policies, and had for several years issued and delivered policies to the insured, keeping a running account of the same, settlements of which were made periodically, and the policy sued on was delivered in the same manner and credit given for the premium, payment of which was tendered and refused shortly after the fire; *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding erroneous statements in application for insurance, filed in by agent, who is on ground and in possession of facts, binding on com-

pany; *Fosmark v. Equitable F. Asso.* 23 S. D. 102, 120 N. W. 777, holding knowledge of soliciting agent authorized to solicit applications for insurance and receive premiums, binds company.

Parol evidence to vary insurance policies.

Cited in note in 16 L.R.A.(N.S.) 1225, on parol evidence rule as to varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

Right of jury to take pleadings to jury room.

Cited in *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1060, holding it reversible error to send the pleadings to the jury, where the allegations of the answer as to the settlement, all evidence of which was excluded, are apparently, if not actually, inconsistent with defendant's contention.

10 S. D. 71, ERICKSON v. SOPHY, 71 N. W. 758.

Evidence as to damages or amount of liability.

Cited in *Tenney v. Rapid City*, 17 S. D. 283, 96 N. W. 96, holding that in an action for personal injuries, a witness could not state a conclusion as to the amount of damages.

Review of order denying new trial.

Cited in *Magnusson v. Linwell*, 9 N. D. 154, 82 N. W. 746, refusing to disturb order denying motion for new trial based on insufficiency of the evidence where there is a substantial conflict in the evidence.

10 S. D. 74, CHURCH v. FOLEY, 71 N. W. 759.

When replevin is sustainable.

Cited in note in 80 Am. St. Rep. 746, as to when replevin or claim and delivery is sustainable.

Error in direction of verdict.

Cited in *Hirsch v. Schlenker*, 11 S. D. 289, 77 N. W. 106, holding that direction of verdict for one party will not be disturbed on appeal where both parties moved for direction.

10 S. D. 82, ANGIER v. WESTERN ASSUR. CO. 66 AM. ST. REP. 685, 71 N. W. 761.

Waiver of defects in proof of loss.

Cited in *Fosmark v. Equitable F. Asso.* 23 S. D. 102, 120 N. W. 777, holding defects in proof of loss waived by insurer receiving them without making objections.

Temporary increase of hazard as avoiding policy.

Cited in *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.* 76 S. C. 76, 10 L.R.A.(N.S.) 736, 121 Am. St. Rep. 941, 56 S. E. 654, 11 A. & E. Ann. Cas. 780, holding that a temporary increase of hazard did not avoid the policy where the increased risk had come to an end, and the loss occurred from another cause; *Williamsburg City F. Ins. Co. v. Weeks Drug Co.* — Tex. —, 31 L.R.A.(N.S.) 603, 132 S. W. 121, holding unsuccessful attempt to burn insured building coupled with failure to take ade-

quate measures to prevent second attempt or to notify insurer, not increase of hazard avoiding policy.

Cited in note in 66 Am. St. Rep. 692, 699, on what constitutes an increase of hazard.

Waiver of error in direction of verdict.

Cited in *Lindquist v. Northwestern Port Huron Co.* 22 S. D. 298, 117 N. W. 365, holding that joining in motion for directed verdict waived objection that evidence was conflicting and should have been submitted to jury.

10 S. D. 90, CHURCH v. WALKER, 72 N. W. 101.

Omissions in complaint as cured by allegations in answer.

Cited in *McMahon v. Polk*, 10 S. D. 296, 47 L.R.A. 830, 73 N. W. 77, holding a failure to state, in a contest of an election to the office of state's attorney, that the contestant is "learned in the law," cured by an allegation in the answer that the contestant was and still is legally qualified and acting state's attorney.

Marking and counting of ballots.

Cited in *Gainer v. Dunn*, 29 R. I. 239, 69 Atl. 851, holding that under a statute similar to the one in the leading case, where the voter had placed a mark in the circle after the party name, and a mark opposite the name of a candidate of another party, the vote should be counted for the candidates of the party marked, irrespective of the other individual mark.

Cited in note in 47 L.R.A. 819, 826, 837, on marking official ballot.

Distinguished in *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018, holding effect of cross mark in square at head of party ticket claimed to include all candidates nullified to extent of particular candidates of their parties for whom voter has signified intention of voting by placing marks against their names.

10 S. D. 98, CITIZENS' BANK v. CORKINGS, 72 N. W. 99.

Reference to complaint to aid attachment affidavit.

Cited in *Germantown Trust Co. v. Whitney*, 19 S. D. 108, 102 N. W. 304, holding that where the affidavit for attachment stated in effect that the plaintiff was the duly authorized administrator under the laws of a foreign state, the complaint may be referred to, where there is a specific allegation therein to that effect, to sustain the attachment proceeding.

Materiality of reasons for creditor's assigning claims.

Cited in *Dewey v. Komar*, 21 S. D. 117, 110 N. W. 90, holding reasons for assignment of claims by foreign corporation, immaterial in action against debtor.

10 S. D. 103, STATE v. FINDER, 72 N. W. 97, Reversed on rehearing in 12 S. D. 423, 81 N. W. 959.

Jurisdiction of misdemeanors.

Cited in *State v. Russell*, 18 N. D. 357, 121 N. W. 918, to point that district court has original jurisdiction of misdemeanors.

10 S. D. 109, STATE EX REL. ADAMS v. HERRIED, 72 N. W. 93.

Entries of constitutional amendments in the legislative journals.

Cited in *West v. State*, 50 Fla. 154, 39 So. 412, holding that in the absence of a mandatory provision of the Constitution requiring constitutional amendments to be entered in the journals of both houses, an amendment which is published and submitted to the vote of the people and adopted by a majority of them is valid though not entered in both journals; *People ex rel. Kent County v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 A. & E. Ann. Cas. 751, holding that the publication of the amendment to the Constitution in the journal of the house, together with the amendments thereto as finally approved, and in the journal of the senate in full as approved, is a sufficient compliance with the Constitution requiring it to be entered in both journals; *State ex rel. Bailey v. Brookhart*, 113 Iowa, 250, 84 N. W. 1064, holding that under Iowa Const. art. 10, § 1, requiring that a proposed amendment of the Constitution shall be entered on the journals of both houses of the general assembly, said amendment must be so entered in full, in both houses.

Submission of constitutional amendment upon two subjects as one amendment.

Cited in *People ex rel. Elder v. Sours*, 31 Colo. 369, 102 Am. St. Rep. 34, 74 Pac. 167, holding that a constitutional amendment providing for the consolidation of the city and county governments of the city of Denver and of the county of Arapahoe within the limits of the city into one government, etc., could be submitted as one amendment; *Lobaugh v. Cook*, 127 Iowa, 181, 102 N. W. 1121, holding that an amendment providing for biennial elections and that certain state, county, and other officers should be elected in a certain year, and the rest in another year, and providing that the legislature should change the law to comply with the amendment, was on one subject to be submitted as one amendment; *Gabbert v. Chicago, R. I. & P. R. Co.* 171 Mo. 84, 70 S. W. 891, holding that a constitutional amendment to the effect that in courts not of record, two-thirds of the jury may render a verdict, and in courts of record, three-fourths of the jury, is upon one subject only and need not be submitted as two amendments; *McBee v. Brady*, 15 Idaho, 761, 100 Pac. 97, holding that an amendment to the Constitution abolishing the probate courts, and extending the jurisdiction of the district courts to probate matters, and to provide for the election and salaries of the judges, and for the terms of the court and districts, contained more than one subject which should have been submitted separately.

Distinguished in *State ex rel. McClurg v. Powell*, 77 Miss. 543, 48 L.R.A. 652, 27 So. 927, holding that a proposed constitutional amendment providing in one proposition for the election of all judges, and fixing their terms of office, as well as for the division of the state into circuit and chancery court districts, with party nominations by districts, while it proposes to repeal separate sections of the Constitution which severally relate to the several subjects involved in the amendment—is void for lack of conformity to § 273, requiring amendments to be submitted in

such manner and form that the people may vote for or against each amendment separately.

10 S. D. 122, RUST-OWEN LUMBER CO. v. WELLMAN, 72 N. W. 89.

10 S. D. 127, STATE v. SEXTON, 72 N. W. 84.

Medical works as evidence.

Cited in *Brady v. Shirley*, 14 S. D. 447, 85 N. W. 1002, holding works of veterinary surgeon inadmissible to show age of horse by its teeth.

Disregarding testimony of witness because false in part.

Cited in *Simpson v. Miller*, 57 Or. 61, 29 L.R.A.(N.S.) 680, 110 Pac. 485, holding that mistaken falsity as to part of testimony does not authorize distrust of entire testimony.

Objection to evidence as incompetent and immaterial.

Cited in *Dillard v. Olalla Min. Co.* 52 Or. 126, 96 Pac. 678, questioning sufficiency of objection to the admissibility of the evidence that it was irrelevant, incompetent and immaterial where the real ground was hearsay.

10 S. D. 132, BARTON v. NORTHERN ASSUR. CO. 72 N. W. 86.

Followed without discussion in *Bartow v. Royal Ins. Co.* 10 S. D. 275, 72 N. W. 1135.

Sufficiency of verdict or findings.

Cited in *Wilson v. Commercial Union Ins. Co.* 15 S. D. 322, 89 N. W. 649, holding that verdict must in form pass on all issues either in form of general or special verdict; *Taylor v. Vandenberg*, 15 S. D. 490, 90 N. W. 142, reversing a judgment by the trial court in an action without a jury when the court omitted to make findings upon issues raised by the pleadings, although expressly requested so to do, and even though it was clear to the appellate court that there was evidence from which the trial court could have made findings in support of its judgment.

Cited in note in 24 L.R.A.(N.S.) 11, 18, 25, on what special verdict must contain.

Sufficiency of denial upon information and belief.

Cited in note in 30 L.R.A.(N.S.) 778, on denials upon information and belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge.

10 S. D. 141, FELKER v. GRANT, 72 N. W. 81.

Necessity of showing affirmative error to secure reversal.

Cited in *State v. Clifford*, 59 W. Va. 1, 52 S. E. 981, holding that in order that the refusal of the trial court to permit a witness to answer a question, where the question, the facts and circumstances already in evidence, all show its relevancy, the expected answer must be shown by the record.

Foreclosure without compliance with statute, as conversion.

Cited in *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372, holding foreclosure of chattel mortgage without substantial compliance with statute, conversion, and lien is extinguished.

Evidence in trover and conversion.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

10 S. D. 148, DAVEY v. FIRST NAT. BANK, 72 N. W. 83.**Effect of usury by national bank.**

Cited in note in 56 L.R.A. 702, 703, on forfeiture or other effect of taking or reserving illegal interest by national bank.

10 S. D. 150, BAXTER v. O'LEARY, 66 AM. ST. REP. 702, 72 N. W. 91.**Confirmation of sale on execution.**

Cited in *Crouch v. Dakota, W. & M. R. Co.* 18 S. D. 540, 101 N. W. 722, holding that the order confirming an execution sale settles no question of fact or proposition of law as against the owner of the property sold, and if the report of sale is regular on its face, it is the duty of the court to confirm the sale.

Failure to file report as invalidating foreclosure sale.

Distinguished in *Edmonds v. Riley*, 15 S. D. 470, 90 N. W. 139, holding invalid a foreclosure of a chattel mortgage under Dak. Laws 1889, chap. 26, § 7, where the report of the sale has not been filed in the office of the register of deeds.

Objection to title by purchaser at judicial sale.

Cited in note in 135 Am. St. Rep. 925, as to whether, when, and how a purchaser at a judicial sale may object to title.

10 S. D. 156, STATE EX REL. GRIGSBY v. BUECHLER CO. 72 N. W. 114.**Validity of act regulating and licensing the sale of intoxicating liquors.**

Followed in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, sustaining validity of act in question in leading case which was an act to regulate the sale of intoxicating liquors.

Act licensing sale of intoxicating liquors by traveling men as a police regulation.

Cited in *Delamater v. South Dakota*, 205 U. S. 104, 51 L. ed. 731, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733 (affirming 20 S. D. 23, 8 L.R.A.(N.S.) 774, 129 Am. St. Rep. 907, 104 N. W. 537), holding that the statute of South Dakota imposing a license tax upon traveling salesmen selling intoxicating liquors in quantities of less than five gallons, is a

police regulation and not a taxing law, and is valid as applied to interstate commerce.

Recovery back of voluntary payment.

Cited in note in 94 Am. St. Rep. 439, on recovery back of voluntary payment.

10 S. D. 165, NIBLACK v. CHAMPENY, 72 N. W. 402.

Extending time of payment of note.

Cited in Brenneke v. Smallman, 2 Cal. App. 306, 83 Pac. 302, holding that a note is not extended past maturity by accepting the interest in advance to some future date, since the instrument can only be altered by a contract in writing; Windhorst v. Bergendahl, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544, holding payment of accrued interest and execution of new note sufficient consideration for extension to discharge nonassenting sureties.

Cited in notes in 53 L.R.A. 317, on effect of usury in consideration for extension of time to principal on surety's liability; 21 Eng. Rul. Cas. 661, on extension of time to relieve surety.

10 S. D. 167, FIRST NAT. BANK v. PEAVY ELEVATOR CO. 72 N. W. 402.

Right of bank to engage in business.

Cited in note in 27 L.R.A.(N.S.) 244, on right of bank to engage in business to save debt.

Sufficiency of description in account filed to perfect seed lien.

Cited in Schouweiller v. McCaull, 18 S. D. 70, 99 N. W. 95, holding that the description in the written account filed to complete a lien on crops for seed furnished may include one or more tracts of land in the county and the account need not state the precise number furnished and sown upon any one tract.

10 S. D. 171, LONDON & L. INS. CO. v. HOLT, 72 N. W. 403.

Alteration of contract as release of sureties on bond.

Cited in Friendly v. National Surety Co. 46 Wash. 71, 10 L.R.A.(N.S.) 1160, 89 Pac. 177, holding that a change of the persons composing the firm, without the consent of the sureties on the bond of the firm, released the sureties.

Cited in note in 42 L. ed. U. S. 990, on indemnity bonds.

10 S. D. 175, LAWRENCE COUNTY v. MEADE COUNTY, 72 N. W. 405.

County warrants as increasing county indebtedness.

Cited in Bryan v. Menefee, 21 Okla. 1, 95 Pac. 471, holding that warrants issued for the payment of debts, where the money is already in the treasury or where a valid tax levy has been made for the payment of such warrants, do not increase the indebtedness of the county so as to be invalid as increasing the indebtedness beyond the legal limits; Harling v.

Taylor, 7 N. D. 538, 75 N. W. 766, holding valid, warrant of county treasurer issued for current expenses of the county after reaching debt limit but in anticipation of collecting tax deed levied; Chicago & N. W. R. Co. v. Faulk County, 15 S. D. 501, 90 N. W. 149, holding that county warrants drawn upon designated funds in anticipation of uncollected revenue are not debts in such sense as to authorize their inclusion in a levy to provide a sinking fund under S. D. Laws 1897, chap. 28, § 71, to meet interest on "all outstanding debts;" Lake County v. Keene Five-Cents Sav. Bank, 47 C. C. A. 464, 108 Fed. 505, holding that a county whose indebtedness exceeds the constitutional limitation may issue valid warrants for current expenses against taxes levied to pay those expenses; Johnson v. Pawnee County, 7 Okla. 686, 56 Pac. 701, holding it not a sufficient defense, in a suit involving the validity of county warrants issued to meet current expenses, that at the date the warrants were issued the county was indebted beyond the prescribed limit, but it must affirmatively appear that no taxes had been provided for their payment when the warrants were issued; Williamson v. Aldrich, 21 S. D. 13, 108 N. W. 1063, to point that execution and exchange of refunding bonds for equal amount of valid outstanding indebtedness does not operate to increase city's liability.

10 S. D. 178, BANK OF SCOTLAND v. BLISS, 72 N. W. 406.

Review of order continuing or dissolving temporary injunction.

Cited in State ex rel. Dakota Cent. Teleph. Co. v. Huron, 23 S. D. 153, 120 N. W. 1008, holding restraining order not reversible except for manifest abuse of discretion; Clark v. Deadwood, 22 S. D. 233, 18 L.R.A. (N.S.) 402, 117 N. W. 131, holding that the dissolution or continuance of a temporary injunction rests in the discretion of the trial court and will not be disturbed on appeal except for an abuse of discretion.

10 S. D. 180, BUELL v. BOYLAN, 72 N. W. 406.

Interpretation of tax laws.

Cited in State v. Western U. Telég. Co. 96 Minn. 13, 104 N. W. 567, on the rule for the interpretation of tax laws.

10 S. D. 182, STATE v. TAYLOR, 66 AM. ST. REP. 707, 72 N. W. 407.

Release of sureties on official bonds.

Cited in note in 90 Am. St. Rep. 199, as to when official bond binds sureties and what irregularities fail to relieve them from liability.

10 S. D. 188, SWENSON v. CHRISTOFERSON, 66 AM. ST. REP. 712, 72 N. W. 459, Later appeal as to costs in 10 S. D. 342, 73 N. W. 96.

Liability of ministerial officers.

Cited in McFarland v. Schuler, 12 S. D. 83, 80 N. W. 161, holding that no cause of action exists against the sheriff for refusing to sell on execution property belonging to a third person.

Cited in note in 95 Am. St. Rep. 105, on liability of ministerial officers for nonperformance and misperformance of official duties.

10 S. D. 191, ST. PAUL F. & M. INS. CO. v. DAKOTA LAND & LIVE STOCK CO. 72 N. W. 460.

Right to maintain more than one action for mortgage debt.

Cited in *Bennett v. Ellis*, 13 S. D. 401, 83 N. W. 429, sustaining right to maintain more than one action for recovery of debt secured by mortgage.

10 S. D. 196, KIRBY v. CIRCUIT CT. 72 N. W. 461.

Costs in extraordinary proceedings.

Cited in *Coffey v. Gamble*, 134 Iowa, 754, 94 N. W. 936, holding that ordinarily costs in certiorari are to be taxed against the party procuring the order adjudged to be illegal to be entered and if not a party to the action he may be brought in for that purpose; *State ex rel. Howells v. Metcalf*, 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923, holding that in an action for mandamus to compel the county auditor to place the names of certain candidates upon the ballot, if the relator is entitled to have his name so placed upon the ballot, he is entitled to recover his taxable disbursements but no statutory costs.

Remedy for wrongful allowance of costs.

Cited in *Re Kirby*, 10 S. D. 414, 39 L.R.A. 859, 73 N. W. 907, holding the appropriate remedy, in case one is aggrieved by a judgment for costs in the supreme court, a motion to modify the judgment, instead of an appeal from their taxation.

10 S. D. 198, AXIOM MIN. CO. v. WHITE, 72 N. W. 462.

Followed without discussion in *Axiom Min. Co. v. Little*, 10 S. D. 343, 73 N. W. 1103.

Burden of proving forfeiture of mining claim.

Cited in *McCulloch v. Murphy*, 125 Fed. 147, holding that the burden of proving a forfeiture of a mining claim because of the failure of the original locator to have work performed or the required improvements made, rests upon the person asserting the forfeiture.

Cited in note in 87 Am. St. Rep. 411, 413, 414, on abandonment and forfeiture of mining claims.

New trial because of newly discovered evidence.

Cited in *Hahn v. Dickinson*, 19 S. D. 373, 103 N. W. 642, holding that the order of the trial court denying a motion for new trial on the grounds of newly discovered evidence, will not be disturbed where such evidence is merely cumulative and no excuse is made for its nonproduction; *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding denial of new trial for newly discovered evidence which only goes to discredit or impeach witness, proper; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150, holding denial of new trial for newly discovered evidence proper where second time would probably not result differently; *Larson v. Dutiel*, 14 S.

D. 476, 85 N. W. 1006, holding that finding by court will not be disturbed on appeal unless clearly against the preponderance of evidence.

10 S. D. 203, ACME MERCANTILE AGENCY v. ROCHFORD, 66 AM. ST. REP. 714, 72 N. W. 466.

Presumption of admission of foreign corporations to do business.

Cited in *T. H. Rogers Lumber Co. v. McRea*, 7 Ind. Terr. 468, 104 S. W. 803, holding that the presumption is in favor of a compliance with the law, and a foreign corporation need not aver, and need not prove where the question is not raised by the answer, a compliance with the statute requiring it to appoint a resident agent; *State use of Hart-Parr Co. v. Robb-Lawrence Co.* 15 N. D. 55, 106 N. W. 406, holding that in an action by a foreign corporation the complaint need not allege a compliance with the statute governing its admission to the state to do business, but such noncompliance must be pleaded as a defense; *Kelley v. R. J. Schwab & Sons Co.* 22 S. D. 406, 118 N. W. 696, holding that objection that foreign corporation has not complied with statute authorizing it do do business must be pleaded.

10 S. D. 205, LANDAUER v. SIOUX FALLS IMPROVEMENT CO. 72 N. W. 467.

Application of statute of limitations to sealed instruments.

Cited in *Gibson v. Allen*, 19 S. D. 617, 104 N. W. 275, holding that the statute abolishing the distinction between sealed and unsealed instruments, applies in all cases except in regard to the application of the statute of limitations to sealed instruments.

Cited in note in 126 Am. St. Rep. 369, on effect of abolition of distinction between sealed and unsealed instruments.

Burden of proving good faith in purchase of note negotiated by fraud.

Cited in *Bank of Spearfish v. Graham*, 16 S. D. 49, 91 N. W. 340; *McGill v. Young*, 16 S. D. 360, 92 N. W. 1066; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 A. & E. Ann. Cas. 665,—holding that the burden is upon the holder of a note, which has been negotiated in fraud of the maker, to prove that he is a bona fide holder without notice of the fraud in the negotiation; *Cosgrove v. Fanebust*, 10 S. D. 213, 72 N. W. 469, holding the burden of proof on the makers of a note drawn on a printed blank to show that a provision as to the rate of interest at maturity, written immediately under the last printed line, was placed thereon after the signing and delivery of the note; *Jamison v. McFarland*, 10 S. D. 574, 74 N. W. 1033, holding burden of proving purchase in good faith for value before maturity on transferee of note deposited in escrow and delivered without authority or consideration; *Dunn v. National Bank*, 11 S. D. 305, 77 N. W. 111, holding that plaintiff in action on certificate of deposit transferred to him by one obtaining sum from payee in gambling transaction has burden of proving good faith and payment of value; *Kirby v. Berguin*, 15 S. D. 444, 90 N. W. 856, holding

burden of proving purchase for value before maturity in good faith without notice imposed on indorsee by proof that note was obtained by fraud; *Mee v. Carlson*, 22 S. D. 365, 29 L.R.A.(N.S.) 351, 117 N. W. 1033; *Rockford v. Barrett*, 22 S. D. 83, 115 N. W. 522,—holding that holder of note has burden of proving that he is bona fide holder where fraud in obtaining note is established; *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31, to point that burden of proving good faith is upon purchase when fraud in inception of transaction is shown.

Cited in notes in 22 L.R.A.(N.S.) 719, as to whether fact that negotiable instrument was, contrary to agreement, transferred before happening of a certain contingency, imposes burden of showing bona fides upon holder: 86 Am. St. Rep. 83, on unauthorized alteration of written instruments.

Unauthorized delivery of note as defense available to maker.

Cited in *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567, holding unauthorized delivery of note by payee's agent not available to makers as defense to action thereon by innocent purchaser.

10 S. D. 213, COSGROVE v. FANEBUST, 72 N. W. 469.

Presumption of fraud or alteration of written instrument.

Cited in *Northwestern Mortg. Trust Co. v. Leitzow*, 23 S. D. 562, 122 N. W. 600, holding that erasure in tax deed will be presumed to have been made prior to or contemporaneous with execution thereof; *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140, holding that the interlineation of the words "or order" at the proper place in a promissory note does not raise a presumption of fraud or alteration of the note after delivery, when there is nothing in the appearance of the note indicating that it was not made at the time the note was made or delivered.

Cited in note in 86 Am. St. Rep. 128, on unauthorized alteration or written instruments.

10 S. D. 216, SALMER v. LATHROP, 72 N. W. 570.

Sufficiency of tax deed to start statute of limitations in operation.

Cited in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding that a tax deed which does not substantially comply with the form prescribed by the statute is not evidence of a valid tax sale and does not set in operation the statutes of limitation which bars actions to set aside tax sales, without adverse possession; *Horswill v. Farnham*, 16 S. D. 414, 92 N. W. 1082, holding that the provisions of the statute limiting the time of commencement of action for the recovery of land sold for taxes to three years after the recording of the deed, does not run in favor of a deed void upon its face; *Batelle v. Knight*, 23 S. D. 161, 120 N. W. 1102, 20 A. & E. Ann. Cas. 456, holding that limitations do not run in favor of recorded tax deed void on its face; *Matthews v. Blake*, 16 Wyo. 116, 27 L.R.A.(N.S.) 339, 92 Pac. 242, holding that a tax deed void upon its face is not color of title sufficient to start in operation the six year statute of limitations.

Cited in note in 27 L.R.A.(N.S.) 348, 349, 355, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes.

Tender of payment of taxes paid as a condition precedent to suit to set aside tax deed.

Cited in *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212, holding that where the taxes for which the sale had been made had not been assessed, and the tax sale was adjudged void and the parties entitled to the sums they had paid as taxes since the sale, no tender of the amounts paid by the defendants was necessary before bringing suit.

Allowance of interest in actions to set aside tax deeds.

Cited in *Cornelius v. Ferguson*, 16 S. D. 113, 91 N. W. 460, holding that where the tax sale is invalid, it is proper to allow only the legal rate of interest on the amount paid, though a statute provides that a person bidding in property at a tax sale should be entitled to thirty per cent interest.

Conveyances to or by persons under erroneous names.

Cited in *Chapman v. Tyson*, 39 Wash. 523, 81 Pac. 1066, holding that a conveyance to and by a person under an assumed name passes title.

10 S. D. 228, LINDSAY v. PETTIGREW, 72 N. W. 574.

Remarks of counsel as ground for reversal.

Distinguished in *Kirby v. Berguin*, 15 S. D. 444, 90 N. W. 856, holding statement by defendant's counsel in action on lightning rod note transferred to plaintiff that he did not believe latter had any of the swindler's lightning rods on any of his houses not ground for reversal.

10 S. D. 234, GILLESPIE v. EVANS, 72 N. W. 576.

10 S. D. 239, ADAMS v. GRAND ISLAND & W. C. R. CO. 72 N. W. 577, Modified on rehearing in 12 S. D. 424, 81 N. W. 960.

Loes of mechanic's lien.

Cited in *Congdon & H. Hardware Co. v. Grand Island & W. C. R. Co.* 14 S. D. 575, 86 N. W. 633, holding right to lien by one furnishing supplies to subcontractor if used in building railroad, lost by failure to file lien within sixty days after materials are furnished where subcontractor had been fully paid though amount in excess of lien is still due proper contractor.

10 S. D. 249, RE HOUSE RESOLUTION NO. 30, 72 N. W. 892.

10 S. D. 253, STODDARD MFG. CO. v. MATTICE, 72 N. W. 891.

Collateral attack on judgment.

Cited in *Hoffman v. Pack*, 123 Mich. 74, 81 N. W. 934, holding that a tax deed cannot be defeated in a collateral proceeding, by the fact that there is on file no proof of publication of the petition and notice of sale, when it appears from uncontradicted testimony that such proof was duly filed, but has since been lost or mislaid; *Stearns v. Wright*, 13 S. D. 544, 83 N. W. 587, holding that judgment of court of general jurisdiction will

not on collateral attack be presumed invalid because record does not affirmatively show service, waiver or appearance.

Running of limitations against action on judgment.

Cited in *Osborne v. Lindstrom*, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72, holding that the provision of the North Dakota statute that no action shall be commenced on a judgment within nine years after its rendition, without notice and leave of the court, does not prevent the running of the statute of limitations.

10 S. D. 256, KIDDER v. AARON, 72 N. W. 893.

10 S. D. 259, MORRIS v. HUBBARD, 72 N. W. 894.

Presumption that laws of foreign state are same as local laws.

Cited in *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255; *Foss v. Petterson*, 20 S. D. 93, 104 N. W. 915; *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89,—holding that in the absence of evidence to the contrary, it will be presumed that the laws of a foreign state are the same as the local laws; *Kephart v. Continental Casualty Co.* 17 N. D. 380, 116 N. W. 349, holding that a defense that the contract sued upon is a foreign contract and void under the laws of the state where made, is unavailing where there is no allegations or proof as to what the laws of such state were.

Cited in notes in 113 Am. St. Rep. 870, 871, 878, on proof of foreign laws and their effect; 67 L.R.A. 53, on how case determined when proper foreign law not proved.

10 S. D. 263, WRIGHT v. LEE, 72 N. W. 895.

Former decision as the law of the case.

Cited in *Parker v. Randolph*, 10 S. D. 402, 73 N. W. 906, holding that questions decided on appeal will not ordinarily be reversed on later appeal where facts are substantially the same; *Cranmer v. Kohn*, 11 S. D. 245, 76 N. W. 937, holding objection to introduction of evidence on ground that complaint does not state a cause of action properly overruled where same question was decided in plaintiff's favor on former appeal; *Sherman v. Port Huron Engine & Thresher Co.* 13 S. D. 95, 82 N. W. 413; *State v. Ruth*, 14 S. D. 92, 84 N. W. 394,—holding that law announced on first appeal will even though erroneously stated be adhered to on second appeal in same action; *Dunn v. National Bank*, 15 S. D. 454, 90 N. W. 1045, holding that decision on former appeal determines law of the case at all subsequent stages where no new issues are introduced; *First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646, holding that in so far as the record made at the former trial in no way differs from that before the court upon a second appeal, the questions there decided have become the law of the case; *Waterhouse v. Jos. Schlitz Brewing Co.* 16 S. D. 592, 94 N. W. 587, holding that a decision upon a former appeal as to the sufficiency of the complaint becomes the law of the case which cannot be questioned upon a second appeal.

Amendment of record by Supreme Court.

Cited in *Jones v. Sioux Falls*, 18 S. D. 477, 101 N. W. 43, holding that as the Supreme Court is without jurisdiction to change the record certified on appeal, it can neither grant amendment nor determine whether the prevailing party may rightfully insist upon having the bill of exceptions contain certain matters.

Distinguished in *Nelson v. Jordeth*, 18 S. D. 30, 82 N. W. 90, holding that application to have copy of tax deed annexed to bill of exceptions as an exhibit will be granted where record shows that it was offered and received in evidence and that the court understood when certifying that bill of exceptions contained all the evidence offered that such deed was a part of the bill of exceptions.

10 S. D. 271, HITCHCOCK v. STATE INS. CO. 72 N. W. 898.**Waiver of proofs of loss.**

Cited in *Providence Washington Ins. Co. v. Wolf*, 168 Ind. 690, 120 Am. St. Rep. 395, 80 N. E. 26; *Prussian Nat. Ins. Co. v. Peterson*, 30 Ind. App. 289, 64 N. E. 102,—holding that where immediately after the fire the company sent its adjuster and he after an examination, of the facts, made an offer of settlement, the failure to furnish proof of loss as required by the policy, is waived; *Fosmark v. Equitable F. Asso.* 23 S. D. 102, 120 N. W. 777, holding defects in proof of loss, waived by insurer receiving them without making objections.

10 S. D. 275, BARTOW v. ROYAL INS. CO. 72 N. W. 1135.**10 S. D. 276, PARRISH v. MAHANY, 66 AM. ST. REP. 715, 73 N. W. 97, Modified on rehearing in 12 S. D. 278, 76 Am. St. Rep. 604, 81 N. W. 295, Related case in 15 S. D. 134, 87 N. W. 584.****Omissions by register as affecting sufficiency of title record.**

Cited in *Shelby v. Bowden*, 16 S. D. 531, 94 N. W. 416, holding that if the record of a deed or mortgage be defective, it is constructive notice of what the instrument contains, so that a foreclosure by advertisement, of a mortgage containing a power of sale is valid though the clerk in transcribing it for record omitted the power of sale from the record; *Citizens' Bank v. Shaw*, 14 S. D. 197, 84 N. W. 779, holding no rights affected by the mistake of the register of deeds in recording a satisfaction of a mortgage, unless a party is actually misled by the mistake; *Schouweiller v. McCaull*, 18 S. D. 70, 99 N. W. 95, holding that acts of the official in recording an account filed for a seed lien, cannot prejudice the rights of the lienor.

Cited in note in 96 Am. St. Rep. 399, on effect of defective recording of legal instruments on rights of third persons.

Review of sufficiency of evidence to support verdict.

Cited in *Bank of Iowa and Dakota v. Price*, 12 S. D. 184, 80 N. W. 195, holding that sufficiency of evidence to sustain findings of the court will

not be considered on appeal where appellant's abstract fails to show that any notice of motion for new trial was ever served, or that such a motion was ever made or argued, or that any order denying such a motion was ever made or entered; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial; *Blackman v. Hot Springs*, 14 S. D. 497, 85 N. W. 996, holding sufficiency of evidence to justify findings not reviewable on appeal from judgment alone; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605,—holding that upon appeal from the judgment alone, entered before the motion for a new trial is made, the sufficiency of the evidence to support the findings cannot be reviewed.

10 S. D. 286, STOKES v. GREEN, 73 N. W. 100.

Contemporaneous contracts as aid in construction.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding contemporaneous contracts, closely related thereto, admissible to explain contract of guaranty.

Effect of filing excessive mechanic's lien.

Cited in note in 29 L.R.A.(N.S.) 313, on effect of filing excessive mechanics' lien.

10 S. D. 290, CHAMBERLAIN v. HEDGER, 73 N. W. 75.

Consideration of verbal stipulations.

Cited in *Kaslow v. Chamberlain*, 17 N. D. 449, 117 N. W. 529, holding that courts cannot take jurisdiction to hear a motion for a new trial on a verbal agreement, which is denied by one of the parties.

Appeal from order not entered by trial court.

Followed in *Martin v. Smith*, 11 S. D. 437, 78 N. W. 1001; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181,—holding that appeal will not lie until judgment or order sought to be appealed from has been entered as a permanent record of the trial court.

Cited in *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding that an appeal cannot lie from an order denying a new trial until such order has been attested by the clerk.

10 S. D. 294, PARKSTON v. HUTCHINSON COUNTY, 73 N. W. 76.

10 S. D. 296, McMAHON v. POLK, 47 L.R.A. 830, 73 N. W. 77.

Counting of ballots.

Cited in *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153, holding that where the voter placed a mark before the name of every candidate of two parties, and crossed out all the candidates of the other parties, the ballot could not be counted, though there were candidates on one ticket who had no opposition on the others; *Church v. Walker*, 10 S. D. 450, 74 N. W. 198, holding that ballot should not be excluded because in addition to cross made with official stamp of circle at head of party ticket there is

also a cross made by lead pencil outside circle at head of same ticket; **Moody v. Davis**, 13 S. D. 86, 82 N. W. 419, holding that ballot marked by cross in circle at head of ticket which contains only name of candidate for county commissioner and also on circle head of other ticket containing names of other candidates for supreme court judges but not candidate for county commissioner cannot be counted.

Residents on Federal reservations as voters.

Cited in *State ex rel. Lyle v. Willett*, 117 Tenn. 334, 97 S. W. 299, holding that the inmates of the National Soldiers' Home could not acquire the right to vote at the place where such Home was located.

10 S. D. 306, STATE USE OF PERKINS v. BARNES, 73 N. W. 80.

Discharge of sureties on official bond.

Cited in note in 90 Am. St. Rep. 198, as to when official bond binds sureties and what irregularities fail to relieve them from liability.

Validity of assignment of future salary of public officer.

Cited in *First Nat. Bank v. State ex rel. O'Brien*, 68 Neb. 482, 94 N. W. 633, 4 A. & E. Ann. Cas. 423, holding that the assignment of the salary or fees of a public officer, to be earned in the future is void as against public policy; *Serrill v. Wilder*, 77 Ohio St. 343, 14 L.R.A.(N.S.) 982, 83 N. E. 486, holding that an agreement between a public officer and the sureties upon his bond that in consideration of their becoming his sureties, he would apply his salary in excess of a certain amount to the payment of an obligation for which they were both jointly liable, was void as against public policy.

Cited in note in 5 L.R.A.(N.S.) 567, on validity of assignment of future wages or salary.

10 S. D. 312, SEARLE v. LEAD, 39 L.R.A. 345, 73 N. W. 101.

Appeal from taxation of costs in 10 S. D. 405, 73 N. W. 913.

Recovery for property taken or damaged for public use.

Cited in *Griswold v. Minneapolis, St. P. & S. Ste. M. R. Co.* 12 N. D. 435, 102 Am. St. Rep. 572, 97 N. W. 538, to point that franchise to use streets does not authorize occupancy thereof without first compensating abutting owners; *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441, holding that the abutting owners on a highway are entitled to compensation for the erection of telephone poles in the highway; *Chicago, M. & St. P. R. Co. v. Brink*, 16 S. D. 644, 94 N. W. 422, holding that in the condemnation of land for a railroad, the owner is entitled not only to compensation for the land taken but for the damage to the remainder because of such taking.

Cited in note in 109 Am. St. Rep. 911, on what constitutes "damage" to property within provision that property shall not be taken or damaged for public use without compensation.

— Injuries by grading streets.

Cited in *Less v. Butte*, 28 Mont. 27, 61 L.R.A. 601, 98 Am. St. Rep. 545, 72 Pac. 140; *Sallden v. Little Falls*, 102 Minn. 358, 13 L.R.A.(N.S.) 790, Dak. Rep.—61.

120 Am. St. Rep. 635, 113 N. W. 884,—holding that a property owner is entitled to damages for injuries from the improvement of a street in conformity with the first grade established; *Whittaker v. Deadwood*, 12 S. D. 608, 82 N. W. 202, sustaining right of abutting owner to recover for injury due to change of street grade regardless of former establishment of grade by legal ordinance; *Kimball v. Salt Lake City*, 32 Utah, 253, 10 L.R.A.(N.S.) 483, 125 Am. St. Rep. 859, 90 Pac. 395, holding cities liable for injuries to property resulting from a change of grade of streets, though the grade as first established was never carried into effect but was followed more or less by property owner.

Cited in note in 7 L.R.A.(N.S.) 109, on damage to abutting owner by first grading and improvement of street.

—Injunction till payment be made.

Cited in *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441, holding that the placing of telephone poles upon the streets of a city under a franchise therefor, could not be done until compensation to the abutting owners had been made or secured, and this would be protected by injunction; *Griswold v. Minneapolis*, St. P. & S. Ste. M. R. Co. 12 N. D. 435, 102 Am. St. Rep. 572, 97 N. W. 538, on the necessity of first making, or securing compensation before taking land by eminent domain; *Edwards v. Thrash*, 26 Okla. 472, 138 Am. St. Rep. 975, 109 Pac. 832, holding that injunction does not generally lie at instance of abutting owner to restrain improvement of street until such owner is compensated for damages arising from change of grade.

Constitutional provisions as selfexecuting or prohibitive.

Distinguished in *State v. Bradford*, 12 S. D. 207, 80 N. W. 143, holding constitutional provision that manufacture and sale of intoxicating liquors shall be under exclusive state control and conducted by authorized agents of state and that the purity of all liquors shall be established not self-executing nor prohibitive.

10 S. D. 322, RE KIRBY, 39 L.R.A. 856, 73 N. W. 92, Rehearing denied in 10 S. D. 414, 39 L.R.A. 859, 73 N. W. 907; Later appeal as to costs in 10 S. D. 416, 73 N. W. 908.

Revocation of professional license because of conviction for crime.

Cited in *Fort v. Brinkley*, 87 Ark. 400, 112 S. W. 1084, holding that the illegal sale of intoxicating liquors is not a crime involving "moral turpitude" so as to justify the revocation of a physician's license.

Cited in note in 30 L.R.A.(N.S.) 784, on grounds for revoking physician's license.

—Disbarment of attorney.

Cited in *Re Henry*, 15 Idaho, 755, 21 L.R.A.(N.S.) 207, 99 Pac. 1054, holding that petit larceny is a crime involving moral turpitude so as to justify the disbarment of an attorney; *Re Crum*, 7 N. D. 316, 75 N. W. 257, holding that proceeding to cancel attorney's license need not be brought or entitled in name of state; *Re Kirby*, 10 S. D. 338, 73 N. W. 95, holding proceeding for disbarment civil in nature; *Ex parte Biggs*, 52 Or. 433,

97 Pac. 713, holding that it is not necessary to warrant disbarment that the conviction be in the courts of the state but that a conviction in a Federal court will also warrant it; *Re Hopkins*, 54 Wash. 569, 103 Pac. 805, holding that a conviction in the Federal court of an attorney for falsely certifying to pension claims as notary, is sufficient to warrant disbarment because of conviction for crime involving moral turpitude.

— Pending appeal from conviction.

Cited in *Barnes v. Lyons*, 187 Fed. 881, to point that judgment of conviction is sufficient to warrant suspending attorney though judgment superseded by writ of error.

Disapproved in *State ex rel. Larew v. Sale*, 188 Mo. 493, 87 S. W. 967, holding that an attorney could not be suspended or disbarred because of a conviction for a felony, pending an appeal from such conviction.

Judgment as bar.

Cited in *Ransom v. Pierre*, 41 C. C. A. 585, 101 Fed. 665, holding that *Dak. Comp. Laws 1887*, § 5343, providing that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied," was not intended to prevent a final judgment of a state court of superior jurisdiction from being pleaded in bar to another suit between the same parties and upon the same cause of action during pendency of an appeal therefrom, but its purpose was to effect purchasers of property which is in litigation with notice of the litigation until it is ended.

10 S. D. 332, *McCLAIN v. WILLIAMS*, 43 L.R.A. 287, 73 N. W. 72, Reversed on rehearing in 11 S. D. 60, 43 L.R.A. 289, 75 N. W. 391. Decision on the merits in 11 S. D. 227, 49 L.R.A. 610, 74 Am. St. Rep. 791, 76 N. W. 930.

Followed without discussion in *Williams v. Chicago N. W. R. Co.* 10 S. D. 336, 73 N. W. 74.

Right of appeal as a vested right.

Cited in *Theo. Poull & Co. v. Foy-Hays Constr. Co.* 159 Ala. 453, 48 So. 785, holding that an appeal is a part of the remedy and not a vested right; *Mau v. Stoner*, 14 Wyo. 183, 83 Pac. 218, holding that under the state Constitution, the right of appeal is not a vested right but in proceedings unknown to common law, the legislature could make the judgment of the district court final; *Lake Erie & W. R. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443, holding that the Legislature may, under Ind. Const. art. 7, § 4, giving the supreme court jurisdiction in appeal and writs of error "under such regulations and restrictions as may be prescribed by law," enlarge or contract the appellate jurisdiction of such court, designate the amount which will authorize an appeal, and, within reasonable limits, prescribe the class of cases in which appeals may be taken, and from what courts or tribunals.

Retroactive operation of statutes.

Cited in *Oppegaard v. Renville County*, 110 Minn. 300, 125 N. W. 504,

holding that the statute permitting appeals from orders rearranging the territory of school districts, operated retroactively.

Constitutionality of statutes relating to city's liability for defective streets.

Cited in *Williams v. Port Chester*, 72 App. Div. 505, 76 N. Y. Supp. 631, holding a provision of a village charter that no action to recover damages by reason of a defective sidewalk can be maintained unless a claim therefor is presented within thirty days after the injury,—unconstitutional and void as far as relates to one whose injuries prevented him from presenting his claim until the 43d day after the accident, as he is entitled to a reasonable time within which to assert his rights; *Mattson v. Astoria*, 39 Or. 577, 87 Am. St. Rep. 687, 65 Pac. 1066, holding a provision in a city charter that neither the city nor any member of the council shall be liable for injuries resulting from the defective condition of any street, a violation of Or. Const. art. 1, § 10, providing that every man shall have remedy by due course of law for injury done him in person, property, or reputation.

"May" in constitutional or statutory provision as mandatory.

Cited in note in 5 L.R.A.(N.S.) 344, on "may" in constitutional or statutory provision as mandatory.

10 S. D. 336, WILLIAMS v. CHICAGO & N. W. R. CO. 73 N. W. 74.

10 S. D. 338, RE KIRBY, 73 N. W. 95.

10 S. D. 340, ISSENHUTH v. BAUM, 73 N. W. 96.

10 S. D. 340, WINN v. SANBORN, 73 N. W. 96.

10 S. D. 342, SWENSON v. CHRISTOPHERSON, 73 N. W. 96.

Costs for unnecessary matter in abstract or brief.

Cited in *McVay v. Tousley*, 20 S. D. 487, 107 N. W. 828, holding that the prevailing party should not be allowed costs for unnecessary matter in an abstract or brief.

10 S. D. 343, AXIOM MIN. CO. v. LITTLE, 73 N. W. 1103.

10 S. D. 344, THOMPSON v. BROWNE, 73 N. W. 194.

Who may purchase at compulsory sale.

Cited in note in 136 Am. St. Rep. 813, on who may not purchase at judicial, execution, or other compulsory sales because so doing may conflict with their duties.

What constitutes "premises."

Cited in *Kunkel v. Abell*, 170 Ind. 305, 84 N. E. 503, holding that a correct and precise description of the location of the town lot or part thereof upon which is located the building containing the room in which appli-

cant proposes to sell intoxicating liquors is sufficient under the statute regulating application for license to sell intoxicating liquors.

10 S. D. 349, STATE v. THORNTON, 41 L.R.A. 530, 73 N. W. 196.

Burden of proof in criminal cases.

Cited in McDuffee v. State, 55 Fla. 125, 46 So. 721, holding that the burden is upon the state at all times to make out all the essential elements of the offense beyond a reasonable doubt.

— Proving an alibi.

Cited in People v. Winters, 125 Cal. 325, 57 Pac. 1067, holding an instruction that "an alibi, if proved, is a good defense," not erroneous when the court at once proceeded to tell the jury that if a reasonable doubt is raised in their minds from the evidence as to the presence of the defendant at the scene of the homicide, such doubt entitled him to an acquittal; State v. McClellan, 23 Mont. 532, 75 Am. St. Rep. 558, 12 Am. Crim. Rep. 13, 59 Pac. 924, holding an instruction requiring a defendant to prove his claim of alibi, irreconcilable with, and not cured by, a subsequent instruction telling the jury to acquit, if they have a reasonable doubt of the defendant's presence at the time and place of the commission of the alleged crime; Wilburn v. Territory, 10 N. M. 402, 62 Pac. 968, 14 Am. Crim. Rep. 500, holding that after the prosecution has made out a prima facie case, the burden is upon the defense to prove an alibi so as to raise a reasonable doubt as to the defendant's guilt.

Omission of names of witnesses from indictment.

Cited in State v. Cambron, 20 S. D. 282, 105 N. W. 241, holding that the right of the prosecution to introduce testimony of witnesses whose names were not upon the indictment, depends upon whether they were omitted for the purpose of withholding them from the defense.

10 S. D. 360, CHAMBERLAIN v. PUTNAM, 73 N. W. 201.

10 S. D. 365, STATE EX REL. NULL v. MAYHEW, 73 N. W. 200.

Validity of claims against state.

Cited in Van Dusen v. State, 11 S. D. 318, 77 N. W. 201, holding the agents of the state authorized to procure fuel and light for the Dakota Agricultural College at the expense of the state to an amount not exceeding \$2,000 for the year ending March, 1892; Meade County Bank v. Reeves, 13 S. D. 193, 82 N. W. 751, holding treasurer's certificates for wolf bounties payable in full in the order of their filing with the state treasurer, until the appropriation for the year is exhausted.

Cited in note in 42 L.R.A. 37, on what claims constitute valid demands against a state.

Distinguished in Brown v. State, 14 S. D. 219, 84 N. W. 801, holding the state liable on a contract by the insurance commissioner for the use of his office after his term expires, where such expenditures had been expressly authorized by the legislature, and the contract was made in good faith.

10 S. D. 368, FREEMAN v. HURON, 73 N. W. 260.

10 S. D. 379, MINNEHAHA NAT. BANK v. TORREY, 73 N. W. 193.

Discharge of surety by extension of time.

Cited in *McCormick Harvesting Mach. Co. v. Rae*, 9 N. D. 482, 84 N. W. 346, holding a surety not discharged by a contract with the principal debtor to extend the time of payment, unless the extension is for a definite time.

10 S. D. 384, CONNOR v. KNOTT, 73 N. W. 264.

Entry of final judgment upon dismissal or nonsuit.

Cited in note in 26 L.R.A.(N.S.) 915, on jurisdiction to enter final judgment upon dismissal or nonsuit.

10 S. D. 386, DeFORD v. HYDE, 73 N. W. 265.

10 S. D. 389, STACKPOLE v. DAKOTA LOAN & T. CO. 73 N. W. 258.

Liability for deficiency on foreclosure sale.

Distinguished in *Hanna v. Stroud*, 13 S. D. 352, 83 N. W. 365, sustaining right of assignee of bond and mortgage, payment of principal of which within two years from maturity assignor guarantees, to foreclose mortgage and hold guarantor liable for deficiency on nonpayment within the two years.

10 S. D. 391, FRANKLIN v. APPEL, 73 N. W. 259.

Right to enjoin acts under unconstitutional statute.

Cited in *State ex rel. Kenamore v. Wood*, 155 Mo. 425, 48 L.R.A. 596, 56 S. W. 474, holding that an injunction cannot be granted to restrain the state beer inspector and his deputies from inspecting beer and malt liquors upon a bill containing naked averments of the unconstitutionality of the law authorizing the inspection and the illegality of the inspection fee.

Cited in note in 8 L.R.A.(N.S.) 126, on right to enjoin acts under unconstitutional statute, as affected by other remedies in case such acts are done.

10 S. D. 394, WUEST v. AMERICAN TOBACCO CO. 73 N. W. 903.

Advice of counsel as defense in malicious prosecution.

Cited in note in 18 L.R.A.(N.S.) 51, 65, on advice of counsel as defense to action for malicious prosecution.

10 S. D. 402, PARKER v. RANDOLPH, 73 N. W. 906.

10 S. D. 405, SEARLE v. LEAD, 73 N. W. 913.

Allowance of costs of argument on appeal.

Cited in *Nichols v. Smith*, 19 S. D. 161, 102 N. W. 606, holding that where there is no argument, either oral or printed, in the Supreme Court, the item of costs for argument will not be allowed.

10 S. D. 405, SHERWOOD v. SIOUX FALLS, 73 N. W. 913.**Objections to pleadings first raised after trial has begun.**

Cited in *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915, holding that the greatest latitude will be indulged to restrain a complaint when first assailed on the trial by objection to the introduction of evidence; *Martin v. Graff*, 10 S. D. 592, 74 N. W. 1040, holding that a complaint alleging the execution by defendants of a note for a specified amount to a designated payee, duly indorsed and delivered to plaintiff by such payee for value in due course of business before maturity, and that it is past due and unpaid, and that payment has been demanded, states a cause of action; *Seiberling v. Mortinson*, 10 S. D. 644, 75 N. W. 202, holding that the court will on appeal, where evidence was admitted in the trial court supplying a defect in the pleadings, permit an amendment of the pleadings to conform to the facts proved, or presume that such amendment was made in the court below; *Walker v. McCaull*, 13 S. D. 512, 83 N. W. 578, holding a complaint in an action for negligence as to the consignment of wheat, containing a general allegation of damage from want of care, and alleging that certain acts and omissions of defendant in its management and sale were negligent and resulted in injury of a specified amount, sufficient in the absence of any motion to make more specific, or objection to the introduction of evidence for insufficiency of the complaint; *De Luce v. Root*, 12 S. D. 141, 80 N. W. 181, holding overruling of objection to admission of evidence because complaint did not state a cause of action not ground for reversal; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, holding that though the complaint is inartistic, indefinite, and uncertain, reversible error cannot be predicated on the overruling of the defendant's objection first made after trial began, the trial having been had without apparent prejudice to the defendant's rights so far as the pleadings are concerned; *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding that where an objection to a complaint might be cured by amendment, the objection is not available when first raised upon appeal.

10 S. D. 410, AMERICAN BKG. & TRUST CO. v. LYNCH, 73 N. W. 908, Rehearing denied in 13 S. D. 204, 80 N. W. 1134, Motion to retax costs denied in 13 S. D. 34, 82 N. W. 77.**Right of junior lienholder to redeem from sale under prior lien.**

Cited in *Crouch v. Dakota, W. & M. R. Co.* 18 S. D. 540, 101 N. W. 722, holding that where the holders of outstanding liens were not parties to an action to foreclose a lien against a railroad, and the latter has been barred from redeeming by the expiration of the period allowed, such lienholders have only a right to a reasonable time in which to redeem, and are not entitled to have another sale.

Distinguished in *White v. Rathbone*, 73 Minn. 236, 75 N. W. 1046, holding that failure to redeem from a sale made on a second lien on land by the holder of a lien subordinate to the second cuts off his right to redeem from a sale made on the first lien.

10 S. D. 414, RE KIRBY, 39 L.R.A. 859, 73 N. W. 907.**Remedy for improper taxation of costs.**

Cited in *Sorenson v. Donahoe*, 12 S. D. 204, 80 N. W. 179, holding that proper remedy where costs have been improperly taxed against a party is to have the judgment modified instead of by appeal from the taxation of costs.

Grounds for disbarment.

Cited in note in 19 L.R.A.(N.S.) 892, on conviction or commission of crime or misconduct by attorney in another state as ground for disbarment.

10 S. D. 416, RE KIRBY, 73 N. W. 908.**Costs on appeal in extraordinary proceedings.**

Cited in *State ex rel. Howells v. Metcalf*, 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923, holding that upon appeal from a suit for mandamus to compel the county auditor to place certain names upon the ballots, if the relator is granted the writ, he is entitled to recover his taxable disbursements but no statutory costs.

— Disbarment proceedings.

Cited in *Re Watt*, 154 Fed. 678, holding that a disbarment proceeding is not an action and costs cannot be allowed in favor of the respondent against the petitioners, in the absence of a statute allowing the same; *State ex rel. Dill v. Martin*, 45 Wash. 76, 87 Pac. 1054, holding that costs on appeal in disbarment proceedings should not be taxed against either party, but where the defendant secures a substantial reversal of the decree against him he is entitled to recover his costs from the state but not from the relator.

10 S. D. 417, WHITBECK v. SEES, 73 N. W. 915.

Followed without special discussion in *Connor v. Corson*, 13 S. D. 550, 83 N. W. 588; *Parker v. Ausland*, 13 S. D. 169, 82 N. W. 402.

Liberal construction of pleading first objected to upon trial.

Cited in *George Adams & F. Co. v. South Omaha Nat. Bank*, 60 C. C. A. 579, 123 Fed. 641, holding that where the objection to a petition is first made after answer by an objection to the introduction of evidence thereunder, the petition should be liberally construed and technical objections overlooked, unless there is a total failure to allege some matter which is essential to the relief sought; *Fire Asso. of Philadelphia v. Ruby*, 60 Neb. 216, 82 N. W. 629, holding that a petition which was first assailed by objection to the introduction of evidence because of its alleged insufficiency, will be upheld by the supreme court if possible by giving it a liberal construction; *Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169, 3 A. & E. Ann. Cas. 847, holding that upon an objection to the sufficiency of a complaint when first made after the trial has begun, the complaint will be liberally construed, and all reasonable inferences from the facts stated will be indulged in to sustain the pleading; *Nerger v. Equitable F. Asso.* 20 S. D. 419, 107 N. W. 531, holding that a party who has answered

on the merits and has not tested the sufficiency of the complaint by demurrer, cannot demand a reversal on the ground that his general objection to the introduction of evidence was overruled by the trial court; *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536, holding that where the sufficiency of a complaint is first questioned at the trial by an objection to the introduction of evidence, where the complaint set out the contract sued upon and alleged a performance by the plaintiff but a breach upon the part of the defendants, it was not error to overrule the objection.

10 S. D. 421, FARWELL v. STURGIS WATER CO. 73 N. W. 916.

Review of evidence upon appeal.

Cited in *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14, holding that though the findings of the trial court or referee are presumptively right, when the question of the sufficiency of the evidence to support them is properly raised, the appellate court will review the evidence to ascertain if there is a clear preponderance against the findings.

Error in permitting view by jury.

Distinguished in *Brady v. Shirley*, 14 S. D. 447, 85 N. W. 1002, holding it reversible error, in an action involving the identity of a horse, to permit the jury to view the horse in controversy and other horses presented for inspection.

10 S. D. 430, NEBRASKA LAND & LIVE STOCK CO. v. BURRIS, 73 N. W. 919.

Review of order granting or refusing a continuance.

Cited in *State v. Phillips*, 18 S. D. 1, 98 N. W. 171, 5 A. & E. Ann. Cas. 760, holding that the granting or refusing of an application for a continuance rests in the discretion of the trial court and in the absence of an abuse of such discretion, the ruling thereon will not be reversed; *Hood v. Fay*, 15 S. D. 84, 87 N. W. 528, holding grant or refusal of a continuance reviewable on appeal only in case of manifest abuse of discretion; *State v. Pirkey*, 22 S. D. 550, 118 N. W. 1042, 18 A. & E. Ann. Cas. 192, holding granting or refusing of application for stay in criminal case discretionary with trial court.

10 S. D. 436, ADKINS v. LIEN, 73 N. W. 909.

What constitutes "majority" vote on submitted proposition.

Cited in note in 22 L.R.A.(N.S.) 481, on basis for computation of majority essential to adoption of proposition submitted at general election.

10 S. D. 440, EDMISON v. SIOUX FALLS WATER CO. 73 N. W. 910.

Damages to defendant upon dismissal of injunction.

Cited in *J. F. Kelley & Co. v. Mead*, 18 S. D. 594, 101 N. W. 882, holding that the defendant's damages in an action for an injunction, where the injunction has been dismissed, may be assessed by reference or otherwise as the court shall direct, though the damages are not claimed in the plead-

ings, and the making of an ex parte order was not error where plaintiff was represented; *Edmison v. Sioux Falls Water Co.* 14 S. D. 486, 85 N. W. 1016, holding item for amount due water company from plaintiffs for water used while restraining order was in force properly disallowed in assessing damages on injunction bond where plaintiffs were solvent during such period and the company was not restrained from collecting water rates by ordinary proceeding; *Chamberlain v. Quarnberg*, 23 S. D. 55, 119 N. W. 1026, holding sureties not liable on undertaking for injunction which was not signed by principal.

Distinguished in *J. F. Kelley & Co. v. Mead*, 20 S. D. 303, 105 N. W. 736 (rehearing of 18 S. D. 594, 101 N. W. 882), holding that where an action was brought to prevent defendant from interfering with plaintiff's possession of a certain building and an injunction issued and dismissed it was not error to include as damages in behalf of the defendant, the rent of the building for the time the defendant was prevented from interfering with the possession.

10 S. D. 448, WHITE SEWING MACH. CO. v. SIMPSON, 74 N. W. 197.

10 S. D. 450, CHURCH v. WALKER, 74 N. W. 198.

Marks invalidating ballot.

Cited in *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018, holding ballot not invalidated by injurious marks unless made intentionally and in such manner that third person can ascertain therefrom that ballot was deposited by proper person.

10 S. D. 453, BEM v. SHOEMAKER, 74 N. W. 239.

Decision on former appeal as law of case.

Cited in *Cranmer v. Kohn*, 11 S. D. 245, 76 N. W. 937, holding objection to introduction of evidence on ground that complaint does not state a cause of action properly overruled where same question was decided in plaintiff's favor on former appeal.

Action to recover assets of the estate.

Cited in *Prusa v. Everett*, 78 Neb. 250, 113 N. W. 571, holding that the sole heir of an estate may bring an action in equity, making the administrator a party, to recover the assets of the estate where such administrator refuses to bring such action, and nothing remains but to close the estate.

Cited in note in 22 L.R.A.(N.S.) 458, on right of next of kin to maintain action in interest of estate.

10 S. D. 460, TOWNE v. LIEDLE, 74 N. W. 232.

10 S. D. 464, DALEY v. FORSYTHE, 74 N. W. 201.

Error in denial of new trial.

Cited in *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding denial

of new trial for newly discovered evidence, where diligence or materiality is challenged, discretionary with court; *State v. Andre*, 14 S. D. 215, 84 N. W. 783, holding refusal of new trial in murder case because a juror had, before the trial shown a friendly interest in another person indicted for same offense not an abuse of discretion.

10 S. D. 466, *MERCHANTS' NAT. BANK v. STEBBINS*, 74 N. W. 199, Later appeal in 15 S. D. 280, 89 N. W. 674.

Stenographer's notes as evidence.

Cited in 81 Am. St. Rep. 359, 360, on stenographers' notes as evidence, and right to read them to jury.

Distinguished in *State v. Heffernan*, 22 S. D. 513, 25 L.R.A.(N.S.) 868, 118 N. W. 1027, holding that in a criminal trial it was error to permit the reading of the stenographer's report of the testimony of witnesses given at the preliminary examination of the defendant, where such witnesses were absent from the court and no opportunity was given to cross examine them.

Review of discretionary orders of trial court.

Cited in *Kjetland v. Pederson*, 20 S. D. 58, 104 N. W. 677, holding that a motion to set aside a default judgment and for leave to answer is addressed to the discretion of the trial court, and the latter's ruling thereon will not be disturbed except where an abuse of discretion affirmatively appears; *State v. Crowley*, 20 S. D. 611, 108 N. W. 491, holding that the granting or refusing of a motion for new trial rests in the discretion of the court and the ruling thereon will not be disturbed except for an abuse of discretion, and a clearer case is required to reverse an order granting a new trial, than one refusing it.

10 S. D. 471, *STATE v. KNOWLES*, 74 N. W. 201.

Followed without discussion in *State v. Jann*, 10 S. D. 627, 74 N. W. 1119.

Jurisdiction of county court in bastardy proceedings.

Cited in *State v. Sexton*, 11 S. D. 105, 75 N. W. 895, holding that county court is without jurisdiction in bastardy proceedings.

10 S. D. 475, *TROY MIN. CO. v. WHITE*, 42 L.R.A. 549, 74 N. W. 236, Later appeal in 15 S. D. 238, 88 N. W. 106.

Disqualification to vote for increase of director's salary.

Cited in *Ritchie v. People's Teleph. Co.* 22 S. D. 598, 119 N. W. 990, holding that neither director of corporation nor his wife, also director, may vote, as directors, to increase his salary.

10 S. D. 484, *RICHARDSON v. HUSTON*, 74 N. W. 234, Later appeals in 14 S. D. 126, 84 N. W. 486; 17 S. D. 629, 98 N. W. 164.

Liability of officer for making arrest.

Cited in note in 51 L.R.A. 214, on liability of an officer for making an arrest.

10 S. D. 491, BOTHELL v. HOELLWARTH, 74 N. W. 231.

Due diligence to secure personal service before publication.

Cited in *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708, holding that the statute requiring the affidavit for the publication of a summons to show that proper diligence was exercised in attempting to secure personal service, is mandatory and a failure to comply therewith avoids the service and confers no jurisdiction; *Plummer v. Bair*, 12 S. D. 23, 80 N. W. 139, holding insufficient, affidavit for service by publication alleging that affiant placed the summons in hands of sheriff for service requesting service to be made if defendant could be found in county, that he had made return that "after due and diligent search and inquiry" is unable to find defendants and has returned the summons unserved; *Coughran v. Markley*, 15 S. D. 37, 87 N. W. 2, holding that on a motion to set aside a judgment by default entered on defective service of summons, the appellate court will consider the affidavit upon which the order for publication issued, only for the purpose of ascertaining whether it contains sufficient facts to call into exercise the judicial opinion of the trial courts; and if so, its decision, however erroneous, must stand.

Distinguished in *Woods v. Pollard*, 14 S. D. 44, 84 N. W. 214, holding due diligence to find defendant within state shown by affidavit for publication stating that defendant cannot after due diligence be found within state that summons was placed for service in hands of sheriff whose return is referred to, that affiant has known defendant for a number of years and that he sold his residence in state where affiant resided and severed his business connections and removed his family to a specified place in another state where he is at present as affiant is informed by various persons; *Cochran v. Germain*, 15 S. D. 77, 87 N. W. 527, holding statement of ultimate fact in affidavit for publication that defendants are not and cannot be found in state justifiable where affidavit otherwise shows that neither defendant is resident of the state but that their fixed residence and postoffice address is in another state; *Peterson v. Peterson*, 15 S. D. 462, 90 N. W. 136, holding exercise of due diligence to find defendant within state sufficiently shown by plaintiff's affidavit for publication as against motion to affect decree of divorce by default where it states that defendant cannot, after due diligence and diligent search and inquiry be found within state and is not now within state but has a specified postoffice address in another designated state the means of knowledge being letters received by him within last three days from such place; *Allen v. Richardson*, 16 S. D. 390, 92 N. W. 1075, holding that where the affidavit for the publication of the summons stated that the defendant could not be found after due diligence, and that the summons had been placed in the hands of the sheriff and was by him returned with the indorsement that defendant could not be found, it showed due diligence.

10 S. D. 495, STATE EX REL. AYRES v. KIPP, 74 N. W. 440.

Mandamus proceedings to determine right to public office.

Cited in *Couch v. State*, 169 Ind. 269, 124 Am. St. Rep. 221, 82 N. E. 457, holding that the only question which could be decided in an action

for mandamus to secure possession of a public office, was the prima facie right to such office, and whether the relator had forfeited such an office or the right of the board to declare a vacancy could not be decided; *Chandler v. Starling*, 19 N. D. 144, 121 N. W. 198, holding that ultimate right and title to office cannot be litigated.

Cited in note in 13 L.R.A.(N.S.) 664, on mandamus to try who is facto officer.

Jurisdiction in mandamus case.

Cited in note in 58 L.R.A. 853, on original jurisdiction of court of last resort in mandamus case.

Additional compensation to public officer for additional duties.

Cited in *State v. Roddle*, 12 S. D. 433, 81 N. W. 980, in which the court remarked that the legislature may impose additional duties on a public officer without providing additional compensation, and that there is no limit on its power to create new offices, for which it may provide such compensation as it deems proper.

10 S. D. 504, WOODWORTH v. SPIRIT MOUND TWP. 74 N. W. 443.

Failure of notice as vitiating highway proceedings.

Cited in *Bockoven v. Lincoln Twp.* 13 S. D. 317, 83 N. W. 335, holding entire proceeding for establishing highway not vitiated by failure to name or give notice to one of several persons interested in the land taken.

10 S. D. 507, MORRIS v. BAILEY, 74 N. W. 443.

10 S. D. 511, MINNESOTA THRESHER MFG. CO. v. SCHAAK, 74 N. W. 445.

Collateral attack upon judgment.

Cited in *Schmitt v. Dahl*, 88 Minn. 506, 67 L.R.A. 590, 93 N. W. 665, holding that in an action by a judgment creditor to set aside a conveyance from his debtor to another, made prior to the judgment, the grantee cannot set up defenses which might have been interposed by the defendant in the original action, and such judgment cannot be collaterally impeached except for fraud; *Becker v. Linton*, 80 Neb. 655, 127 Am. St. Rep. 795, 114 N. W. 928, holding that the decision of a court of competent jurisdiction having jurisdiction of the parties and the subject-matter, upon the liability of one of the defendants upon a deficiency judgment, cannot be collaterally attacked; *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320, holding that a decision of a court of competent jurisdiction having jurisdiction of the parties and the subject-matter, is conclusive evidence of debt and cannot in the absence of collusion or fraud, be collaterally attacked.

Cited in note in 67 L.R.A. 594, 603, 607, on attack by alleged fraudulent grantee on judgment on which action to set aside conveyance based.

Judgment as bar.

Distinguished in *Pitts v. Oliver*, 13 S. D. 561, 79 Am. St. Rep. 907, 83

N. W. 561, holding judgment bar to subsequent action on different claim or judgment, only as to matters in issue or controverted on the prior action.

10 S. D. 516, TRIPP v. YANKTON, 74 N. W. 447.

Joinder of causes of action.

Cited in *Sheets v. Prosser*, 16 N. D. 180, 112 N. W. 72, holding that a cause of action for equitable relief from a forfeited mechanic's lien and one for the statutory penalty for a failure to release such lien upon demand, may be united.

Conferring additional powers upon cities organized under special charters.

Cited in *Heyler v. Watertown*, 16 S. D. 25, 91 N. W. 334, holding that it is competent for the legislature to confer additional powers upon cities organized under special charters.

Assessments by front-foot rule.

Cited in note in 28 L.R.A.(N.S.) 1136, 1159, 1184, on assessments for improvements by front-foot rule.

10 S. D. 526, BUNKER v. TAYLOR, 74 N. W. 450, Later appeal in 13 S. D. 433, 83 N. W. 555.

Granting extension of time by the trial court.

Distinguished in *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428, holding that where the decision of the court was made in June and a month later the defendants gave notice of intention to move for new trial and were granted sixty days in which to settle the bill of exceptions, the transcript was delivered a year later, and the bill a year and six months after judgment, there was not sufficient cause for an extension of time shown.

Disqualification of witness for interest.

Cited in *Witte v. Koeppen*, 11 S. D. 598, 74 Am. St. Rep. 826, 79 N. W. 831, holding assignor of claim against intestate's estate beneficial interest in result not incompetent to testify as to transactions between himself and intestate.

Validity of agreement for extension of payment.

Cited in *Whiffen v. Hollister*, 12 S. D. 768, 80 N. W. 156, holding an agreement by the holder of a note after its maturity to allow the principal to remain unpaid as long as the interest is kept paid, without any new consideration or agreement by the maker, void for lack of consideration.

10 S. D. 535, YANKTON BLDG. & L. ASSO. v. DOWLING, 74 N. W. 436, Later phase of same case in 10 S. D. 540, 74 N. W. 438.

Right of grantee in absolute deed given as mortgage to possession of the property.

Cited in *State v. Mellette*, 16 S. D. 297, 92 N. W. 395, holding that where a quitclaim deed was given in place of a mortgage to secure a

note, and the same was transferred together with the note, to one having notice, it does not give the grantee a right to the possession of the property but only a lien to secure the note.

When deed will be construed to be mortgage.

Cited in *Shimerda v. Wohlford*, 13 S. D. 155, 82 N. W. 393, holding that deed absolute on face but shown to have been given as security will be treated as a mortgage.

10 S. D. 540, YANKTON BLDG. & L. ASSO. v. DOWLING, 74 N. W. 438.

Absolute deed as a mortgage.

Cited in *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289, holding that where the evidence showed that the value of the property was much greater than the sum of money advanced, and agreement to pay eight per cent interest, the deed and sale contract being contemporaneous, and for the same consideration, the relation between the parties was that of mortgagor and mortgagee.

Harmless error as to cumulative incompetent evidence.

Cited in *Merager v. Madson*, 19 S. D. 400, 103 N. W. 650; *Easton v. Cranmer*, 19 S. D. 224, 102 N. W. 944; *Godfrey v. Faust*, 18 S. D. 567, 101 N. W. 718; *Godfrey v. Faust*, 20 S. D. 203, 105 N. W. 460 (rehearing of 18 S. D. 567, 101 N. W. 718 denied); *Fowler v. Iowa Land Co.* 18 S. D. 131, 99 N. W. 1095,—holding that the admission of incompetent evidence to prove facts already admitted or proved, is harmless error.

10 S. D. 546, GRAHAM v. SELBIE, 74 N. W. 439, Later action in 18 S. D. 365, 100 N. W. 755.

Followed without discussion in *Graham v. Selbie*, 10 S. D. 547, 74 N. W. 450.

Estoppel by judgment.

Cited in *Selbie v. Graham*, 18 S. D. 365, 100 N. W. 755, holding that where the first action was dismissed because of a variance between the pleading and the proof the two actions being different and there being nothing to show that the interests of the parties were not determined, such former action is not an estoppel in the second action as to such interest.

Theory of case on appeal.

Cited in *Wilson v. Huron Bd. of Edu.* 12 S. D. 535, 81 N. W. 952 (dissenting opinion), on the point that a different theory of the answers from that held below should not be adopted on appeal, for the purpose of reversing the lower court.

10 S. D. 547, GRAHAM v. SELBIE, 74 N. W. 450, Later action in 18 S. D. 365, 100 N. W. 755.

10 S. D. 548, MINNEHAHA NAT. BANK v. TORREY, 74 N. W. 390.

10 S. D. 549, BEACH v. CO-OPERATIVE SAV. & L. ASSO. 74 N. W. 889.

10 S. D. 552, COBURN v. BROWN COUNTY, 74 N. W. 1026.

Followed without discussion in Coburn v. Miller, 10 S. D. 626, 74 N. W. 1118.

Appeal from orders not entered by the trial court.

Followed in Martin v. Smith, 11 S. D. 437, 78 N. W. 1001; Mettel v. Gales, 12 S. D. 632, 82 N. W. 181,—holding that appeal will not lie until judgment or order sought to be appealed from has been entered as a permanent record of the trial court. Stephens v. Faus, 20 S. D. 367, 106 N. W. 56, holding that an appeal cannot lie from an order denying a new trial until such order has been attested by the clerk.

Necessity for undertaking on appeal from justice's judgment.

Distinguished in Mather v. Darst, 11 S. D. 480, 78 N. W. 954, refusing to dismiss appeal because no undertaking has been served.

10 S. D. 555, PARSZYK v. MACH, 74 N. W. 1027, Later appeal in 15 S. D. 432, 58 L.R.A. 811, 91 Am. St. Rep. 698, 90 N. W. 1042.

Validity of default judgment in excess of relief demanded.

Cited in Mach v. Blanchard, 15 S. D. 432, 58 L.R.A. 811, 91 Am. St. Rep. 698, 90 N. W. 1042, holding judgment by default for plaintiff on not void because relief granted exceeds prayer of complaint.

10 S. D. 560, SINKLING v. ILLINOIS C. R. CO. 74 N. W. 1029.

Appeal from orders not entered by the trial court.

Cited in Martin v. Smith, 11 S. D. 437, 78 N. W. 1001; Mettel v. Gales, 12 S. D. 632, 82 N. W. 181,—holding that appeal will not lie until judgment or order sought to be appealed from has been entered as a permanent record of the trial court; Stephens v. Faus, 20 S. D. 367, 106 N. W. 56, holding that an appeal cannot lie from an order denying a new trial until such order has been attested by the clerk.

10 S. D. 566, McARTHUR v. SOUTHARD, 74 N. W. 1031.

Validity of default judgment in excess of relief demanded.

Cited in Mach v. Blanchard, 15 S. D. 432, 58 L.R.A. 811, 91 Am. St. Rep. 698, 90 N. W. 1042, holding judgment by default for plaintiff on not void because relief granted exceeds prayed of complaint.

10 S. D. 574, JAMISON v. McFARLAND, 74 N. W. 1033.

Burden of proving good faith in acquisition of note negotiated by fraud.

Cited in Bank of Spearfish v. Graham, 16 S. D. 49, 91 N. W. 340, holding that the burden is upon the holder of a note which has been negotiated in fraud of the maker, to prove that he is a bona fide holder in good faith without notice of the fraud in the negotiation.

10 S. D. 576, ROBERTS v. HOLLIDAY, 74 N. W. 1034.

10 S. D. 581, TUCKER v. RANDALL, 74 N. W. 1036.

10 S. D. 585, HAGGARTY v. STRONG, 74 N. W. 1037.

Review of order not entered.

Cited in McCormick Harvesting Mach. Co. v. Woulph, 11 S. D. 252, 76 N. W. 939, holding that order made after judgment on motion for new trial but never entered will be disregarded on appeal.

Review of sufficiency of evidence.

Cited in State v. Allen, 21 S. D. 121, 110 N. W. 92, holding that it will be presumed that instructions were refused because not justified by evidence, where evidence is not set out in abstract; Mettel v. Gales, 12 S. D. 632, 82 N. W. 181, holding sufficiency of conflicting evidence to sustain verdict not reviewable on appeal from order denying new trial.

Waiver of motion for direction of verdict.

Cited in Greder v. Stahl, 22 S. D. 139, 115 N. W. 1129; Rogers v. Gladiator Gold Min. & Mill. Co. 21 S. D. 412, 113 N. W. 86; Brace v. Van Eps, 12 S. D. 191, 80 N. W. 197; Seim v. Krause, 13 S. D. 530, 83 N. W. 583; Torrey v. Peck, 13 S. D. 538, 83 N. W. 585,—holding motion for judgment or direction of verdict for defendant at close of plaintiff's case waived by failure to renew after all evidence is in.

Error in instructions.

Cited in State v. Peltier, 21 N. D. 188, 129 N. W. 451, holding instruction which advises jury of reasons for fixing certain penalty, erroneous.

Who is concluded by judgment.

Cited in Hart v. Wyndmere, 21 N. D. 383, 131 N. W. 231, holding that one who voluntarily invokes jurisdiction and procures rendition of judgment is bound thereby.

10 S. D. 592, MARTIN v. GRAFF, 74 N. W. 1040.

Objections to pleadings, first made after trial has begun.

Cited in Woodford v. Kelley, 18 S. D. 615, 101 N. W. 1069, holding that though the complaint is inartistic, indefinite and uncertain, reversible error cannot be predicated on the overruling of the defendant's objection first made after the trial began, the trial having been had without apparent prejudice to the defendant's rights so far as the pleadings are concerned; Burgi v. Rudgers, 20 S. D. 646, 108 N. W. 253, holding that where an objection to a complaint might be cured by amendment, the objection is not available when first raised on appeal.

10 S. D. 594, CUSTER COUNTY v. WALKER, 74 N. W. 1040.

Estoppel of bank to deny liability.

Distinguished in Anderson v. Walker, 93 Tex. 119, 53 S. W. 821, holding that the acceptance by a finance committee empowered to ascertain facts for the information of a grand jury, of a bank's written statement as to the amount which a county treasurer has on deposit, does not estop the

Dak. Rep.—62.

bank from denying liability in favor of the county for the difference between such amount and a smaller amount actually on deposit, when no loss to the county is alleged to have resulted from the statement.

10 S. D. 599, McKEEVER v. HOMESTAKE MIN. CO. 74 N. W. 1053.

Assumption of risk.

Cited in *Hardesty v. Largey Lumber Co.* 34 Mont. 151, 86 Pac. 29, holding that the statute providing that the employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care, but not for the ordinary risks of the business, is applicable to cases of personal injury and is merely declaratory of the common law; *Fisher v. Porter*, 11 S. D. 311, 77 N. W. 112, holding that verdict may, on appeal, be directed against claimants of title under chattel mortgage when recitals of instrument in connection with evidence are insufficient to justify difference of opinion on part of jury.

Case for jury.

Cited in *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, holding that where the evidence shows facts from which different impartial minds might fairly draw different conclusions from them, the case should be submitted to the jury, and where they are such as only one conclusion can be drawn from them, the case is for the court; *Lockhart v. Hewitt*, 18 S. D. 522, 101 N. W. 355, holding that where the facts are such that different impartial minds might draw different conclusions from them, the case should be submitted to the jury; *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516, holding direction of verdict proper where verdict for adverse party would have to be set aside; *Aultman Engine & Thresher Co. v. Boyd*, 21 S. D. 303, 112 N. W. 151; *Roberts v. Ruh*, 22 S. D. 13, 114 N. W. 1097, holding it duty of court to submit case to jury where evidence is such that different impartial minds might draw different conclusions; *Coughran v. Western Elevator Co.* 22 S. D. 214, 116 N. W. 1122, holding verdict sustainable where different impartial minds might reasonably draw different conclusions from evidence; *Watters v. Dancy*, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430, holding nonsuit proper where evidence insufficient to support verdict for plaintiff.

10 S. D. 606, HARRINGTON v. WILSON, 74 N. W. 1055.

Amendments changing cause of action.

Cited in *Westover v. Van Dorn Iron Works Co.* 70 Neb. 415, 97 N. W. 598, holding that an attachment affidavit cannot be amended so as to show an entirely different cause of action, but may be as to clerical errors, venue, etc.; *Western Cornice & Mfg. Works v. Meyer*, 55 Neb. 440, 76 N. W. 23, holding that a petition alleging an indebtedness for work, labor, and material furnished at defendant's special instance and request, cannot be amended upon appeal to the district court, so that it will declare on the account in favor of the plaintiff as assignee or transferee of the account from one who had furnished the work, etc., as it would be a substantial change in the cause of action.

10 S. D. 609, RE CARVER, 74 N. W. 1056.

10 S. D. 611, McPHERSON v. FARGO, 66 AM. ST. REP. 723, 74 N. W. 1057.

Action on contract to sell land, signed only by the vendor.

Cited in *Broatch v. Boysen*, 99 C. C. A. 278, 175 Fed. 702, holding that where the party sought to be held in an action upon a contract is the only one who had signed such an agreement, the same containing mutual covenants, he was bound by such agreement as against the others assenting thereto and accepting the same and complying therewith; *Gira v. Harris*, 14 S. D. 537, 86 N. W. 624, holding written agreement to convey land to designated person on payment of specified amount on designated day signed by owner of land only specifically enforceable against him by the other party.

Cited in note in 28 L.R.A.(N.S.) 696, as to who must sign memorandum of executory sale contract within statute of frauds.

Necessity of tender before action on contract to sell land.

Cited in *Matteson v. United States & C. Land Co.* 103 Minn. 407, 115 N. W. 195, holding that no tender of the purchase price is necessary before commencing an action for damages for breach of contract to sell land, where the vendor expressly renounces or repudiates the same, and declares that he is unable or will not perform it.

Direction of verdict on reversal.

Distinguished in *McDonald v. Fuller*, 11 S. D. 355, 74 Am. St. Rep. 815, 77 N. W. 581, holding that supreme court will not on reversing judgment for plaintiff direct verdict in defendant's favor because of erroneous exclusion of execution under which defendant sought to justify seizure.

10 S. D. 620, Mt. TERRY MIN. CO. v. WHITE, 74 N. W. 1060.

Specification of errors in bill of exceptions.

Cited in *McMahon v. Crockett*, 12 S. D. 11, 80 N. W. 136, holding that objection that bill of exceptions contains no specifications of error will not be regarded where notice of intention to move for new trial specifies all the errors relied on and is made part of the bill of exceptions settled by the court in accordance with a stipulation of counsel; *Lennan v. Pollock State Bank*, 21 S. D. 511, 110 N. W. 834, holding reviewable errors presented where application for new trial is made "upon minutes of court" and notice of intention, specifying particulars in which evidence is insufficient and particular errors relied on is incorporated into bill of exceptions.

Right to inspect memorandum used by witness.

Cited in note in 22 L.R.A.(N.S.) 706, on right, for purpose of cross examination, to inspect memorandum used by witness.

10 S. D. 623, DEWEY v. FIELDER, 74 N. W. 1052.

What constitutes sufficient bill of exceptions.

Cited in *Dyea Electric Light Co. v. Easton*, 15 S. D. 572, 90 N. W. 859,

holding insufficient as bill of exceptions, a typewritten document designated "bill of exceptions" attached to judgment roll filed by another typewritten document designated "record" and by certificate of trial judge on a separate page purporting to settle and allow proposed bill of exceptions and all amendments and certifying that the "foregoing bill of exceptions as amended and when so amended is full and complete."

10 S. D. 625, BRESSLER v. STANEK, 74 N. W. 1118.

10 S. D. 626, COBURN v. MILLER, 74 N. W. 1118.

10 S. D. 627, STATE v. JANN, 74 N. W. 1119.

10 S. D. 628, RANKIN v. MATTHIESON, 75 N. W. 196.

Moral obligation as consideration.

Cited in note in 26 L.R.A.(N.S.) 525, on moral obligation as consideration for express promise.

10 S. D. 633, BROWN v. CHICAGO, M. & ST. P. R. CO. 66 AM. ST. REP. 730, 75 N. W. 198.

Undertaking as a jurisdictional step in appeal.

Cited in *Lough v. White*, 14 N. D. 353, 104 N. W. 518, holding that the filing and serving of the undertaking on appeal are jurisdictional steps in the appeal; *Aneta Mercantile Co. v. Groseth*, 20 N. D. 137, 127 N. W. 718, holding serving of pleading with appeal bond, to transfer jurisdiction from justice of peace to district court, not waived by stipulation to continue case over term; *Erpenbach v. Chicago, M. & St. P. R. Co.* 11 S. D. 201, 76 N. W. 923, holding appellant's failure to give undertaking on appeal from justice's judgments ground for dismissal though waived by stipulation of appellant's attorney; *Brown v. Brown*, 12 S. D. 380, 81 N. W. 627, holding failure to appeal undertaking for costs on appeal from justice's judgment not waived by appearance without objection and proceeding to trial; *Miller v. Lewis*, 17 S. D. 448, 97 N. W. 364, holding that where the bond on appeal from justice court contained no provision for the payment of costs on appeal, the bond is insufficient and the appeal is ineffectual, but where the appellee interposed an affirmative defense, he cannot afterward raise the objection to the jurisdiction of the appellate court.

Distinguished in *Wasem v. Bellach*, 17 S. D. 506, 97 N. W. 718, holding that where the undertaking on appeal did not contain provisions for the payment of the costs on appeal, the county court to which the appeal was taken had jurisdiction of the appeal to allow an amendment of the undertaking or the filing of a new one.

Object and benefit of appeal undertaking.

Cited in *Eldridge v. Knight*, 11 N. D. 552, 93 N. W. 860, holding that the requirement of an undertaking upon appeal is not wholly for the benefit of the appellees but on the grounds of public policy in discouraging frivolous and vexatious litigation; *Deardoff v. Thorstensen*, 16 N. D. 355, 113

N. W. 616, holding that the requirement of an appeal bond being not alone for the benefit of the appellee, the latter cannot waive the bond.

Transfer of action to appellate court before trial by stipulation.

Cited in *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221, holding that action for conversion commenced in justice's court cannot, before trial, be transferred to circuit court by stipulation of parties so as to give such courts jurisdiction.

10 S. D. 636, MINNEAPOLIS THRESHING MACH. CO. v. SKAU, 75 N. W. 199.

Review of sufficiency of evidence upon appeal from judgment alone.

Cited in *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding that upon appeal from the judgment alone, entered before the motion for a new trial was made, the sufficiency of the evidence to support the decision of the court, could not be considered.

Appeal before entry of judgment or order.

Followed in *Martin v. Smith*, 11 S. D. 437, 78 N. W. 1001; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181,—holding that appeal will not lie until judgment or order sought to be appealed from has been entered as a permanent record of the trial court.

Cited in *McCormick Harvesting Mach. Co. v. Woulph*, 11 S. D. 252, 76 N. W. 939, holding that order made after judgment on motion for new trial but never entered will be disregarded on appeal; *Myers v. Longstaff*, 12 S. D. 641, 82 N. W. 183, holding that appeal from judgment and order denying new trial will not be dismissed because taken before such order was entered on record.

Burden of proof of necessary steps to perfect appeal.

Cited in *Houser v. Nolting*, 11 S. D. 483, 78 N. W. 955, holding that party appealing from justice's judgment has burden of showing that all necessary steps to perfect appeal were taken.

Sufficiency of description in chattel mortgage.

Distinguished in *Reynolds v. Strong*, 10 N. D. 81, 85 N. W. 987, holding property covered by chattel mortgage on future earnings of threshing machine sufficiently identified in description, name, manufacturer, and present owner of machine and designating time and place of operation and earnings made.

Chattel mortgage on future earnings of machine.

Cited in note in 20 L.R.A.(N.S.) 506, on chattel mortgage of future earnings of threshing outfit.

10 S. D. 642, WINN v. SANBORN, 75 N. W. 201.

Objection to instructions where no request was made.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that the omission of the court to instruct upon any given question cannot be regarded as reversible error where no requests for instructions upon such point have been made;

Hahn v. Dickinson, 19 S. D. 373, 103 N. W. 642, holding that in the absence of exception to the charge or requests for instructions upon the theory of the appellants, the record presents no question for consideration, where the evidence supports the verdict; Belknap v. Belknap, 20 S. D. 482, 107 N. W. 692, holding that the appellant cannot complain that the instructions of the trial court were not as full and complete as they should have been where there was no request for instructions made. **Review of instructions not excepted to.**

Cited in South Dakota C. R. Co. v. Smith, 22 S. D. 210, 116 N. W. 1120, holding that instructions not excepted to will not be reviewed on appeal.

10 S. D. 644, SEIBERLING v. MORTINSON, 75 N. W. 202.

10 S. D. 648, RE OLSON, 75 N. W. 203.

Who entitled to appeal as "persons aggrieved."

Cited in Halde v. Schultz, 17 S. D. 465, 97 N. W. 369, holding that an executor is entitled to appeal from an order of the county court admitting or refusing the probate of a will; Tierney v. Tierney, 81 Neb. 193, 15 L.R.A.(N.S.) 436, 115 N. W. 764, holding that the heirs presumptive or apparent, or those dependent upon an alleged incompetent person, may appeal from the order of the court dismissing their petition for an appointment of a guardian for such incompetent person.

Cited in note in 15 L.R.A.(N.S.) 436, on right of applicant to appeal in proceedings to appoint guardian for incompetent.

Distinguished in Re Carpenter, 140 Wis. 572, 25 L.R.A.(N.S.) 155, 123 N. W. 144, holding that under the state statute, that a relative is not a person aggrieved so as to be entitled to appeal from an order dismissing the petition for a guardian.

10 S. D. 650, MORGAN v. BEUTHEIN, 66 AM. ST. REP. 722, 75 N. W. 204.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 11 S. D.

11 S. D. 1, DISTAD v. SHANKLIN, 75 N. W. 205, Later appeal in 15 S. D. 507, 90 N. W. 151.

Review of order granting or refusing new trial.

Cited in Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, holding that the motion for new trial on the grounds of newly discovered evidence is addressed to the discretion of the trial court and the latter's ruling will not be changed except for an abuse of discretion; Finch v. Martin, 13 S. D. 274, 83 N. W. 263, refusing to disturb discretion of trial court in granting or refusing motion for new trial; State v. Andre, 14 S. D. 215, 84 N. W. 783, holding that refusal of new trial on ground of alleged misconduct of jury will not be disturbed on appeal unless abuse of discretion affirmatively appears; Troy Mining Co. v. Thomas, 15 S. D. 238, 88 N. W. 106, holding that order granting new trial for insufficiency of the evidence will be disturbed only for the manifest abuse of discretion; Rochford v. Albaugh, 16 S. D. 628, 94 N. W. 701, holding that the motion to grant a new trial because of the insufficiency of the evidence to support the judgment, is addressed to the discretion of the trial court and the ruling of the latter will not be reversed except for an abuse of discretion; State v. Crowley, 20 S. D. 611, 108 N. W. 491, holding that a order granting or refusing a new trial in a criminal case on disputed questions of fact, is within the discretion of the trial court and will not be disturbed except for an abuse of discretion.

Limited by Sands v. Cruikshank, 15 S. D. 142, 87 N. W. 589, holding that order granting new trial for insufficiency of evidence will be disturbed only for manifest abuse of discretion.

11 S. D. 7, FARM & COLONIZATION CO. v. MELOY, 75 N. W. 207.

11 S. D. 12, NORTHWESTERN MORTG. TRUST CO. v. BRADLEY, 75 N. W. 269.

11 S. D. 14, HULST v. DOERSTLER, 75 N. W. 270.

Right of plaintiff to dismiss action.

Cited in *Cooke v. McQuaters*, 19 S. D. 361, 103 N. W. 335, holding that whether a plaintiff may dismiss his suit at any time before judgment, where no counterclaim has been interposed or other reasons shown to the contrary, rests in the discretion of the trial court.

Abandonment and forfeiture of mining claims.

Cited in notes in 87 Am. St. Rep. 405, on abandonment and forfeiture of mining claims; 135 Am. St. Rep. 893, on abandonment of mining claim by cotenant.

Cotenants in mine.

Cited in note in 91 Am. St. Rep. 861, on cotenants in mines.

11 S. D. 22, MURRAY v. LEONARD, 75 N. W. 272.

Excessive verdicts.

Cited in *Davis v. Holy Terror Min. Co.* 20 S. D. 399, 107 N. W. 374, holding that a verdict of ten thousand dollars was not excessive for injuries to a miner twenty-six years of age, where he was permanently injured and his hearing permanently impaired, together with his confinement to bed for five weeks and detention from work for two months more, and other things to be considered.

— Reduction by trial courts.

Cited in *Hanson v. Henderson*, 20 S. D. 456, 107 N. W. 670, holding that where the verdict is excessive and there is nothing upon which the trial court can base its opinion in reducing the verdict, the verdict should be set aside and a new trial granted instead of reducing the same.

Distinguished in *Doyle v. Edwards*, 15 S. D. 648, 91 N. W. 322, holding that where the precise sum which the verdict exceeds the amount the plaintiff is entitled to recover clearly appears by the pleadings and evidence the court may order a remittitur instead of a new trial; *Mosteller v. Holborn*, 20 S. D. 545, 108 N. W. 13, holding that where the jury in an action for conversion returned a verdict in excess of the amount asked for, it was proper for the trial court to reduce the amount instead of granting a new trial.

11 S. D. 27, WESTERN TWINE CO. v. SCOTT, 75 N. W. 273.

11 S. D. 30, VAN DYKE v. GRIGSBY, 75 N. W. 274.

When one becomes involuntary trustee.

Cited in *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725,

113 N. W. 618, holding bank, obtaining illegal preference under bankruptcy act, involuntary trustee.

Distinguished in *Hale v. Grigsby*, 12 S. D. 198, 80 N. W. 199, holding one for whom land is held in trust by a third person entitled thereto, as against one who had an attachment against the trustee levying thereon, and a notice of lis pendens filed after a conveyance of the land to him by such trustee, but before the recording of the deed.

11 S. D. 40, *RANDALL v. BURK TWP.* 75 N. W. 276.

Review of discretion in relieving party from stipulation.

Cited in *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 863, holding discretion of trial court in relieving parties from a stipulation for trial on ten days' notice not reviewable on appeal in absence of abuse thereof.

11 S. D. 43, *MUELLER v. MADISON BLDG. & L. ASSO.* 75 N. W. 277.

11 S. D. 47, *MURPHEY v. COOK*, 75 N. W. 387.

When warranty deed may be foreclosed as mortgage.

Distinguished in *David Bradley & Co. v. Helgersen*, 14 S. D. 593, 86 N. W. 634, holding that a warranty deed to a specified person as trustee may be foreclosed as a mortgage, when given solely to secure the payment of certain notes and interest.

11 S. D. 54, *SPRAGUE v. RYAN*, 75 N. W. 390.

11 S. D. 60, *McCLAIN v. WILLIAMS*, 43 L.R.A. 289, 75 N. W. 391, Decision on the merits in 11 S. D. 227, 49 L.R.A. 610, 74 Am. St. Rep. 791, 76 N. W. 930.

Implied repeal of statute.

Cited in *State v. Sexton*, 11 S. D. 105, 75 N. W. 895, holding that statute fixing jurisdiction of county court in counties having population of twenty thousand or over and also in counties having a less population should not unless necessary, be construed as repealing bastardy act as to former class of counties and not as to latter.

11 S. D. 64, *STATE v. WILLIAMS*, 75 N. W. 815.

Indictment for unlawful liquor sale.

Distinguished in *State v. Dunning*, 14 S. D. 316, 85 N. W. 589, in holding that registered pharmacists owning and conducting a pharmacy within S. D. Laws 1897, § 27, chap. 72, cannot, if they have not been guilty of a second offense, be convicted under § 5, as having engaged in the business of selling liquors without a license.

— Sufficiency of.

Cited in *State v. Ely*, 22 S. D. 487, 118 N. W. 687, 18 A. & E. Ann. Cas. 92, holding proper, allegation, in information for selling liquors without

license, that offense was committed by engaging in business between certain dates.

Cited in note in 23 L.R.A.(N.S.) 583, as to whether indictment or information for unlawful liquor sale must state purchaser's name.

Validity of statutes regulating sale of intoxicating liquors.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, as sustaining the provisions of the statute regulating the sale of intoxicating liquors, and holding that the statute giving a cause of action to the wife for damages from the sale of liquors to the husband.

Remarks of counsel as ground for reversal.

Cited in *Com. v. Richmond*, 207 Mass. 240, 93 N. E. 816, 20 A. & E. Ann. Cas. 1269, holding distinct attorney's comment that everyone at scene of homicide except defendant had testified, harmless error, where court plainly instructed jury as to want of presumption against defendant therefrom; *State v. Garrington*, 11 S. D. 178, 76 N. W. 326, holding remark by prosecuting attorney that defendant's failure to go on stand was not against him though he was not compelled to ground for new trial although court stated at once that counsel should not comment on that subject; *State v. Bennett*, 21 S. D. 396, 113 N. W. 78, holding statement, by state's attorney, to court, in presence of jury, in conversation as to holding evening session to complete case, that defendants had not testified yet, reversible error; *State v. Jones*, 21 S. D. 469, 113 N. W. 716, holding statement, to jury in argument, by deputy state's attorney, that certain testimony was not denied by defendant, reversible error; *State v. Kaufmann*, 22 S. D. 433, 118 N. W. 337, holding persistent statements of special counsel in calling attention of jury indirectly to failure of defendant to testify, reversible error.

What are intoxicating liquors.

Cited in *State v. Ely*, 22 S. D. 487, 118 N. W. 687, 18 A. & E. Ann. Cas. 92, holding that "brewed and fermented" liquors in license law are classed as intoxicating liquors.

11 S. D. 74, LAWRENCE COUNTY v. DEADWOOD & G. TOLL-ROAD CO. 75 N. W. 817.

11 S. D. 78, PALMER v. STATE, 75 N. W. 818.

11 S. D. 81, HERMISTON v. GREEN, 75 N. W. 819.

Burden of proof of consideration for written contract.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding burden of showing want of consideration for written contract on party seeking to invalidate it.

Harmless error in admission of incompetent evidence.

Cited in *Neeley v. Roberts*, 23 S. D. 604, 122 N. W. 655, holding admission of incompetent evidence, harmless error, where fact is established by other uncontradicted, competent evidence.

Proper party defendant.

Cited in *Milbank v. Western Surety Co.* 21 S. D. 261, 111 N. W. 561, holding complaint against construction company sufficient to hold surety company as surety for person doing business under name of construction company which executed bond.

11 S. D. 86, STATE v. WELBES, 75 N. W. 820.**Presumption of authority to bring action.**

Cited in *Leedy v. Brown*, 27 Okla. 489, 113 Pac. 177, holding attorney general presumed to have been requested by governor or legislature to bring action to remove officer.

Implied repeal of statute.

Cited in *Sands v. Cruickshank*, 12 S. D. 1, 80 N. W. 173, holding the provision of Dak. Code Civ. Proc. 1877, § 22, requiring notice of appeal from an order granting a new trial to contain an assent by appellant that judgment shall be rendered against him in case of affirmance, repealed by Dak. Laws 1887, chap. 20, relating to appeals to the supreme court of the territory; *Van den Bos v. Douglas County*, 11 S. D. 190, 76 N. W. 935, holding the county commissioners not empowered to change the boundaries of the commissioner districts therein in 1898, under S. D. Laws 1890, chap. 66, authorizing such change to be made in 1890, and every three years thereafter.

11 S. D. 91, OCHSENREITER v. GEORGE C. BAGLEY ELEVATOR CO. 75 N. W. 822.**New trial because of newly discovered evidence.**

Cited in *Grigsby v. Wolven*, 20 S. D. 623, 108 N. W. 250, holding that in order to obtain a new trial because of newly discovered evidence, the party offering it must show sufficient diligence in procuring it and that it could not have been produced at the former trial.

Harmless error in exclusion of evidence.

Cited in *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding exclusion of evidence harmless error, where fact is established by other competent evidence.

11 S. D. 94, MEUER v. CHICAGO, M. & ST. P. R. CO. 74 AM. ST. REP. 774, 75 N. W. 823.**Law governing carrier's contract.**

Cited in *Pittman v. Pacific Exp. Co.* 24 Tex. Civ. App. 595, 59 S. W. 949, holding that the validity of a contract of interstate transportation will be determined according to the law of the state where made and performance began.

Cited in note in 63 L.R.A. 527, on conflict of laws as to carrier's contracts.

Presumption as to foreign law.

Cited in *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255, holding that the law of a foreign state is presumed

to be the same as the local law, where there is no evidence to the contrary.

11 S. D. 105, STATE v. SEXTON, 75 N. W. 895.

Construction of statute.

Cited in *State v. Roddle*, 12 S. D. 433, 81 N. W. 980, holding that S. D. Laws 1897, chap. 90, should not be construed as adding new duties to the office of secretary of state, as such construction would impute an intention on the part of the legislature to violate the Constitution.

11 S. D. 109, NATIONAL BANK v. FEENEY, 75 N. W. 896, Reversed on later rehearing in 12 S. D. 156, 46 L.R.A. 732, 76 Am. St. Rep. 594, 80 N. W. 186.

11 S. D. 109, LEAD v. KLATT, 75 N. W. 896, Later phases of same case in 13 S. D. 140, 82 N. W. 391; 16 S. D. 159, 91 N. W. 582.

Nature of proceeding for violation of ordinance.

Cited in *Lead v. Klatt*, 13 S. D. 140, 82 N. W. 391, holding a prosecution for violation of a city ordinance as to nuisances civil, and not criminal.

Cited in note in 4 L.R.A.(N.S.) 783, on character of proceeding for violation of ordinance as civil or criminal.

Sufficiency of complaint as to defendants.

Cited in *First Nat. Bank v. Hattenbach*, 13 S. D. 365, 83 N. W. 421, holding a complaint fully stating defendants' names in the title, and alleging that "said defendants under the name of J. H. & Bros." executed and delivered the notes sued on, sufficient, although they are not repeated in the body of the complaint.

Writ of error or appeal.

Cited in *Madison v. Horner*, 15 S. D. 359, 89 N. W. 474, holding that judgments rendered for violation of city ordinances in name of the city must in all cases be brought to the supreme court by appeal and not by writ of error.

11 S. D. 111, STATE v. DAVIS, 74 AM. ST. REP. 780, 75 N. W. 897.

Powers of county commissioners.

Cited in *Multnomah County v. Title Guarantee Co.* 46 Or. 523, 80 Pac. 409, holding that the county commissioners had power to compromise a bona fide dispute as to the validity of taxes and tax certificates, and make a compromise settlement as to the taxes in litigation; *Hagler v. Kelly*, 14 N. D. 218, 103 N. W. 629, holding that the county commissioners may compromise or abate taxes which have become merged in judgment; *Brown County v. Jenkins*, 11 S. D. 330, 77 N. W. 579, holding board of county commissioners authorized to sell for full worth stale bills receivable and in connection with same to settle disputed claim against county.

Cited in note in 19 L.R.A.(N.S.) 323, on right of town, county, or municipality to surrender valid claim upon partial payment.

Distinguished in *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161, holding that the board of county commissioners had not the authority to employ a nonresident attorney to collect a judgment in favor of the county.

11 S. D. 116, DELL RAPIDS MERCANTILE CO. v. DELL RAPIDS, 74 AM. ST. REP. 783, 75 N. W. 898.

Right of abutting owner to use streets in connection with his land.

Cited in *Colegrove Water Co. v. Hollywood*, 151 Cal. 425, 13 L.R.A.(N.S.) 904, 90 Pac. 1053, holding that the owner of the fee over which a public highway passes can use the land for all purposes not inconsistent with the use of such land for highway purposes, and could maintain water pipes in such land and make necessary excavations if it held the city harmless.

Cited in notes in 101 Am. St. Rep. 104, 107, on rights, obligations, and remedies of persons over whose land a highway runs; 125 Am. St. Rep. 348, on grant by city of right to use streets and sidewalks for private purpose; 13 L.R.A.(N.S.) 906, on right of fee owner to make underground use of highway; 16 L.R.A.(N.S.) 1039, on right of abutter to change conditions in surface of street or highway; 32 L.R.A.(N.S.) 1036, on municipal power to require removal of vaults in street.

Duty and liability with respect to drainage.

Cited in note in 61 L.R.A. 685, on duty and liability of municipality with respect to drainage.

Omission of court to instruct upon given question without request.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that the omission of the court to instruct upon a given question cannot be considered as reversible error where there were no requests for instructions upon the question.

11 S. D. 120, RIVERSIDE TWP. v. NEWTON, 75 N. W. 899.

Grants of public rights of way over public lands.

Cited in *Hughes v. Veal*, 84 Kan. 534, 114 Pac. 1081, holding that location of highway by proper officers and use by public constitute dedication and acceptance; *Great Northern R. Co. v. Viborg*, 17 S. D. 374, 97 N. W. 6, holding that all persons whose rights accrued after the government grant of all section lines as roads, took grants subject to such rights of the public in the section lines; *Lawrence v. Ewert*, 21 S. D. 580, 114 N. W. 709, holding public entitled to appropriate 33 feet on each side of all section lines for highways, without compensation to owners acquiring title from government after 1866.

Cited in note in 24 L.R.A.(N.S.) 765, on establishment of highways over public land subsequent to entry by one who has not perfected title.

—Lands reserved for school purposes.

Cited in *Union P. R. Co. v. Karges*, 169 Fed. 459, holding that the grant of the right of way by Congress to the Union Pacific Railroad Company

over public lands gave the right of way over lands reserved for school purposes prior to the acquisition of title thereto by the state; *Peterson v. Baker*, 39 Wash. 275, 81 Pac. 681, holding that the sections reserved for the use of public schools were not reserved for public uses, so that a highway over a school section became a public highway by seven years' use, under a statute granting a right of way over lands not reserved for public use.

11 S. D. 124, THURBER v. MILLER, 75 N. W. 900, Modified on rehearing in 14 S. D. 352, 85 N. W. 600.

Collateral attack upon void orders of court.

Cited in *Bowman v. Hazen*, 69 Kan. 682, 77 Pac. 589, holding that orders of the court purporting to vest a receiver with authority over property not involved in the litigation, being absolutely void, can be attacked collaterally at any time, by any person, in any proceedings.

Rights capable of de facto enjoyment.

Cited in *State v. Stevens*, 16 S. D. 309, 92 N. W. 420, holding that there can be no de facto corporation unless there is a law authorizing a de jure one.

11 S. D. 133, CAMPBELL v. MINNEHAHA NAT. BANK, 76 N. W. 10.

Reclassification of property by board of equalization.

Cited in *Bell v. Meeker*, 39 Ind. App. 224, 78 N. E. 641, holding that where the statute made a class of lands and the improvements thereon, the board of equalization could not reclassify it and increase the valuation of the improvements without increasing that of the lands; *Coler v. Sterling*, 11 S. D. 140, 76 N. W. 12, holding state board of equalization not authorized to direct bank stock as classed separate and distinct from other stocks for purpose of classification.

Cited in note in 58 L.R.A. 614, on taxation of capital stock of corporations in United States.

11 S. D. 140, COLER v. STERLING COUNTY, 76 N. W. 12.

Taxation of capital stock of corporations.

Cited in note in 58 L.R.A. 614, on taxation of capital stock of corporations in the United States.

11 S. D. 141, EDINBURGH-AMERICAN LAND MORTG. CO. v. NOONAN, 76 N. W. 298.

Authority of agent to receive payment.

Cited in note in 23 L.R.A. (N.S.) 423, on effect of agent's nonpossession of security upon question of authority to receive payment.

11 S. D. 144, STATE v. RANKIN, 76 N. W. 299.

Taxation of interstate commerce.

Cited in notes in 19 L.R.A. (N.S.) 306, on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or

otherwise, as violating the commerce clause; 46 L. ed. U. S. 786, on peddlers and drummers as related to interstate commerce.

Distinguished in *State v. Delamater*, 20 S. D. 23, 8 L.R.A. (N.S.) 774, 129 Am. St. Rep. 907, 104 N. W. 537, holding that statute requiring travelling salesmen selling intoxicating liquors in quantities of less than five gallons to take out a license, is not unconstitutional as applied to salesmen of foreign companies.

11 S. D. 150, LIVINGSTON v. SCHOOL DIST. NO. 7, 76 N. W. 301.

Recovery on quantum meruit.

Cited in *Dring v. St. Lawrence Twp.* 23 S. D. 624, 122 N. W. 664, holding that holder of township bonds, issued in excess of constitutional limitation, cannot recover any part of debt represented thereby; *Lincoln Land Co. v. Grant*, 57 Neb. 70, 77 N. W. 349, holding that a municipal corporation which has been furnished a year's water supply under a contract which it was authorized to make but which is void because irregularly executed, is liable for the reasonable value of the benefits received.

11 S. D. 153, OWEN v. BURLINGTON, C. R. & N. R. CO. 74 AM. ST. REP. 786, 76 N. W. 302.

Right to freight.

Cited in *Corinth Engine & Boiler Works v. Mississippi C. R. Co.* 95 Miss. 817, 49 So. 261, holding that conditional vendor need not pay freight to obtain property shipped by transferee of vendee.

11 S. D. 155, TORREY v. BERKE, 76 N. W. 302.

Trying title in forcible entry and detainer.

Distinguished in *Zahn v. Obert*, 24 Okla. 159, 103 Pac. 702, holding that title cannot be put in issue in forcible detainer action.

Civil action for forcible entry and detainer.

Cited in note in 121 Am. St. Rep. 402, on right to civil action for forcible entry and detainer.

11 S. D. 160, REEDY v. HOWARD, 76 N. W. 304.

General appearance as conferring jurisdiction on appellate court.

Cited in *Houser v. Nolting*, 11 S. D. 483, 78 N. W. 955, holding jurisdiction not conferred on the appellate court by a general appearance on motion to dismiss an appeal, where the court is not called on to do any act presupposing jurisdiction.

11 S. D. 167, DEERING v. SECHLER, 76 N. W. 311.

11 S. D. 170, YANKTON COUNTY v. KLEMISCH, 76 N. W. 312.

Collateral attack on judgment.

Cited in *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393, 127 N. W. 499, holding school district estopped from collateral-

ly attacking after two years validity of annexation of territory by adjoining school district; *Weiland v. Ashton*, 18 S. D. 331, 100 N. W. 737, holding that a judgment in condemnation proceedings is not open to collateral attack because of nonessential defects.

11 S. D. 178, STATE v. GARRINGTON, 76 N. W. 326.

Incrimination by traces of blood.

Cited in *State v. McAnarney*, 70 Kan. 679, 79 Pac. 137, holding that where the trousers of the defendant were put in a sack with other bloody clothes and left there for some time and were then examined by an expert for traces of blood, the result of the test was not admissible to prove that there was blood on the garment.

Statements of counsel as ground for reversal.

Cited in *State v. Bennett*, 21 S. D. 396, 113 N. W. 78, holding statement, by state's attorney, to court, in presence of jury, in conversation as to holding evening session to complete case, that defendants had not testified yet, reversible error; *State v. Jones*, 21 S. D. 469, 113 N. W. 716, holding statement by deputy state's attorney in argument to jury that certain testimony was not denied by defendant, reversible error; *State v. Kaufmann*, 22 S. D. 433, 118 N. W. 337, holding persistent statements of special counsel in calling attention of jury indirectly to failure of defendant to testify, reversible error.

Homicide in commission of unlawful act.

Cited in note in 63 L.R.A. 398, on homicide in commission of unlawful act.

11 S. D. 190, VAN DEN BOS v. DOUGLAS COUNTY, 76 N. W. 935.

11 S. D. 196, MATHER v. DUNN, 74 AM. ST. REP. 788, 76 N. W. 922.

Recovery of possession by tenant in common against stranger to title.

Cited in *Griswold v. Minneapolis*, St. P. & S. Ste. M. R. Co. 12 N. D. 435, 102 Am. St. Rep. 572, 97 N. W. 538, holding that a tenant in common of real estate is entitled to possession of the same as against all the world save his cotenants, and may maintain ejectment and recover possession of the entire tract as against strangers to the title.

Cited in note in 6 L.R.A. (N.S.) 713, on extent of recovery in ejectment by tenants in common against stranger.

11 S. D. 201, ERPENBACH v. CHICAGO, M. & ST. P. R. CO. 76 N. W. 923.

Necessity of bond on appeal from justice of peace.

Cited in *Doering v. Jensen*, 16 S. D. 58, 91 N. W. 343, holding that where the appeal bond on appeal from justice court is insufficient the circuit court has no jurisdiction and cannot allow the filing of a new bond;

Miller v. Lewis, 17 S. D. 448, 97 N. W. 364, holding that where the appeal bond on appeal from justice court did not contain provisions for the payment of costs on appeal, an objection to the jurisdiction of the circuit court should be sustained, but where the appellee asked for affirmative relief thereafter, he waived the objection.

Transfer of action to appellate court before trial by stipulation.

Cited in *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221, holding that action for conversion commenced in justice's court cannot before trial be transferred to circuit court by stipulation of parties so as to give such courts jurisdiction.

11 S. D. 203, CROW v. ZOLLARS, 76 N. W. 924.

Sufficiency of description in chattel mortgage.

Cited in *Longerbeam v. Huston*, 20 S. D. 254, 105 N. W. 743, holding that a chattel mortgage which described the property as one bald-faced mare, five years old, weight about 1,400 pounds, and one black mare, seven years old, weight about 1,200 pounds, in possession of the mortgagor, was sufficient in describing them, where mortgagor had no other mare answering the description.

11 S. D. 206, WILSON v. GABLER, 76 N. W. 924.

11 S. D. 210, DILLAWAY v. PETERSON, 76 N. W. 925.

Extension of time of payment.

Cited in *Fanning v. Murphy*, 126 Wis. 538, 4 L.R.A.(N.S.) 666, 110 Am. St. Rep. 946, 105 N. W. 1056, 5 A. & E. Ann. Cas. 435, on the sufficiency of consideration for extension of time of payment.

— To person assuming mortgage as discharging original mortgagor.

Cited in *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255, holding that where the mortgaged premises are conveyed and the grantee assumes the mortgage with the knowledge of the mortgagee, an extension of the time of payment to the person assuming the mortgage, acts as a release of the original mortgagor upon the note and mortgage; *Miller v. Kennedy*, 12 S. D. 478, 81 N. W. 906, holding that mortgagee of land who knowing that grantee has assumed mortgage debt extends time of payment against mortgagor's protest releases latter from personal liability.

Cited in note in 4 L.R.A.(N.S.) 667, on effect upon mortgagor's obligation of modification between mortgagee and subsequent grantee.

Distinguished in *Hull v. Hayward*, 13 S. D. 291, 79 Am. St. Rep. 890, 83 N. W. 270, holding a mortgagor who sells his interest in the land to one assuming the mortgage, of which fact the mortgagee has notice, not relieved from liability by the latter's failure to proceed against the estate of the grantee after the latter's death.

What constitutes partnership.

Cited in note in 18 L.R.A.(N.S.) 990, 1013, 1089, on effect of agreement to share profits to create partnership.

Dak. Rep.—63.

11 S. D. 222, GILES v. HAWKEYE GOLD-MIN. CO. 76 N. W. 928.

Failure to file brief as an abandonment of appeal.

Cited in *Russell v. Deadwood Development Co.* 16 S. D. 644, 94 N. W. 693, holding that where there are no abstracts nor briefs filed it will be presumed that there are no questions to be decided and the appeal will be dismissed; *Welch v. Synoground*, 17 S. D. 514, 97 N. W. 720, holding that where no briefs are filed upon the part of the appellant, it will be presumed that the appeal has been abandoned and the court will dismiss the appeal or affirm the judgment as seems most proper; *Erickson v. Stevenson*, 21 S. D. 96, 110 N. W. 36; *State ex rel. Christianson v. Allison*, 21 S. D. 4, 108 N. W. 556,—holding appeal abandoned, where appellant has filed neither abstract nor brief.

11 S. D. 223, ISSENHUTH v. BAUM, 76 N. W. 928.

11 S. D. 227, McCLAIN v. WILLIAMS, 49 L.R.A. 610, 74 AM. ST. REP. 791, 76 N. W. 930.

Innkeeper's lien.

Cited in *Wertheimer-Swartz Shoe Co. v. Hotel Stevens Co.* 38 Wash. 409, 107 Am. St. Rep. 864, 80 Pac. 563, 3 A. & E. Ann. Cas. 625, holding that the statute did not give the hotel keeper a lien upon the samples of a travelling salesman, belonging to his employer.

Cited in notes in 107 Am. St. Rep. 879, on innkeeper's liens; 24 L.R.A. (N.S.) 959, on innkeeper's lien on third person's property in possession of guest.

11 S. D. 233, BAIRD v. GLECKLER, 76 N. W. 931.

Right of broker to commissions.

Cited in *Mattes v. Engel*, 15 S. D. 330, 89 N. W. 651, holding that plaintiff in action for commissions as broker went into details with reference to improvements not ground for reversal where his commission was not contingent on development of the property.

Cited in note in 44 L.R.A. 605, on performance by a real estate broker of his contract to find a purchaser or effect an exchange of his principal's property.

11 S. D. 237, JOHNSON v. GLIDDEN, 74 AM. ST. REP. 795, 76 N. W. 933.

Parent's liability for torts of minor.

Cited in note in 10 L.R.A. (N.S.) 943, on parent's liability for torts of minor.

11 S. D. 245, CRANMER v. KOHN, 76 N. W. 937.

Papers incorporated by reference.

Cited in *Murtha v. Hubbard*, 20 S. D. 152, 105 N. W. 100, holding that where the notice of an election contest referred to the complaint attached

and made the same a part of the notice, such complaint should be referred to in deciding the sufficiency of the facts upon which the contestant relies; *Thomas v. Douglas County*, 15 S. D. 520, 83 N. W. 580, holding that exhibits attached to complaint must be considered in determining its sufficiency.

Presumption of regularity of verdict.

Cited in *State v. McDonald*, 16 S. D. 78, 91 N. W. 447, holding that where it does not affirmatively appear that there was an adjournment after the retirement of the jury, it will be presumed that the court remained in session and that the verdict was regular.

Profits as element of damages.

Cited in note in 53 L.R.A. 78, on loss of profits as an element of damages for breach of contract.

Pleading in trover and conversion.

Cited in note in 9 N. D. 633, on pleading in actions for trover and conversion.

Remedy of wrongfully discharged servant.

Cited in notes in 1 Brc. Rul. Cas. 134; 6 L.R.A.(N.S.) 86,—on remedy of wrongfully discharged servant by action for breach of contract.

11 S. D. 252, McCORMICK HARVESTING MACH. CO. v. WOULPH, 76 N. W. 939.

Appeal before entry of order or judgment.

Cited in *McCarthy v. Speed*, 12 S. D. 7, 50 L.R.A. 190, 80 N. W. 135, holding that appeal from judgment and order denying new trial will not be dismissed because taken before such order was entered on record.

Reformation of instruments.

Cited in *Cox v. Beard*, 75 Kan. 369, 89 Pac. 671, holding that a deed is reformation where by the mistake of one party and the fraud of another, there is omitted from it land which it was stipulated should be conveyed.

Cited in note in 117 Am. St. Rep. 231, on mistakes for which written instruments may be canceled or corrected in equity.

Review of error occurring at the trial, on appeal from judgment and unauthorized motion for new trial.

Cited in *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281, holding that where through the insufficiency of the notice of intention to move for new trial, the court was without authority to entertain such a motion and an appeal from a denial of such motion and from judgment was taken, it was an appeal from judgment alone and errors occurring upon the trial could be reviewed upon exceptions preserved at the trial as shown by the judgment roll.

When replevin or claim and delivery is sustainable.

Cited in notes in 80 Am. St. Rep. 745, as to when replevin or claim and delivery is sustainable; 18 L.R.A.(N.S.) 1267, on right to maintain action to recover property in specie against one not in possession.

11 S. D. 258, DANFORTH v. McCOOK COUNTY, 74 AM. ST. REP. 808, 76 N. W. 940.

Taxes as debts.

Cited in *Plymouth County v. Moore*, 114 Iowa, 700, 87 N. W. 662, reversing a judgment for the county in a personal action against the owner to recover a tax upon personal property sold after the levy, since a tax is not a debt, and the proceeding in rem, under Iowa Code, §§ 447, 448, against the property taxed, is exclusive; *Baillies v. Des Moines*, 127 Iowa, 124, 102 N. W. 813, holding that unpaid taxes are not debts in the sense that they might be deducted from the credits under a statute allowing the deduction of debts from all the credits in assessing the latter; *Brule County v. King*, 11 S. D. 294, 77 N. W. 107, holding taxes not recoverable as such by action; *Acme Harvesting Mach. Co. v. Hinkley*, 23 S. D. 509, 122 N. W. 482, holding that action will not lie for recovery of personal taxes; *State v. Chicago, M. & St. P. R. Co.* 128 Wis. 449, 108 N. W. 594; *Hanson v. Franklin*, 19 N. D. 259, 123 N. W. 386; holding that a tax is not a debt in the ordinary sense of the word; *Harris v. Larsen*, 24 Utah, 139, 66 Pac. 782 (dissenting opinion), on taxes as debts.

Exemption from taxation.

Cited in note in 132 Am. St. Rep. 338, on exemption from taxation or assessment of lands owned by governmental bodies, or in which they have an interest.

Liability for penalties and interest on unpaid taxes.

Cited in *Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443, holding that the owner of property omitted from the assessment roll and duplicate cannot be charged with the penalties and interest which would have accrued on the taxes on such property had it been included at the proper time.

Retrospective action of tax laws as to tax liens acquired before law took effect.

Cited in *Hagler v. Kelly*, 14 N. D. 218, 103 N. W. 629, holding that a judgment for personal taxes having become a lien before the Revised Codes took effect, the lien remained though the Codes repealed the law under which the tax was acquired.

11 S. D. 270, REAGAN v. McKIBBEN, 76 N. W. 943, 19 MOR. MIN. REP. 556.

Sufficiency of specifications of error in notice of intention to move for new trial.

Cited in *Wenke v. Hall*, 17 S. D. 305, 96 N. W. 103, holding that the bill of exceptions and notice of intention to move for new trial should contain specifications of the particulars wherein the evidence is alleged to be insufficient to support the findings; *McMahon v. Crockett*, 12 S. D. 11, 80 N. W. 136, holding that objection that bill of exceptions contains no specifications of error will not be regarded where notice of intention to move for new trial specifies all the errors relied on and is made part of the bill of exceptions settled by the court in accordance with a stipulation of counsel; *Lennan v. Pollock State Bank*, 21 S. D. 511, 110 N. W. 834, hold-

ing specification of error in bill of exceptions unnecessary on application for new trial upon minutes of court.

Reversal of findings of trial court on disputed questions of fact.

Cited in *Clarke v. Conners*, 18 S. D. 600, 101 N. W. 883; *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207; *Lee v. Dwyer*, 20 S. D. 464, 107 N. W. 674; *Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641,—holding that there is a presumption in favor of the correctness of the findings of the trial court, and they will not be reversed unless there is a clear preponderance of evidence against them; *Henderson v. Hughes County*, 13 S. D. 576, 83 N. W. 682; *Littlejohn v. County Line Creamery Co.* 4 S. D. 312, 85 N. W. 588,—holding that finding by court will not be disturbed on appeal unless clearly against the preponderance of evidence; *Krueger v. Dodge*, 15 S. D. 159, 87 N. W. 965, holding that finding of fact will be presumed on appeal to be sustained by weight of evidence; *Empson v. Reliance Gold Min. Co.* 23 S. D. 412, 122 N. W. 346, holding that findings of court will not be disturbed, unless evidence clearly preponderates against them.

Location of mining claim.

Cited in note in 7 L.R.A.(N.S.) 818, 819, on location of mining claim.

Cotenants in mines.

Cited in note in 91 Am. St. Rep. 854, on cotenants in mines.

Admissibility of conversations between attorney and client.

Cited in *International Harvester Co. v. McKeever*, 21 S. D. 91, 109 N. W. 642, holding conversion between parties in consultation with attorney in attempting to settle case, inadmissible.

Contract relating to land as within statute of frauds.

Cited in *Floyd v. Duffy*, 68 W. Va. 350, 33 L.R.A.(N.S.) 883, 69 S. E. 993, holding joint purchase of land for resale, title being taken in name of one for both, not within statute of frauds.

11 S. D. 280, HOLLISTER v. BUCHANAN, 77 N. W. 103.

Adequacy of price on mortgage sale.

Cited in note in 103 Am. St. Rep. 55, on necessity of reasonable price on mortgage sales under powers.

11 S. D. 282, STATE EX REL. TOMPKINS v. CHICAGO, M. & ST. P. R. CO. 77 N. W. 104.

11 S. D. 289, HIRSCH v. SCHLENKER, 77 N. W. 106.

11 S. D. 292, WEBSTER INDEPENDENT SCHOOL DIST. NO. 101 v. PRIOR, 77 N. W. 106.

11 S. D. 294, BRULE COUNTY v. KING, 77 N. W. 107.

Exclusiveness of statutory method for collection of taxes.

Cited in *Logan County v. Carnahan*, 66 Neb. 685, 92 N. W. 984, holding that the remedies provided by statute for the collection of real estate taxes, being adequate and efficient, are exclusive; *Hanson County v. Gray*,

12 S. D. 124, 76 Am. St. Rep. 591, 80 N. W. 175, holding that action at law will not lie for collection of taxes on personalty; *Acme Harvesting Mach. Co. v. Hinkley*, 23 S. D. 509, 122 N. W. 482, holding that action will not lie for recovery of personal taxes; *Marye v. Diggs*, 98 Va. 749, 51 L.R.A. 902, 37 S. E. 315, holding a suit by the state or by a county for the collection of taxes is not within the jurisdiction of a court of equity.

11 S. D. 301, *GAGE v. GAGE*, 77 N. W. 109.

11 S. D. 305, *DUNN v. NATIONAL BANK*, 77 N. W. 111, Later appeal in 15 S. D. 454, 90 N. W. 1045.

Burden of proof of good faith in acquisition of note negotiated by fraud.

Cited in *McGill v. Young*, 16 S. D. 360, 92 N. W. 1066; *Bank of Spearfish v. Graham*, 16 S. D. 49, 91 N. W. 340,—holding that the burden is upon the holder of a note negotiated in fraud of the maker, to prove that he is a bona fide holder of such note for value and without notice of such fraud; *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567, holding that proof of unauthorized and fraudulent delivery of note by payee's agent casts burden on plaintiff of proving purchase for value in due course.

Right of intervention.

Cited in note in 123 Am. St. Rep. 301, on intervention.

11 S. D. 311, *FISHER v. PORTER*, 77 N. W. 112.

Restriction of cross-examination within scope of direct examination.

Cited in *Harold v. Oklahoma*, 94 C. C. A. 415, 169 Fed. 47, 17 A. & E. Ann. Cas. 868; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 64 C. C. A. 180, 129 Fed. 668,—holding that the party on whose behalf a witness is called, has a right to restrict his cross-examination to the subjects of his direct examination and if the party wishes to go farther, they must call him as their own witness.

Disqualification of witness by interest.

Cited in *Cross v. Robinson Point Lumber Co.* 55 Fla. 374, 46 So. 6, 15 A. & E. Ann. Cas. 588, holding that where one of the parties furnishing them money to purchase land, was a witness to the deed, title being taken by a trustee, and the land was afterward transferred to the plaintiff who took without notice of the witness's interest, such witness was competent to testify as to the execution of the deed.

Criticized and disapproved in *Donovan v. St. Anthony & D. Elevator Co.* 8 N. D. 585, 46 L.R.A. 721, 73 Am. St. Rep. 779, 80 N. W. 772, holding chattel mortgage witnessed by mortgagee a person not party to the instrument not so executed as to entitle it to be filed or to operate as constructive notice.

Disapproved in *Ames v. Parrott*, 61 Neb. 847, 87 Am. St. Rep. 536, 86 N. W. 503, holding that a plaintiff in attachment is not a competent witness of the levy thereof in view of the provision of Neb. Code, § 205, that

the witnesses to the levy shall inventory and appraise the attached property.

Sufficiency of description in chattel mortgage.

Cited in *Longerbean v. Huston*, 20 S. D. 254, 105 N. W. 743, holding that a chattel mortgage which described the property as one bald faced mare, five years old, weight about 1,400 pounds, and one black mare, seven years old, weight about 1,200 pounds, in the possession of the mortgagor, was sufficient where mortgagor had no other mares answering the description.

Distinguished in *Barrett v. Magner*, 105 Minn. 118, 127 Am. St. Rep. 531, 117 N. W. 245, holding description of horses in chattel mortgage sufficient, where a third party aided by inquiries could identify the property.

— Question for jury.

Cited in *Livingston v. Stevens*, 122 Iowa, 62, 94 N. W. 925, holding that whether the description was sufficient to cover the particular property in dispute and its identity in connection with the extrinsic evidence offered, was a question for the jury.

Validity of chattel mortgage.

Cited in note in 137 Am. St. Rep. 475, on effect of failure to execute and record chattel mortgage as prescribed by statute.

Evidence in trover and conversion.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

Direction of verdict.

Cited in *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516, holding verdict properly directed, where verdict for other party would be set aside.

11 S. D. 318, VAN DUSEN v. STATE, 77 N. W. 201.

Followed without discussion in *Winona Mill Co. v. State*, 11 S. D. 322, 77 N. W. 1118.

Effect of ultra vires contract of public officials.

Cited in *Davenport v. Elrod*, 20 S. D. 567, 107 N. W. 833, holding that the state capitol commission could not be prevented from inserting a clause in the contracts that certain disputes could be settled by the architects, since if the provision was valid, they had the right to place them in the contract, and if they were not, they would be of no effect and such provision would be null and void.

11 S. D. 322, WINONA MILL CO. v. STATE, 77 N. W. 1118.

11 S. D. 323, McDERMOTT v. CARROLL, 77 N. W. 579.

Recovery of rental of land from unlawful occupant.

Cited in *Baldwin v. Bohl*, 23 S. D. 395, 122 N. W. 247, holding that plaintiff can recover customary rental of farm from person unlawfully occupying same, where plaintiff's ownership is established.

11 S. D. 325, MASSILLON ENGINE & THRESHER CO. v. HUBBARD, 77 N. W. 588.**Sufficiency of service to confer jurisdiction.**

Cited in *Phelps v. McCollam*, 10 N. D. 536, 88 N. W. 292, holding leaving of summons with defendant's wife while she is temporarily staying with her children at a friend's house in absence of her husband who had left the jurisdiction for purpose of establishing homestead in other part of country to which the wife was to follow make not a service on defendant.

Cited in note in 21 L.R.A. (N.S.) 349, as to where process may be served under statutes providing for service by leaving at usual place of abode, etc.

11 S. D. 330, BROWN COUNTY v. JENKINS, 77 N. W. 579.**Powers of county commissioners.**

Cited in *Multnomah County v. Title Guarantee Co.* 46 Or. 523, 80 Pac. 409, holding that the county commissioners had power to compromise a bona fide dispute as to the validity of taxes and tax certificates, and make compromise settlement as to taxes in litigation.

11 S. D. 333, CHAFFEE v. RUNKEL, 77 N. W. 583.

Followed without discussion in *Pillar v. Runkel, R. & Co.* 11 S. D. 337, 77 N. W. 1118; *Smith v. Runkel, R. & Co.* 12 S. D. 241, 80 N. W. 1135.

11 S. D. 337, PILLAR v. RUNKEL, 77 N. W. 1118.**11 S. D. 338, AULTMAN, M. & CO. v. NELSON, 77 N. W. 584.**

Followed without discussion in *Aultman, M. & Co. v. Nelson*, 11 S. D. 389, 390, 77 N. W. 1117.

Sufficiency of bond on appeal.

Distinguished in *Doering v. Jensen*, 16 S. D. 58, 91 N. W. 343, holding that a bond on appeal from justice court which failed to make provision for the payment of the costs on appeal was insufficient and warranted the dismissal of the appeal.

11 S. D. 340, MALE v. BROWN, 77 N. W. 585.

Followed without discussion in *Male v. Miller*, 11 S. D. 433, 78 N. W. 1119.

Sufficiency of complaint.

Cited in *Frum v. Weaver*, 13 S. D. 457, 83 N. W. 579, holding allegations as to tax title in complaint alleging plaintiff's ownership and right to immediate possession of land which defendants are holding and occupying as a homestead claiming same right and interest therein under a treasurer's sale deed without plaintiff's consent, surplusage; *Campbell v. Equitable Loan & T. Co.* 14 S. D. 483, 85 N. W. 1015, holding sufficient, complaint in action to determine adverse claims to land alleging plaintiff's ownership in fee simple and defendant's claim of interest adverse

to plaintiff by virtue of pretended tax deed which claim is without merit or foundation in law.

11 S. D. 342, PITTS AGRI. WORKS v. BAKER, 77 N. W. 586.

Validity of foreclosure sale of chattel mortgage.

Distinguished in *Edmonds v. Riley*, 15 S. D. 470, 90 N. W. 139, holding foreclosure sale of chattel mortgage by advertisement invalid where report of sale was not filed.

Discharge of lien of chattel mortgage.

Cited in *Northwestern Port Huron Co. v. Iverson*, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372, holding that sale of mortgaged chattels in county in which mortgage is not filed discharges lien.

11 S. D. 348, TURNER v. HAND COUNTY, 77 N. W. 589.

Sufficiency of description in tax proceedings.

Cited in *Brown v. Reeves*, 31 Ind. App. 517, 68 N. E. 604, holding that a description of land in an advertisement of tax sale, as "Lot 1 Col. W. Co.," is insufficient as intending Lot 1, in Columbus Wheel Co. & M. T. Reeves Addition to the city of Columbus; *Moran v. Thomas*, 19 S. D. 489, 104 N. W. 212, holding that the letters and figures, "S. 2, N. E. 4, and S. E. 4 N. W. 4 Sec. 29, township 118, range 54," were insufficient as a description in the assessment book; *Stokes v. Allen*, 15 S. D. 421, 89 N. W. 1023, holding insufficient, description in duplicate tax list as "S. W. 4 N. E. 4 and W. 2 S. E. less R. W. D. C. Ry." without giving section, township, or range although immediately under description of other property of another person specifying section, township, and range.

Distinguished in *Moran v. Thomas*, 19 S. D. 489, 104 N. W. 212 (dissenting opinion), differentiating the tax deeds under consideration in this case and the leading case; *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 287, holding that description reading, "NE⁴ SW⁴ Sec. 4 Twp. 30 R. 6," "40 Acres," is sufficient under the statute; *Stoddard v. Lyon*, 18 S. D. 207, 99 N. W. 1116, holding that where the columns of the assessment roll were each headed N. E., N. W., etc., Sec., Twp., Range, Acres, where ditto marks were placed in the column under N. E., under Sec., Twp., Range, Acres, the numbers 21, 105, 68, 160, respectively, it was sufficient description.

Establishment and regulation of municipal water supply.

Cited in note in 61 L.R.A. 54, on establishment and regulation of municipal water supply.

11 S. D. 353, TRIPP v. YANKTON, 77 N. W. 580.

Right of plaintiff to dismiss action.

Cited in *Cooke v. McQuaters*, 19 S. D. 361, 103 N. W. 385, holding that the plaintiff may dismiss his action at any time before judgment where no counterclaim has been interposed and no sufficient reasons are shown that the defendant will be prejudiced, and whether the dismissal be with or without prejudice rests with the court.

11 S. D. 355, *McDONALD v. FULLER*, 74 AM. ST. REP. 315, 77 N. W. 581.

Issuance of execution.

Cited in *Schroeder v. Pehling*, 20 S. D. 642, 129 Am. St. Rep. 952, 108 N. W. 252, holding that the issuance of an execution is not completed until the same has been delivered to the officer for service, so that the sixty day limit for its return is computed from that time and not when it was prepared by the clerk.

Collateral attack upon sale on execution.

Distinguished in *Jochem v. Cooley*, 100 C. C. A. 155, 176 Fed. 719, holding that a sale on execution of real estate seized under attachment in another county, made before the judgment was docketed in that county, is not void but voidable and cannot be collaterally attacked.

Limited in *Carson v. Fuller*, 11 S. D. 502, 74 Am. St. Rep. 823, 78 N. W. 960, holding execution under which sheriff justifies seizure not available defense unless it affirmatively appears that judgment was docketed in county before delivery of execution to him.

11 S. D. 362, *McCARATHY v. SPEED*, 50 L.R.A. 184, 77 N. W. 590, 19 Mor. Min. Rep. 615, Modified on rehearing 12 S. D. 7, 50 L.R.A. 190, 80 N. W. 135, 20 Mor. Min. Rep. 124, writ of error to which is dismissed in 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

Termination of rights to mining claim by entry and relocation.

Cited in *Madison v. Octave Oil Co.* 154 Cal. 768, 99 Pac. 176, holding that failure to perform the work required to be done upon mining claims, does not absolutely forfeit the rights of the locator, but these rights are only forfeited by an entry of a new locator; *Sherlock v. Leighton*, 9 Wyo. 297, 63 Pac. 580, 934, holding that in an action to determine adverse claims to a mining property, the failure of the original locator and applicant for patent to prove citizenship may prevent a recovery on his part, but will not operate to authorize a judgment, for that reason alone, in favor of his adversary.

— Acts of cotenant inuring to benefit of others.

Cited in *Stevens v. Grand Central Min. Co.* 67 C. C. A. 284, 133 Fed. 28, holding that a co-owner who amends the location notice relocates the claim, or procures the patent in his name, will not be permitted to exclude the others and appropriate the title to himself, but the title will be acquired in trust for all; *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123, 22 Mor. Min. Rep. 398, holding that the relocation of a mining claim by one cotenant inures to the benefit of all the cotenants.

Cited in note in 91 Am. St. Rep. 860, 861, on cotenants in mines.

Location of lode claims.

Cited in *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428, holding that there can be no valid mining claim until a discovery is made within the lines of such claim and outside the limits of any other valid existing lode location.

Cited in notes in 50 L.R.A. 295, on lodes or veins within placer claims; 7 L.R.A. (N.S.) 820, on location of mining claim; 68 L.R.A. 842, on relocation of mining claim as abandoned or forfeited.

11 S. D. 373, MACBRIDE v. HITCHCOCK, 77 N. W. 1021.

11 S. D. 376, G. S. CONGDON HARDWARE CO. v. CONSOLIDATED APEX MIN. CO. 77 N. W. 1022.

Application to open default.

Cited in *Masten v. Indiana Car & Foundry Co.* 25 Ind. App. 175, 57 N. E. 148, holding that an appellate court will not reverse the action of a trial court in setting aside a default judgment on grounds of mistake, inadvertence, or excusable neglect when it is supported by evidence; *McLaughlin v. Nettleton*, 25 Okla. 319, 105 Pac. 662, holding that sufficiency of defense to action cannot be raised on application to vacate default judgment.

Distinguished in *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199, where a refusal to open a default was sustained on the ground of inexcusable delay in making the application.

11 S. D. 381, PARKER v. VINSON, 77 N. W. 1023.

Color of title.

Cited in *Murphy v. Pierce*, 17 S. D. 207, 95 N. W. 925, holding that a deed and tax deed which were void because executed within five years after the issuance of the patent to the Indian entryman, were color of title sufficient to give title by occupation for ten years and payment of taxes for that time.

—Defective tax deed.

Cited in *Murphy v. Dafee*, 18 S. D. 42, 99 N. W. 86, holding that a tax deed is color of title whether valid or invalid, sufficient to give title by adverse possession for the required time under color of title; *Meadows v. Osterkamp*, 13 S. D. 571, 83 N. W. 264, holding defendant in action to remove cloud on title by setting aside tax deed fair on its face entitled to recover for improvements made by him greatly exceeding the value of the land though the deed was granted without proper notice; *Stokes v. Allen*, 15 S. D. 421, 89 N. W. 1023, holding that a bill to remove cloud on title lies against the holder of a void tax deed; *King v. Lane*, 21 S. D. 101, 110 N. W. 37, on void tax deed as color of title.

Recovery for improvements upon real estate made in good faith under belief of perfect title.

Cited in *Hunter v. Coe*, 12 N. D. 505, 97 N. W. 869, holding that one who in good faith has made valuable improvements upon real estate under belief that he has a perfect title, is entitled to recover from the vendee in a contract for the sale of such land, the value of such improvements, where the latter is seeking specific performance of the contract and stood by while the improvements were made.

Cited in note in 34 L.R.A.(N.S.) 549, 550, on right of holder of invalid tax deed to be reimbursed for improvements.

What are betterments.

Cited in note in 81 Am. St. Rep. 190, on what are betterments, and allowance therefor.

Correction of record after appeal.

Cited in note in 31 L.R.A.(N.S.) 214, on power of trial court to correct record after appeal or writ of error.

11 S. D. 389, AULTMAN, M. & CO. v. NELSON, 77 N. W. 1117.

11 S. D. 390, AULTMAN, M. & CO. v. NELSON, 77 N. W. 1117.

11 S. D. 391, LYMAN COUNTY v. STATE, 78 N. W. 17.

Liability for expense of criminal prosecutions in unorganized counties.

Cited in *Morgan v. State*, 11 S. D. 396, 78 N. W. 19, holding territorial statute providing for payment out of state treasury of expenses of criminal prosecutions in unorganized counties not abrogated by adoption of state constitution.

11 S. D. 396, MORGAN v. STATE, 78 N. W. 19.

11 S. D. 398, LINDSKOG v. SHOUWEILER, 78 N. W. 1119.

11 S. D. 399, SMITH v. HAWLEY, 78 N. W. 355.

Followed without special discussion in *Lindskog v. Schouweiler*, 11 S. D. 398, 78 N. W. 1119.

Appeal from order not entered by the clerk.

Followed in *Martin v. Smith*, 11 S. D. 437, 78 N. W. 1001, holding that appeal will not lie until judgment or order sought to be appealed from has been entered as a permanent record of the trial court.

Cited in *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding that an appeal will not lie from an order denying a new trial, until such order has been attested by the clerk.

Length of notice of appeal required.

Cited in *Sands v. Cruickshank*, 12 S. D. 1, 80 N. W. 173, to point that objection to a motion to dismiss an appeal on the ground that eight days' notice thereof had not been given will be sustained.

11 S. D. 401, SCHOUWEILER v. MERCHANTS' MUT. INS. ASSO. 78 N. W. 356.

Waiver of appraisal of loss.

Cited in *Norris v. Equitable F. Asso.* 19 S. D. 114, 102 N. W. 306, holding that where the company failed to make any attempt to settle or have the loss appraised, it was a waiver of the condition of the policy calling for appraisal in case of disagreement as to the amount of the loss.

Cited in note in 15 L.R.A. (N.S.) 1075, on arbitration as condition precedent to action on insurance policy.

11 S. D. 408, LUSCOMBE v. GRIGSBY, 78 N. W. 357.

Involuntary trustee.

Cited in *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725, 113 N. W. 618, holding bank, obtaining illegal preference under bankruptcy act, involuntary trustee.

— Agent who purchases land in his own name.

Cited in *Brookings Land & Trust Co. v. Bertness*, 17 S. D. 293, 96 N. W. 97, holding that where one was entrusted with negotiations for the purchase of land, as an agent, at an amount not exceeding a certain price, but could not obtain the property at that price but purchased it himself at an advanced price taking the deed in his wife's name, he was trustee for his principal who was entitled to it; *Morris v. Reigel*, 19 S. D. 26, 101 N. W. 1086, holding that by the purchase of land for his principal an agent becomes the trustee for the principal where he takes the title in his own name, though he uses his own money for the purchase, and such a trust is enforceable under the statute of frauds.

11 S. D. 414, HERRON v. LYMAN COUNTY, 78 N. W. 996.

11 S. D. 418, CLARK v. DARLINGTON, 78 N. W. 997.

Judgment for just amount of taxes due in action to invalidate assessment.

Cited in *Pettigrew v. Moody County*, 17 S. D. 275, 96 N. W. 94, holding that in an action to invalidate taxes due on land for a particular year, the court should fix the amount of taxes justly due the county for such a year and render judgment for that amount in favor of the county; *Salmer v. Clay County*, 20 S. D. 307, 105 N. W. 623, holding that in an action to invalidate assessment proceedings or restrain the collection of taxes, the court could render judgment for the just amount of taxes due, or order a reassessment of the property.

— Order for reassessment.

Cited in *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212, holding that where there was no assessment of the property for certain years, no tender of the taxes for those years need be made to the defendants before commencing an action to cancel the tax deed, and the court could order a reassessment and the defendant was entitled to judgment for the amounts paid.

Recovery of amounts paid as taxes under invalid tax deed.

Cited in *Easton v. Cranmer*, 19 S. D. 224, 102 N. W. 944, holding that where the tax deed under which the plaintiff claimed was found to be void upon its face, and the defendant was entitled to the property, the plaintiff was entitled to recover the taxes paid, with interest; *Campbell v. Equitable L. & T. Co.* 14 S. D. 483, 85 N. W. 1015, holding that the complaint in an action to determine adverse claims to land, in which de-

fendant claims an interest under a tax deed, need not allege a tender of the amount of taxes recoverable to justify the court in adjudicating the matter, as it is its duty to ascertain the amount of taxes due.

— Interest.

Cited in *Cornelius v. Ferguson*, 16 S. D. 113, 91 N. W. 460, holding that in rendering judgment for the recovery of taxes paid by one under an invalid tax deed, the court could allow seven per cent only and not thirty per cent as provided by statute for those bidding in property at tax sales.

Presumption of performance of duty.

Cited in *Bennett v. Darling*, 15 S. D. 1, 86 N. W. 751, holding that performance of statutory duty will be presumed in favor of acts of tax-gatherers, in absence of evidence to contrary.

11 S. D. 422, NEHER v. MCCOOK COUNTY, 78 N. W. 998.

Compensation of sheriff for summoning jurors.

Cited in *Remer v. Lawrence County*, 13 S. D. 418, 83 N. W. 554, holding sheriff entitled to receive only five instead of fifteen cents per mile for distance traveled in summoning grand and petit jurors.

Construction of statute.

Cited in *Montello Salt Co. v. Utah*, 221 U. S. 465, 55 L. ed. 814, 31 Sup. Ct. Rep. 706, holding that words "and including all saline lands" in grant in enabling act are not to be construed as grant of salines in addition.

11 S. D. 427, McCORMICK HARVESTING MACH. CO. v. HALVORSON, 74 Am. St. Rep. 820, 78 N. W. 1000.

11 S. D. 431, STATE v. ADAMS, 78 N. W. 353.

Plea of former acquittal.

Distinguished in *State v. Irwin*, 17 S. D. 380, 97 N. W. 7, holding that where the defendant was acquitted of an offense charged as having been committed Sept. 22, and was being tried for a similar offense, selling intoxicating liquors without a license, on Sept. 23, and days subsequent, and set up the defense of prior acquittal, it was error for the court to pass upon the evidence on such plea and not submit it to the jury.

11 S. D. 433, MYERS v. CAMPBELL, 78 N. W. 353.

11 S. D. 437, MARTIN v. SMITH, 78 N. W. 1001.

When time for appeal commences to run.

Cited in *Bright v. Juhl*, 16 S. D. 440, 93 N. W. 648, holding that the time for appealing commences to run from the time the judgment is entered.

Appeal from orders not entered.

Followed in *Bank of Iowa & Dakota v. Oliver*, 11 S. D. 444, 78 N. W. 1002, holding order denying new trial not appealable until actually entered; *Neeley v. Roberts*, 11 S. D. 634, 80 N. W. 130, holding that appeal

taken before entry of order appealed from must be dismissed notwithstanding subsequent entry of order by the clerk as of a date prior to that of the appeal; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, holding that appeal will not lie until judgment or order sought to be appealed from has been entered as a permanent record of the trial court; *Hughes v. Stearns*, 13 S. D. 627, 84 N. W. 196, holding that appeal from judgment and order denying new trial will not be dismissed because taken before such order was entered on record; *Dyea Electric Light Co. v. Easton*, 14 S. D. 520, 86 N. W. 23, holding that appeal from judgment cannot be taken until judgment is perfected by filing judgment roll.

Cited in *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding that an appeal will not lie from an order denying a motion for new trial, until such order has been attested by the clerk.

Correction of defects in appeal bond.

Cited in *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, holding that failure of principal to sign undertaking on appeal and of sureties to justify properly may be corrected by new undertaking.

11 S. D. 440, BENDER BROS. CO. v. McDONALD, 78 N. W. 1118.

11 S. D. 443, MALE v. MILLER, 78 N. W. 1119.

11 S. D. 444, BANK OF IOWA & DAKOTA v. OLIVER, 78 N. W.

1002, Decision on the merits in 12 S. D. 184, 80 N. W. 195.

Appeal from order not entered.

Followed in *Neeley v. Roberts*, 11 S. D. 634, 80 N. W. 130, holding that appeal taken before entry of order appealed from must be dismissed notwithstanding subsequent entry of order by the clerk as of a date prior to that of the appeal.

Cited in *Hughes v. Stearns*, 13 S. D. 627, 84 N. W. 196, holding that appeal from judgment and order denying new trial will not be dismissed because taken before such order was entered on record; *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding that an appeal will not lie from an order denying a motion for a new trial, until such order has been attested by the clerk.

11 S. D. 445, CARR v. GILBERT, 78 N. W. 1002.

11 S. D. 450, MILES v. BENTON TWP. 78 N. W. 1004.

Establishment and regulation of municipal water supply.

Cited in note in 61 L.R.A. 35, on establishment and regulation of municipal water supply.

11 S. D. 456, HOLT v. METROPOLITAN TRUST CO. 78 N. W. 947.

Defective acknowledgment of assignment as invalidating mortgage foreclosure.

Cited in *Kenny v. McKenzie*, 23 S. D. 111, — L.R.A.(N.S.) —, 120 N.

W. 781; *Cooper v. Harvey*, 21 S. D. 471, 113 N. W. 717,—holding mortgage foreclosure void because of defective acknowledgment of assignment of mortgage.

Cited in note in 108 Am. St. Rep. 576, as to when defects in acknowledgment are fatal.

11 S. D. 461, *HOLLISTER v. HUBBARD*, 78 N. W. 949.

Proper party to bring action.

Followed in *Guernsey v. Tuthill*, 12 S. D. 584, 82 N. W. 190, sustaining right to bring action on sheriff's bond in name of real party in interest in his individual capacity.

Cited in note in 64 L.R.A. 608, as to who is real party in interest within statutes defining parties by whom action must be brought.

Discharge of sureties on official bond.

Cited in note in 78 Am. St. Rep. 425, on sureties on official bond escaping liability on ground that principal was a trespasser.

11 S. D. 463, *WILLIAMS v. CHICAGO & N. W. R. CO.* 78 N. W. 949.

11 S. D. 468, *KEILBACH v. CHICAGO, M. & ST. P. R. CO.* 78 N. W. 951, Later appeal in 13 S. D. 629, 84 N. W. 192.

11 S. D. 471, *SCHMIKE v. CHICAGO, M. & ST. P. R. CO.* 78 N. W. 951.

Right of jury to disregard testimony.

Cited in *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192, holding the jury not required to believe evidence of railroad employees as to the impossibility to prevent the accident after the discovery of the animal killed on the railroad track, where there is evidence rebutting the same.

When direction of verdict is proper.

Distinguished in *Miller v. Chicago & N. W. R. Co.* 21 S. D. 242, 111 N. W. 553, sustaining direction of verdict for defendant, where evidence of conductor, engineer and fireman that they did not see animals on track is uncontradicted.

11 S. D. 474, *AUBY v. RATHBUN*, 78 N. W. 952.

11 S. D. 480, *MATHER v. DARST*, 78 N. W. 954.

Steps necessary to confer jurisdiction on appellate court.

Cited in *Beddow v. Flage*, 20 N. D. 66, 126 N. W. 97, holding that failure to serve undertaking with notice of appeal is not jurisdictional and may be permitted to be done later; *Sands v. Cruickshank*, 12 S. D. 1, 80 N. W. 173, holding dismissal of appeal from order granting new trial not prevented by fact that the record has not been transmitted to the supreme court where the bill has been perfected by service of notice

of bill and execution of undertaking for costs; *McConnell v. Spicker*, 13 S. D. 409, 83 N. W. 435, holding that appeal will not be dismissed where notice of appeal has been served, and undertaking duly executed, because undertaking was not served; *Fullerton Lumber Co. v. Tinker*, 21 S. D. 647, 115 N. W. 91, holding that appellate court has jurisdiction, when notice of appeal and undertaking are served, though undertaking is defective.

11 S. D. 483, *HOUSER v. NOLTING*, 78 N. W. 955.

11 S. D. 486, *CARTER PUB. CO. v. DENNETT*, 78 N. W. 956.

Unlawful detainer.

Cited in note in 120 Am. St. Rep. 64, on unlawful detainer.

11 S. D. 491, *WYLLY v. GRIGSBY*, 78 N. W. 957.

Presumption of value of note.

Cited in *Alexander v. Ransom*, 16 S. D. 302, 92 N. W. 418, holding that under statute making lien enforceable until obligation is barred the introduction of note and mortgage with no payments endorsed thereon will fix amount of liability although the note as such was outlawed.

Evidence in trover and conversion.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

Right to nominal damages.

Cited in *Zipp v. Colchester Rubber Co.* 12 S. D. 218, 80 N. W. 367, holding an objection to the admission of evidence on the ground that the complaint alleging a breach of a mutual agreement for the purchase of merchandise is insufficient properly overruled, as plaintiff is entitled to at least nominal damages on the admission, by such objection, of the breach of the agreement.

11 S. D. 493, *HAUKLAND v. MINNEAPOLIS & ST. L. R. CO.* 78 N. W. 958.

11 S. D. 497, *HOLLISTER v. DONAHOE*, 78 N. W. 959, Later appeal in 16 S. D. 206, 92 N. W. 12.

11 S. D. 502, *CARSON v. FULLER*, 74 AM. ST. REP. 823, 78 N. W. 960.

Premature issuance of execution on judgment rendered in another county.

Distinguished in *Jochem v. Cooley*, 100 C. C. A. 155, 176 Fed. 719, holding that a sale on execution of real estate seized under attachment in another county, made before the judgment was docketed in that county, is not void but voidable and cannot be collaterally attacked.

Proceedings in claim and delivery by third persons.

Cited in *Guernsey v. Tuthill*, 12 S. D. 584, 82 N. W. 190, holding serv. Dak. Rep.—64.

ice of notice and affidavit on sheriff in claim and delivery by third person claiming property seized by sheriff unnecessary where latter has failed to make return within twenty days after taking same.

11 S. D. 506, TRENER v. AMERICAN MORTG. CO. 78 N. W. 991.

Time in which to redeem from foreclosure sale.

Cited in *Stocker v. Puckett*, 17 S. D. 267, 96 N. W. 91, holding that the mortgagor is entitled to one year from the date of sale in which to redeem.

Adequacy of price on mortgage sale.

Cited in note in 103 Am. St. Rep. 57, on necessity of reasonable price on mortgage sales under powers.

11 S. D. 512, HEWETT v. USHER, 78 N. W. 993.

11 S. D. 516, MCFARLAND v. SCHULER, 78 N. W. 994.

Amendment of abstract on appeal.

Cited in *Neeley v. Roberts*, 17 S. D. 161, 95 N. W. 921, holding that where the abstract was defective because it did not state from what the appeal was taken and there was no motion to dismiss the appeal and there was no dispute as to what the appeal was taken from, the appellant should be allowed to amend his abstract.

11 S. D. 517, NATIONAL BANK v. GUTHRIE, 78 N. W. 995.

11 S. D. 521, WESTERN TWINE CO. v. WRIGHT, 44 L.R.A. 438, 78 N. W. 942.

Copy of telegram as evidence.

Limited in *Distad v. Shanklin*, 15 S. D. 507, 90 N. W. 151, holding copy of telegram properly admitted in evidence where it had been received without objection at a former trial and a copy thereof in a letter to the other party was never questioned.

Presumption of authenticity of answer received to inquiry.

Followed with approval in *People v. Hammond*, 132 Mich. 422, 93 N. W. 1084, holding that where a telegram was received in answer to one sent, the answer was admissible in evidence where the original telegram had been destroyed before trial, since there is a presumption that the answer was sent by the original addressee.

Resale as affecting vendee's rights as against the vendor.

Cited in *Denton Bros. v. Gill*, 102 Md. 386, 3 L.R.A.(N.S.) 465, 62 Atl. 627, holding that where the defendants sold the plaintiffs a shipment of corn, and the latter resold it, when it was discovered that the shipment had not been for the full amount contracted and paid for, the plaintiffs could recover for the shortage though their vendees had made no claim for the shortage; *C. H. Dean Co. v. Standifer*, 37 Tex. Civ. App. 181, 83 S. W. 230, holding that the fact that the buyer has made a re-

sale of the property at a profit, does not prevent him recovering of his vendor, damages flowing from the breach of warranty of quality.

Disregarding immaterial defects in proceedings.

Cited in *Kinkade v. Howard*, 18 S. D. 60, 99 N. W. 91, holding that where it appeared that the officer in question had authority to take the disposition, and make the certificate, and no substantial right of the other party was in any manner affected, it was the duty of the trial court to admit the deposition though it did not bear the officer's seal.

Measure of damages for breach of warranty.

Cited in *Standard Rope & Twine Co. v. Olmem*, 13 S. D. 298, 83 N. W. 271, holding measure of damages for breach of implied warranty of fitness of binding twine, difference between what is actual value and what it would have been worth if merchantable.

Cited in notes in 3 L.R.A.(N.S.) 466, on right of purchaser who has resold to recover for breach of warranty as to quantity or quality, where he has not actually made good to his vendees; 5 L.R.A.(N.S.) 1151, on price on resale as affecting measure of damages for breach of warranty as to quality.

Burden of proof as to consideration.

Cited in *Grimsrud Shoe Co. v. Jackson*, 22 S. D. 114, 115 N. W. 656, holding burden of showing want of consideration for written contract on party seeking to invalidate it.

Misjoinder of parties as reversible error.

Cited in *Mader v. Plano Mfg. Co.* 17 S. D. 556, 97 N. W. 843, holding misjoinder of parties plaintiff not reversible error, when defendant is not prejudiced thereby.

What constitutes conversion.

Cited in note in 23 Eng. Rul. Cas. 573, on sale at a loss or on unauthorized terms by one rightfully in possession, as conversion.

11 S. D. 529, MEAD v. PETTIGREW, 78 N. W. 945.

Representations of officers as binding upon bank.

Cited in *National Bank v. Carper*, 28 Tex. Civ. App. 334, 67 S. W. 188, holding that representations by the president of the bank that the makers of the note would not have to pay a cent thereon but that the bank merely wanted the note to show the bank examiner, were not binding upon the bank without actual notice thereof.

Cited in note in 28 L.R.A.(N.S.) 502, on power of officer to bind bank by agreement that liability of party to commercial paper shall not be enforced.

11 S. D. 537, FLETCHER v. CHURCH, 78 N. W. 947.

Change of venue because of convenience of witnesses.

Cited in *Robertson Lumber Co. v. Jones*, 13 N. D. 112, 99 N. W. 1082, holding that the granting of a change of venue because of the convenience of the witnesses lies in the discretion of the trial court, and the court

did not abuse its discretion in granting it where the affidavit offered was not disputed by the opposing party.

Distinguished in *Senn v. Connelly*, 23 S. D. 158, 120 N. W. 1097, sustaining refusal of change of venue, where facts in applicant's affidavit are denied.

11 S. D. 539, PLANO MFG. CO. v. PERSON, 79 N. W. 833.

Right of appellate court to settle case.

Cited in *Taylor v. Miller*, 10 N. D. 361, 87 N. W. 597, holding that statement of the case cannot be settled by appellate court unless the trial court has refused to settle same in accordance with the facts.

11 S. D. 544, STATE v. YOKUM, 79 N. W. 835, Reversed on rehearing in 14 S. D. 84, 84 N. W. 389.

Burden of proving defense in criminal trial.

Cited in *State v. Quigley*, 26 R. I. 263, 67 L.R.A. 322, 58 Atl. 905, 3 A. & E. Ann. Cas. 920, holding that the burden is upon the defendant to prove his defense of insanity by a preponderance of evidence.

Disapproved in *State v. Hazlet*, 16 N. D. 426, 113 N. W. 374, holding that an instruction to the effect that the burden was upon the defendant in a trial for homicide to prove that the killing was justifiable or excusable where the fact of the homicide had been proved, unless the proof of the homicide shows that the same was justifiable or excusable or amounts only to manslaughter.

Error in refusal of instructions.

Cited in *State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 A. & E. Ann. Cas. 87, holding refusal to give instructions requested not reversible error, where they are substantially covered by instructions given.

Application of reasonable doubt rule.

Cited in note in 19 L.R.A.(N.S.) 489, 493, on applicability of rule of reasonable doubt to self-defense in homicide.

11 S. D. 559, DUDLEY v. DAKOTA HOT SPRINGS CO. 79 N. W. 839.

Followed without discussion in *Dudley v. Dakota Hot Springs Co.* 11 S. D. 564, 79 N. W. 1127.

Appointment of receiver pendente lite.

Cited in *Kelly v. Fargo Mercantile Co.* 16 S. D. 73, 91 N. W. 350, holding that since the statutes provide that a receiver can be appointed for a corporation only where the same has been dissolved or is insolvent, etc., a receiver pendente lite cannot be appointed by the court where the pleadings show that the corporation is solvent.

Action by stockholder to protect corporate interests.

Distinguished in *Gates v. McGee*, 15 S. D. 247, 88 N. W. 115, sustaining stockholder's right to bring action to protect corporate interest where directors refuse to do so or their conduct is equivalent to a refusal.

- 11 S. D. 564, DUDLEY v. DAKOTA HOT SPRINGS CO. 79 N. W. 1127.

Appointment of receiver.

Distinguished in Glover v. Manila Gold Min. & Mill. Co. 19 S. D. 559, 104 N. W. 261, holding that in an action by the stockholders against the directors for their fraudulent conduct, the plaintiffs are entitled to have a receiver appointed where the pleadings showed that there was imminent danger of insolvency.

- 11 S. D. 566, NORTHWESTERN LOAN & BKG. CO. v. JONASEN, 79 N. W. 840, Rehearing denied in 12 S. D. 618, 82 N. W. 94.

Lien for purchase money of homestead.

Cited in note in 86 Am. St. Rep. 176, on lien for purchase money of homestead.

Questioning signature upon duly acknowledged instrument.

Cited with special approval in Swett v. Large, 122 Iowa, 267, 97 N. W. 1104, holding that it was not sufficient to over throw the validity of the release of dower because of unauthorized signature or impeach the certificate of acknowledgment thereon, where the wife failed to attack the same for thirty-three years, and not until after her husband and the acknowledging officer were both dead.

- 11 S. D. 578, KUNZ v. HUTCHINSON COUNTY SCHOOL DIST. NO. 28, 79 N. W. 844.

- 11 S. D. 585, STATE v. DUNNING, 79 N. W. 846.

- 11 S. D. 589, CO-OPERATIVE SAV. & L. ASSO. v. FAWICK, 79 N. W. 847.

Repeals by implication.

Cited in Collins Coal Co. v. Hadley, 38 Ind. App. 637, 78 N. E. 353, holding that a repeal by implication not being favored it will be applied only where the later act is irreconcilably opposed to the former; Anderson v. Cortelyou, 75 N. J. L. 532, 68 Atl. 118, holding that the courts will not imply a repeal, more extensive than is contained in an express repealer.

- 11 S. D. 595, ELDER v. HORSESHOE MIN. & MILL. CO. 79 N. W. 834.

- 11 S. D. 598, WITTE v. KOEPPEN, 74 AM. ST. REP. 826, 79 N. W. 831.

Competency of witnesses.

Cited in Bunker v. Taylor, 13 S. D. 433, 83 N. W. 555, holding defendant in action by administrator incompetent to testify in favor of co-defendant although he does not appear and allows judgment to be taken against him by default.

Statutory construction.

Cited in *Chauncy v. Dyke Bros.* 55 C. C. A. 579, 119 Fed. 1, holding that where the statute is clear and unambiguous and its meaning evident, there is no occasion for interpretation and it will be held to mean what it clearly expresses; *Louisville & N. R. Co. v. Daniel*, 131 Ky. 689, 115 S. W. 1198 (dissenting opinion), on the construction of statutes, and the right to disregard the plain and express terms to enforce its spirit.

11 S. D. 603, SORENSON v. DONAHOE, 79 N. W. 998, Later appeal as to costs in 12 S. D. 204, 80 N. W. 179.

11 S. D. 605, TAYLOR v. NEYS, 79 N. W. 998.

Admission of incompetent evidence to prove fact already proved.

Cited in *Godfrey v. Faust*, 18 S. D. 567, 101 N. W. 718; *Fowler v. Iowa Land Co.* 18 S. D. 131, 99 N. W. 1095,—holding that it is harmless error to admit incompetent evidence of a fact already sufficiently proven.

11 S. D. 610, ASHTON v. ASHTON, 79 N. W. 1001, Reversed on rehearing in 14 S. D. 350, 85 N. W. 599.

Impeachment of witnesses.

Cited in note in 82 Am. St. Rep. 41, on evidence to show credibility or bias of witness.

11 S. D. 615, BLACK HILLS TELEG. & TELEPH. CO. v. MITCHELL, 74 AM. ST. REP. 830, 79 N. W. 999.

11 S. D. 620, F. MEYER BOOT & SHOE CO. v. C. SHENKBERG CO. 80 N. W. 126.

Effect of special verdict in equity case.

Cited in *Apland v. Pott*, 16 S. D. 185, 92 N. W. 19, holding that the special findings of the jury being merely advisory and entitled to little weight, error in submitting questions for special findings, is not prejudicial error and ground for reversal and will be disregarded.

When chattel mortgage is fraudulent as to creditors.

Cited in *First Nat. Bank v. Calkins*, 12 S. D. 411, 81 N. W. 732, holding chattel mortgage not necessarily void as to creditors by fact that mortgagee permits mortgagor to sell and appropriate to his own use part of mortgaged property.

11 S. D. 632, DEWEY v. FEILER, 80 N. W. 130.

Judgment as bar.

Cited in *McPherson v. Swift*, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76, holding that judgment, unless rendered on merits, is no bar to subsequent action on same claim.

Presumption of performance of official duty.

Cited in *State v. Carlisle*, 22 S. D. 529, 118 N. W. 1033, holding that it will be presumed that justice of peace did his duty.

11 S. D. 634, NEELEY v. ROBERTS, 80 N. W. 130, Later appeal in 17 S. D. 161, 95 N. W. 921.

Appeal from orders not entered.

Cited in *Stephens v. Faus*, 20 S. D. 367, 106 N. W. 56, holding that an appeal will not lie from an order denying a motion for a new trial until such order has been attested by the clerk.

11 S. D. 635, FROELICH v. AYLWARD, 80 N. W. 131.

Setting aside levy of execution on motion.

Cited in *McCarthy v. Speed*, 16 S. D. 584, 94 N. W. 411, holding that where parties, not parties to the action, purchase the land upon execution, the sale will not be set aside on motion where there is not irregularity or defect in the judgment or the execution themselves; *Cable v. Magpie Gold Min. Co.* 22 S. D. 566, 119 N. W. 174, holding that motion to vacate levy under execution will not lie to determine whether property is personalty, but remedy is by action.

11 S. D. 639, RICHISON v. MEAD, 80 N. W. 131.

Review of conflicting evidence, on appeal.

Cited in *Schott v. Swan*, 21 S. D. 639, 114 N. W. 1005, holding that only question determinable on appeal, where evidence is conflicting is its sufficiency; *Comeau v. Hurley*, 22 S. D. 79, 115 N. W. 521, holding that conflicting evidence will not be weighed on appeal, except to determine its sufficiency.

Contracts to be performed to satisfaction.

Cited in *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700, holding that under a contract to erect a wall in accordance with the specifications set out, the employer to settle all questions as to performance, cannot arbitrarily determine that the contractor has not fulfilled the contract and refuse payment; *Sherman v. Port Huron Engine & Thresher Co.* 13 S. D. 95, 82 N. W. 413, denying principal's absolute right to reject order for machinery under contract with agent by which former agrees to fill orders obtained by agent who agrees not to deliver machinery until full settlement by purchaser.

11 S. D. 646, RUDOLPH v. HEWITT, 80 N. W. 133.

Objection to amount of recovery.

Cited in *Mattes v. Engel*, 15 S. D. 330, 89 N. W. 651, holding that appellant cannot complain because verdict was for less amount than other party was entitled to.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 12 S. D.

12 S. D. 1, SANDS v. CRUICKSHANK, 80 N. W. 173.

Repeals by implication on revision.

Cited in *Collins v. Gladiator Consol. Gold Min. & Mill. Co.* 19 S. D. 358, 103 N. W. 385, holding that an omission of a section of a preceding statute from the recompilation of statutes, acts to repeal such omitted portions by implication; *Kane v. Hughes County*, 12 S. D. 438, 81 N. W. 894, holding provision of South Dakota statute relating to requirements of notice of appeal impliedly repealed by later statute.

**12 S. D. 7, McCARTHY v. SPEED, 50 L.R.A. 184, 80 N. W. 135,
20 MOR. MIN. REP. 124, Writ of error dismissed in 181
U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.**

Cotenant holding mineral patent as trustee for other cotenants.

Cited in *Stevens v. Grand Central Min. Co.* 67 C. C. A. 284, 133 Fed. 28, holding that a co-owner who amends the location notice, relocates the claim, or procures the issuance of the patent in his own name, will be declared a trustee for all and hold the title in trust for all the co-owners.

Cited in notes in 91 Am. St. Rep. 861, on cotenants in mines; 4 L.R.A. (N.S.) 1127, on duty and right of excluded co-owner to file adverse or protest against application of mining patent.

Appeal from judgment alone where appeal as to new trial fails.

Cited in *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281, holding that errors of law occurring upon the trial, may be reviewed upon exceptions preserved at the trial as shown by the judgment roll, where there is an appeal from the judgment alone, the appeal from the order denying motion for new trial has failed.

12 S. D. 11, McMAHON v. CROCKETT, 80 N. W. 136.**Specification of errors on appeal.**

Cited in Lennan v. Pollock State Bank, 21 S. D. 511, 110 N. W. 834, holding sufficiency of evidence and alleged error reviewable, where application for new trial is made "upon minutes of court" and notice of intention, specifying particulars in which evidence is insufficient and particular errors relied upon, is incorporated in bill of exceptions, though bill contains no specification of errors.

Preservation of ballots.

Cited in note in 30 L.R.A.(N.S.) 606, on scope and effect of election law provisions for preserving ballots.

12 S. D. 16, JAMIESON v. WIGGIN, 46 L.R.A. 317, 76 Am. St. REP. 585, 80 N. W. 137.**Eligibility to office.**

Cited in Howard v. Burns, 14 S. D. 383, 85 N. W. 920, holding one admitted to practice in Illinois eligible to the office of state's attorney.

"Learned in the law."

Cited in Danforth v. Egan, 23 S. D. 43, 139 Am. St. Rep. 1030, 119 N. W. 1021, 20 A. & E. Ann. Cas. 418, holding attorney barred for violation of legal ethics not "learned in the law" within constitutional provision that state's attorney shall be learned in law.

12 S. D. 21, BROWN v. BROWN, 80 N. W. 139.**12 S. D. 23, PLUMMER v. BAIR, 80 N. W. 139.****Service of summons by publication.**

Cited in Coughran v. Markley, 15 S. D. 37, 87 N. W. 2, holding that on a motion to vacate a judgment on the sole ground that the court was without jurisdiction by reason of the insufficiency of the affidavit upon which the order for publication of summons was based, the court may consider only the sufficiency of the statements of the affidavit to call into exercise the judgment of the trial court; if sufficient, the court's judgment, however erroneous, must be sustained.

Distinguished in Cohen v. Portland Lodge No. 142, B. P. O. E. 144 Fed. 266, holding, following state decisions, that an affidavit for the publication of a summons which recited that the summons had been delivered to the sheriff and returned with the certificate that the defendant could not be found in the county, and that the affiant then made inquiries of persons who should have known, and could not locate the defendant, was sufficient to warrant publication.

12 S. D. 25, ZERFING v. SEELIG, 80 N. W. 140, Affirmed on rehearing in 14 S. D. 303, 85 N. W. 585.**Notice imparted by recorded deed.**

Cited in Simonson v. Monson, 22 S. D. 238, 117 N. W. 133, holding warranty deed duly acknowledged and recorded imparted constructive

notice that any title subsequently acquired by grantor, under his patent, enured to grantee.

When action on warranty of title or seisin is maintainable.

Cited in note in 17 L.R.A.(N.S.) 1184, on necessity of eviction to maintenance of action on warranty of title or seisin.

Estoppel to question grantor's right to purchase money.

Cited in note in 21 L.R.A. (N.S.) 388, on right of grantee in possession to question right of grantor to collect purchase money.

12 S. D. 28, BRADLEY v. INTERSTATE LAND & CANAL CO. 80 N. W. 141.

12 S. D. 36, NORTHWESTERN MUT. HAIL INS. CO. v. FLEMING, 80 N. W. 147.

Waiver of mistake or fraud in insurance policy.

Cited in note in 67 L.R.A. 742, on retention of policy as waiver of mistake or fraud of insurer or its agent.

12 S. D. 43, ROOT v. SWEENEY, 80 N. W. 149, Appeal from order granting motion to dismiss for want of prosecution after remittitur in 17 S. D. 179, 95 N. W. 916.

Abatement of action by or against corporation.

Cited in note in 32 L.R.A.(N.S.) 452, on abatement of action by or against corporation by dissolution or expiration of charter.

12 S. D. 52, PILCHER v. SIOUX CITY SAFE DEPOSIT & T. CO. 80 N. W. 151.

12 S. D. 59, DEDRICK v. ORMSBY LAND & MORTG. CO. 80 N. W. 153.

Estoppel by acceptance of benefits of transaction.

Cited in Hunt v. Northwestern Mortg. Trust Co. 16 S. D. 241, 92 N. W. 23, holding that where the president of a corporation which had authority to guaranty the payment of negotiable paper, transfer a note belonging to the corporation and guarantied the payment and the corporation accepted the benefits of the transaction, the authority of the president could not be questioned afterward.

12 S. D. 63, FINCH v. PARK, 76 AM. ST. REP. 588, 80 N. W. 155.

Objections to pleading raised first at the trial.

Cited in Merger v. Equitable F. Asso. 20 S. D. 419, 107 N. W. 531, holding that a party who fails to test the sufficiency of an amendable complaint by demurrer, but answers on the merits is not in a position to demand a reversal on the ground that his general objection was overruled by the trial court; Schriener v. Dickinson, 20 S. D. 433, 107 N. W. 536, holding that where the legal sufficiency of the facts pleaded to con-

stitute a cause of action, is first questioned on the trial, a wider latitude is allowed than would be indulged in on demurrer.

Implied promise to pay.

Cited in *Hyde v. Thompson*, 19 N. D. 1, 120 N. W. 1095, holding that law raises implied promise from one selling chattel under mortgage to apply proceeds to prior lien.

12 S. D. 67, IRVING v. HUBBARD, 80 N. W. 156.

Pleading right to chattel in actions of claim and delivery.

Cited in *Kierbow v. Young*, 20 S. D. 414, 8 L.R.A.(N.S.) 216, 107 N. W. 371, 11 A. & E. Ann. Cas. 1148, holding that in actions of claim and delivery, the plaintiff must allege that he is the owner of the property or has some special property or interest therein so as to entitle him to maintain the action; *Jones v. Winsor*, 22 S. D. 480, 118 N. W. 716, holding complaint in conversion insufficient because it did not allege ownership or possession in plaintiff at time of conversion.

12 S. D. 68, WHIFFEN v. HOLLISTER, 80 N. W. 156.

12 S. D. 77, CEDARBERG v. GUERNSEY, 80 N. W. 159.

What constitutes partnership.

Cited in notes in 115 Am. St. Rep. 438, on what constitutes a partnership; 18 L.R.A.(N.S.) 975, 981, 1073, on effect of agreement to share profits to create partnership.

12 S. D. 83, McFARLAND v. SCHULER, 80 N. W. 161.

Estoppel of mortgagee to claim mortgaged chattels levied on.

Cited *Plunkett v. Hanschka*, 14 S. D. 454, 85 N. W. 1004, holding chattel mortgagee not estopped to show that he claims mortgaged property by receipting therefor when levied on by sheriff under execution and promising to deliver same on demand or pay amount of execution.

12 S. D. 86, PRIOR v. SANBORN COUNTY, 80 N. W. 169.

Objections first raised on appeal.

Cited in *Schuyler v. Wheelon*, 17 N. D. 161, 115 N. W. 259, holding that where the objection that the contract sued upon is void under the statute of frauds, is first raised upon appeal, the objection cannot be considered.

12 S. D. 91, ACME HARVESTER CO. v. BUTTERFIELD, 80 N. W. 170.

Material alteration of written instrument.

Cited in *Port Huron Engine & Thresher Co. v. Sherman*, 14 S. D. 461, 85 N. W. 1008, holding unauthorized act of payee's clerk in inserting for purpose of memorandum merely place where note is payable not such an alteration as will prevent a recovery.

Evidence in trover and conversion.

Cited in note in 9 N. D. 635, an evidence in actions for trover and conversion.

12 S. D. 93, GRISSEL v. BANK OF WOONSOCKET, 80 N. W. 161.

12 S. D. 101, SANDIGE v. WIDMAN, 80 N. W. 164.

Wife's action for damages arising from sale of liquors to the husband.

Cited in Garrigan v. Kennedy, 19 S. D. 11, 117 Am. St. Rep, 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that a statute giving a cause of action to the wife for damages arising from the sale of intoxicating liquors to the husband, is valid.

— Exemplary damages.

Explained in Garrigan v. Thompson, 17 S. D. 132, 95 N. W. 294, holding that the question as to the correctness of the instructions was not raised in the leading case and was not determined, and holding that an instruction to the effect that the jury might allow exemplary damages for the death of the husband by the sale of intoxicating liquors, was erroneous.

Unlawful sale of intoxicating liquor.

Distinguished in State v. Bradley, 15 S. D. 148, 87 N. W. 590, holding selling of liquor to minor is not an offense if made in good faith in belief in his majority and without intent to violate the law.

12 S. D. 105, ANDERSON v. HULTMAN, 80 N. W. 165.

Presumption of attorney's authority to appear in action.

Cited in note in 126 Am. St. Rep. 39, on presumption of attorney's authority to appear for party whom he assumes to represent.

Double appeals.

Cited in Sucker State Drill Co. v. Brock, 18 N. D. 8, 118 N. W. 348, holding appeal from judgment and from two orders denying motion for new trial, upon same grounds after judgment, not double appeal; Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23, denying right to incorporate in one notice of appeal an appeal from an order vacating a judgment and an appeal from the judgment subsequently entered; Gordon v. Kelley, 20 S. D. 70, 104 N. W. 605, holding that an appeal from a default judgment and from an order denying motion to vacate the judgment, is a double appeal and will be dismissed; Ewing v. Lunn, 21 S. D. 55, 109 N. W. 642, holding that plaintiff cannot take appeal from order vacating judgment in this favor and from judgment for defendant on second trial.

Distinguished in Meade County Bank v. Decker, 17 S. D. 590, 98 N. W. 86, holding that where the appeal is from an appealable order and from a non-appealable one, the appeal will not be dismissed as a double appeal; Kinney v. Brotherhood of American Yeoman, 15 N. D. 21, 106 N. W. 44, holding that a notice of appeal may include an appeal from a judgment and from a subsequent order denying motion for new trial.

Dismissal of appeal for omission from record of oral evidence on hearing of order.

Cited in *Woodcock v. Reilly*, 16 S. D. 198, 92 N. W. 10, holding that where it appears from the abstract that upon the hearing of the motion appealed from, oral evidence was admitted which is not included in the bill of exceptions, the appeal should be dismissed.

12 S. D. 108, FIRST NAT. BANK v. SPEAR, 80 N. W. 166.

12 S. D. 118, CORNWALL v. MCKINNEY, 80 N. W. 171.

Limitation of action on certificate of deposit.

Cited in *Tobin v. McKinney*, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228, holding that the statute of limitations does not begin to run on a certificate of deposit until demand for payment is made.

Cited in note in 75 Am. St. Rep. 55, on certificate of deposit.

12 S. D. 124, HANSON COUNTY v. GRAY, 76 AM. ST. REP. 591, 80 N. W. 175.

Enforcement of taxes.

Cited in *Boston v. Turner*, 201 Mass. 190, 87 N. E. 634, holding that a tax is not a debt and no action will lie to enforce it unless authorized by statute; *Acme Harvesting Mach. Co. v. Hinkley*, 23 S. D. 509, 122 N. W. 482, holding that action does not lie to recover personal tax.

12 S. D. 127, GREWING v. MINNEAPOLIS THRESHING MACH. CO. 80 N. W. 176.

Review of findings of court upon disputed questions of fact.

Cited in *International Harvester Co. v. McKeever*, 21 S. D. 91, 109 N. W. 642; *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589; *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960,—holding that findings of trial court on disputed question of fact must stand unless evidence clearly preponderates against them; *Ricker v. Stott*, 13 S. D. 208, 83 N. W. 47, holding that the findings of fact will be presumed to be fully sustained unless the contrary clearly appears; *Hill v. Whale Min. Co.* 15 S. D. 574, 90 N. W. 853, holding that findings on disputed questions of fact are presumptively right; *Re McClellan*, 20 S. D. 498, 107 N. W. 681, holding that the findings of the trial court upon disputed questions of fact are presumptively correct and though not as controlling as the verdict, yet they will not be overturned except where the evidence clearly preponderates against them.

12 S. D. 135, CHAMBERLAIN v. HEDGER, 80 N. W. 178.

Powers of canvassing board.

Cited in *Payne v. Hodgson*, 34 Utah, 269, 97 Pac. 132, holding that the powers of the canvassing board were extinguished when they had determined who had received the highest number of votes cast for a particular office and they could not inquire into the legality of the nominations or the regularity of the official ballots.

Right to vote for candidate not named on official ballot.

Cited in *Chamberlain v. Wood*, 15 S. D. 216, 56 L.R.A. 187, 91 Am. St. Rep. 674, 88 N. W. 109, by Fuller, P. J., dissenting from the opinion of the court that the S. D. election law compelling an elector to vote only for the candidates whose names are printed upon the ballot, is constitutional.

Cited in note in 91 Am. St. Rep. 682, on right of elector to vote for candidate not named on official ballot.

12 S. D. 139, SUTTERFIELD v. MAGOWAN, 80 N. W. 180.**Report of referee.**

Cited in *Neeley v. Roberts*, 17 S. D. 161, 95 N. W. 921, on what is required to be in a report of a referee.

12 S. D. 141, DELUCIE v. ROTT, 80 N. W. 181.**Objections to pleadings after trial has begun.**

Cited in *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069, holding that though the complaint is inartistic, inaccurate, and indefinite, reversible error cannot be predicated upon the overruling of the defendant's objection thereto first raised after trial began, the case having been heard upon the merits without prejudice to the defendant's rights; *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding that where the objection to a complaint may have been cured by amendment, the objection is not available for the first time on appeal.

Evidence in trover and conversion.

Cited in note in 9 N. D. 636, on damages in actions for trover and conversion.

Title and rights after condition of chattel mortgage is broken.

Cited in note in 96 Am. St. Rep. 693, on title and rights of holder of chattel mortgage after condition broken.

12 S. D. 146, STARKWEATHER v. BELL, 80 N. W. 183.**Admission of incompetent evidence in action tried by the court alone.**

Cited in *Chapman v. Greene*, 18 S. D. 505, 101 N. W. 351, holding that where material, incompetent evidence is admitted and is conclusive upon the issue, it is reversible error, though the case be tried by the court alone without a jury; *Godfrey v. Faust*, 20 S. D. 203, 105 N. W. 460 (denying rehearing of 18 S. D. 567, 101 N. W. 718) holding that the admission of incompetent evidence is not reversible error where there is other competent evidence to prove the issue; *Kirby v. Citizens' Teleph. Co.* 20 S. D. 154, 105 N. W. 95, holding that where the incompetent evidence is not conclusive its admission is not reversible error in an action tried by the court without a jury.

Distinguished in *Bowdle v. Jencks*, 18 S. D. 80, 99 N. W. 98, holding that where the incompetent evidence admitted is not conclusive, it is not reversible error in an action tried by the court without a jury.

Amendment of filing indorsements.

Cited in *O'Connor v. Bear Lake County*, 17 Idaho, 346, 105 Pac. 560, holding that it was not error to permit the correction of a petition for an election under the local option law, by changing the word after the name of the officer receiving the same for filing, to show his correct office.

12 S. D. 156, NATIONAL BANK v. FEENEY, 46 L.R.A. 732, 76 AM. ST. REP. 594, 80 N. W. 186.

Writing in margin as a part of note.

Cited in *Kimball v. Costa*, 76 Vt. 289, 104 Am. St. Rep. 907, 56 Atl. 1009, 1 A. & E. Ann. Cas. 610, holding that where the amount of the note was omitted from the body of the instrument, reference should be made to the figures in the margin to ascertain the amount, where the note provides for payment in instalments of \$50 each, and also citing annotation on this subject.

Cited in note in 127 Am. St. Rep. 433, 443, on effect of indorsements of memoranda on negotiable instruments at time of execution.

Burden of proving material alteration of note.

Cited in *Colby v. Foxworthy*, 80 Neb. 239, 114 N. W. 174, holding that the burden is upon the persons alleging the material alteration of a note to prove the alteration after the execution and delivery.

Provisions of note rendering it non-negotiable.

Cited in *Davis v. Brady*, 17 S. D. 511, 97 N. W. 719, holding that where it is uncertain from the face of the note what interest it will bear, two rates being specified, and what rate the overdue interest will bear cannot be determined, the note is non-negotiable.

Cited in note in 125 Am. St. Rep. 203, 204, on agreements and conditions destroying negotiability.

Presumption as to erasures in tax deed.

Cited in *Northwestern Mortg. Trust Co. v. Levtzow*, 23 S. D. 562, 122 N. W. 600, holding that erasure in tax deed will be presumed to have been made prior to or contemporaneous with execution thereof.

12 S. D. 162, MEEK v. MEADE COUNTY, 80 N. W. 182.

Authority of county commissioners.

Cited in *Lawrence v. Ewert*, 21 S. D. 580, 114 N. W. 709 (dissenting opinion), on validity of order of board of county commissioners given without jurisdiction.

12 S. D. 168, WALLACE v. SINGER MFG. CO. 80 N. W. 188.

12 S. D. 171, PARKINSON v. SHEW, 80 N. W. 189.

12 S. D. 172, MEYER v. DAVENPORT ELEVATOR CO. 80 N. W. 189.

Review of verdict.

Cited in *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 A. & E. Ann.

Cas. 516, holding that in reviewing conflicting testimony court will only determine as to whether verdict is sustained by sufficient legal evidence; **Magnusson v. Linwell**, 9 N. D. 157, 82 N. W. 743, holding that an appellate court will not review the action of the trial court in denying a motion for a new trial based on the insufficiency of the evidence to sustain the verdict, where there is substantial evidence in support of it.

Absolute deed as a mortgage.

Cited in **Flynn v. Holmes**, 145 Mich. 606, 11 L.R.A.(N.S.) 209, 108 N. W. 685, holding that title is not conveyed by a deed absolute on its face intended as a mortgage.

Sufficiency of constructive notice.

Cited in **Rochford v. Barrett**, 22 S. D. 83, 115 N. W. 522, holding purchaser of note concluded by facts which he could have ascertained where his agent had sufficient notice of fraud in notes inception to put purchaser on inquiry and failed to make inquiry of proper parties.

Evidence in trover and conversion.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

12 S. D. 176, LINDSKOG v. SCHOUWEILER, 80 N. W. 190.

Reference to summons to interpret pleadings.

Cited in **Buckham v. Hoover**, 18 S. D. 429, 101 N. W. 28, holding that reference cannot be had to the summons to affect the complaint on demurrer.

Judgment on appeal from justice court.

Distinguished in **Olson v. Shirley**, 12 N. D. 106, 96 N. W. 297, holding that the district court properly retained the action upon a reversal of the judgment of the justice court upon questions of law alone.

12 S. D. 184, BANK OF IOWA & DAKOTA v. PRICE, 80 N. W. 195, Later appeal in 13 S. D. 561, 79 Am. St. Rep. 907, 83 N. W. 591.

12 S. D. 191, BRACE v. VAN EPS, 80 N. W. 197, Affirmed on rehearing in 13 S. D. 452, 83 N. W. 572.

Waiver of motion for direction of verdict.

Cited in **Seim v. Krause**, 13 S. D. 530, 83 N. W. 583; **Rogers v. Gladiator Gold Min. & Mill. Co.** 21 S. D. 412, 113 N. W. 86; **Greder v. Stahl**, 22 S. D. 139, 115 N. W. 1129; **Torrey v. Peck**, 13 S. D. 538, 83 N. W. 585,—holding motion for judgment or direction of verdict for defendant at close of plaintiff's case waived by failure to renew after all evidence is in.

Time of taking effect of deed creating trust.

Cited in **Lewis v. Curnutt**, 130 Iowa, 423, 106 N. W. 914, holding that a warranty deed and instrument executed therewith creating a trust, takes effect immediately though limited by the words "from and after my death Dak. Rep.—65.

and not before," and that the words referred to the time when the trustee should take control.

What constitutes testamentary writing.

Cited in note in 89 Am. St. Rep. 500, on what constitutes a testamentary writing.

What constitutes cloud on title.

Cited in *Hale v. Grigsby*, 12 S. D. 198, 80 N. W. 199, holding action maintainable to cancel as cloud on plaintiff's title warrant of attachment against one who held legal title in trust for plaintiff after execution but before recording of deed to him from the trustee.

12 S. D. 198, HALE v. GRIGSBY, 80 N. W. 199.

Sufficiency of complaint in action to quiet title under the statute.

Cited in *Buckham v. Hoover*, 18 S. D. 429, 101 N. W. 28, holding that where there are no parties to an action to quiet title under earlier statute such as it describes, failure to comply with the terms of the later statute which relates to such parties only, does not affect the sufficiency of the complaint.

12 S. D. 204, AMERICAN BKG. & T. CO. v. LYNCH, 80 N. W. 1134, Later appeal as to costs in 13 S. D. 24, 82 N. W. 77.

12 S. D. 204, SORENSON v. DONAHOE, 80 N. W. 179.

12 S. D. 207, STATE v. BRADFORD, 80 N. W. 143, Reversed on rehearing in 13 S. D. 201, 83 N. W. 47.

Validity of the state liquor law.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that the statute giving a right of action to the wife for damages arising from the sale of intoxicating liquors to the husband is valid and constitutional.

12 S. D. 218, ZIPP v. COLCHESTER RUBBER CO. 80 N. W. 367.

12 S. D. 225, NEELEY v. ROBERTS, 80 N. W. 1078.

12 S. D. 226, FIRST NAT. BANK v. McGUIRE, 47 L.R.A. 413, 76 AM. ST. REP. 598, 80 N. W. 1074.

Followed without discussion in *First Nat. Bank v. Keenan*, 12 S. D. 240, 80 N. W. 1135.

Disqualification of judge for interest.

Cited in *State ex rel. Bullion & Exch. Bank v. Mack*, 26 Nev. 430, 69 Pac. 862, holding that where the probate judge was a stockholder of a corporation having a claim against an estate, the judge was disqualified to pass upon the claim; *Re Taber*, 13 S. D. 62, 82 N. W. 398, holding county judge disqualified to act in probate proceeding where his son, as attorney, has contracted for a contingent fee to conduct prosecu-

tion of claim of certain persons that they be adjudged sole heirs; *First Nat. Bank v. McCarthy*, 13 S. D. 356, 83 N. W. 423, holding judge whose wife is stock holder and director of bank disqualified to try foreclosure action by bank.

Cited in note in 79 Am. St. Rep. 200, on affinity as disqualification of judge.

Disqualification to vote to increase director's salary.

Cited in *Ritchie v. People's Teleph. Co.* 22 S. D. 598, 119 N. W. 990, holding director of corporation, and his wife, also director, disqualified from voting to increase his salary.

12 S. D. 234, BENNETT v. CONSOLIDATED APEX MIN. CO.
80 N. W. 1078.

Followed without discussion in *Farrar v. Consolidated Apex Min. Co.*
12 S. D. 237, 80 N. W. 1079.

12 S. D. 237, FARRAR v. CONSOLIDATED APEX MIN. CO.
80 N. W. 1079.

Vacation of default judgments.

Cited in *Meade County Bank v. Decker*, 19 S. D. 128, 102 N. W. 597, holding that there should be a liberal construction of the code giving the right to set aside judgments by default, and allow defenses upon the merits, where by mistake, inadvertence, surprise, or excusable neglect they have omitted to file their pleadings on time; *Judd v. Patton*, 13 S. D. 648, 84 N. W. 199, holding purchaser of interest in land pending suit not entitled to have the judgment set aside for mistake, surprise, inadvertence, or excusable neglect, nearly a year after it was taken on affidavit failing to fix time of learning of suit or judgment or to give valid excuse for delay.

12 S. D. 240, FIRST NAT. BANK v. KEENAN, 80 N. W. 1135.

12 S. D. 241, SMITH v. RUNKEL, 80 N. W. 1135.

12 S. D. 241, MITCHELL v. SMITH, 80 N. W. 1077.

Refunding bonds as an increase of indebtedness.

Cited in *Walling v. Lummis*, 16 S. D. 349, 92 N. W. 1063; *Hyde v. Ewert*, 16 S. D. 133, 91 N. W. 474,—holding that the issuance of bonds bearing less interest, by exchanging them at par for existing bonds for the purpose of refunding the bonded indebtedness, does not increase the bonded indebtedness; *Ewert v. Mallery*, 16 S. D. 151, 91 N. W. 479, holding that refunding bonds issued and exchanged or sold at par do not increase the indebtedness of the city; *Veatch v. Moscow*, 18 Idaho, 313, 109 Pac. 722; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78,—holding refunding bonds not regarded as creating additional indebtedness; *Williamson v. Aldrich*, 21 S. D. 13, 108 N. W. 1063, to point that issuance of refunding bonds does not create new indebtedness.

12 S. D. 245, STUART v. KIRLEY, 81 N. W. 147.**Statutes embracing more than one subject.**

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that an act "to provide for the licensing, restriction, and regulation of the sale of intoxicating liquors" is not invalid as embracing two subjects not expressed in the title where it gives the wife a cause of action for damages resulting from a sale of liquor to the husband, and prohibiting the sale or giving of liquor to minors or habitual drunkards; *Davenport v. Elrod*, 20 S. D. 569, 107 N. W. 833, holding that the statute creating a capitol commission and giving it the right to have a capitol constructed with the funds derived from the sale of lands granted to the state for such purpose not invalid as containing provisions not embraced within the title; *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, holding title of primary election law sufficient to properly include in act any provisions germane to main subject.

Increasing county boundaries.

Distinguished in *State ex rel. Frich v. Stark County*, 14 N. D. 368, 103 N. W. 913, holding that a law which increased the boundaries of a county so as to include parts of the territory of two unorganized counties, is unconstitutional where it does not provide for a submission of the question to the voters of the organized county.

Validity of special legislation.

Cited in note in 93 Am. St. Rep. 112, on constitutional inhibition against special legislation where general law can be made applicable.

12 S. D. 259, STATE v. DONALDSON, 81 N. W. 299.**Validity of liquor statutes.**

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that the statutes of 1897, regulating, restricting and licensing the sale of intoxicating liquors, are valid.

Charging more than one offense in indictment.

Cited in *State v. Pirkey*, 22 S. D. 550, 118 N. W. 1042, 18 A. & E. Ann. Cas. 192, holding two separate offenses, buying and receiving not charged in indictment charging buying receiving and taking stolen property, etc.

12 S. D. 265, STATE v. LEVERS, 81 N. W. 294.**12 S. D. 270, BARNES v. CLEMENT, 81 N. W. 301.****Recovery back of instalments paid under contract.**

Distinguished in *Hanschka v. Vodopich*, 20 S. D. 551, 108 N. W. 28, holding that where an option contract had been wholly abandoned, the purchaser could not secure a conveyance of the property or recover the money paid.

Condition precedent to rescission of contract.

Cited in *Coleman v. Stalnacke*, 15 S. D. 242, 88 N. W. 107, holding vendee not entitled to be relieved from terms of valid contract for purchase of land without tender of payment.

Penalty or liquidated damages.

Cited in notes in 108 Am. St. Rep. 62, on agreements purporting to liquidate damages; 34 L.R.A.(N.S.) 31, on provision for damages in land contract as penalty or stipulated damages.

12 S. D. 278, PARRISH v. MAHANY, 76 Am. St. Rep. 604, 81 N. W. 295, Later appeal in 15 S. D. 134, 87 N. W. 584.

Reversal on theory not urged in trial court.

Cited in Thomas v. Wilcox, 18 S. D. 625, 101 N. W. 1072; McPherson v. Julius, 17 S. D. 98, 95 N. W. 428,—holding that judgments would not be reversed on appeal upon a theory not advanced in the trial court.

Questions first raised upon appeal.

Cited in Willard v. Monarch Elevator Co. 10 N. D. 400, 87 N. W. 996, holding objection that no evidence of value of grain at time of conversion is before the court not first available on appeal where its value at time of delivery was stipulated and no evidence as to time of conversion given; McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341, holding that questions not raised in the trial court cannot be urged on appeal.

12 S. D. 285, DEINDORFER v. BACHMOR, 81 N. W. 297.

Reversal of judgment upon grounds not urged in the trial court.

Cited in McPherson v. Julius, 17 S. D. 98, 95 N. W. 428, holding that judgments would not be reversed on a theory not urged in the trial court.

12 S. D. 293, FARGO v. GRAVES, 81 N. W. 291.

Dismissal of appeal for nonfiling of transcript.

Distinguished in McLaughlin v. Michel, 14 S. D. 189, 84 N. W. 777, holding motion to dismiss appeal from justice's judgment for nonfiling of transcript within statutory period properly denied where appellant filed undertaking for costs of justice's fee for making out transcript and was told by latter that transcript had been transmitted.

12 S. D. 296, STUDEBAKER BROS. MFG. CO. v. ZOLLARS, 81 N. W. 292.

Failure to instruct.

Cited in Belknap v. Belknap, 20 S. D. 482, 107 N. W. 692, holding that the appellant could not complain of the incompleteness of the court's instructions where he did not ask for further instruction to be given.

Review of verdict.

Cited in Schott v. Swan, 21 S. D. 639, 114 N. W. 1005; Comeau v. Hurley, 22 S. D. 79, 115 N. W. 521,—holding that verdict on conflicting evidence will not be disturbed where independent of case made by appellant, verdict is sustained by ample evidence.

12 S. D. 305, STATE EX REL. TOMPKINS v. CHICAGO, ST. P. M. & O. R. CO. 47 L.R.A. 569, 81 N. W. 503

Powers of railroad commissioners.

Cited in Louisiana R. & Nav. Co. v. Railroad Commission, 121 La. 848,

46 So. 884, holding that it was within the power of the state railroad commission to select the site for the depot proposed for a certain settlement.

Cited in note in 17 L.R.A.(N.S.) 823, on power to compel establishment of, or stopping of trains at stations.

What is a station.

Cited in *McGuire v. St. Louis, M. & S. R. Co.* 113 Mo. App. 79, 87 S. W. 564, holding that a place where passengers are regularly received and discharged and likewise freight, is sufficient to constitute the place a station though there is not a depot at the place, so that the grounds need not be fenced; *Acord v. St. Louis South Western R. Co.* 113 Mo. App. 84, 87 S. W. 537, holding that a place where the railroad maintained a side track and received and discharged freight and passengers on flag, was a station though there was no depot, within the meaning of statute requiring tracks to be fenced except at stations.

12 S. D. 313, SWENEHART v. STRATHMAN, 81 N. W. 505.

12 S. D. 317, LIEN v. SIOUX FALLS SAV. BANK, 81 N. W. 628.

Followed without special discussion in *Kirby v. Crisp*, 15 S. D. 33, 87 N. W. 1103.

Rights of surety in collateral security.

Cited in *Park v. Robinson*, 15 S. D. 551, 91 N. W. 344, holding that a surety who is compelled to pay his note, is entitled to a chattel mortgage previously given, but deemed insufficient security for the debt; *Sioux Falls Sav. Bank v. Lien*, 14 S. D. 410, 85 N. W. 924, holding that collateral security for a note to a bank, deposited by the bank with the clerk of the court, in a suit against it for conversion of such collateral by a surety who has paid the note, is in the custody of the court.

12 S. D. 320, IRVING v. DOCKSTADER, 81 N. W. 629.

12 S. D. 321, HURLBUT v. LEPER, 81 N. W. 631.

Error in instruction as to credibility of witness.

Cited in *Elrod v. Ashton*, 14 S. D. 350, 85 N. W. 599, holding an instruction that a witness is impeached if he has made material statements out of court "other than" those made in court, ground for reversal.

12 S. D. 324, LOOMIS v. LECOCQ, 81 N. W. 633.

Reversal of judgment on grounds not urged in trial court.

Cited in *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428, holding that a judgment would not be reversed upon a theory not urged in the trial court.

12 S. D. 326, OLSON v. BURLINGTON, C. R. & N. R. CO. 81 N. W. 634.

Sufficiency of objection.

Cited in *St. Paul White Lead & Oil Co. v. Tibbetts*, 13 S. D. 446, 83 N.

W. 564, holding objection that evidence is incompetent irrelevant and immaterial too general for consideration on appeal.

Sufficiency of objection to reception of evidence.

Cited in *Towne v. Mathwig*, 19 N. D. 4, 121 N. W. 63, holding objection on alleged ground that it is incompetent, irrelevant and immaterial too indefinite in cases where ground of objection might be remedied.

12 S. D. 330, SAVINGS BANK v. CANFIELD, 81 N. W. 630.

When lien of chattel mortgage attaches.

Cited in *Hawk v. Konouzki*, 10 N. D. 37, 84 N. W. 563, holding that lien of lessee's chattel mortgage on grain raised under unrecorded lease does not attach until performance of covenants in the lease where his title to the grain is made contingent on such performance.

Who may maintain trover.

Cited in note in 9 N. D. 632, on who may maintain trover.

12 S. D. 335, WAGNER v. PHILLIPS, 81 N. W. 632.

12 S. D. 339, STATE v. WELBES, 81 N. W. 629.

Liability of surety on official bond.

Cited in note in 90 Am. St. Rep. 194, as to when official bond binds sureties and what irregularities fail to relieve them from liability.

12 S. D. 342, STRIEGEL v. HARDING, 76 AM. ST. REP. 607, 81 N. W. 635.

12 S. D. 350, ST. LAWRENCE v. GROSS, 47 L.R.A. 572, 76 Am. St. Rep. 612, 81 N. W. 640.

12 S. D. 355, WHITFIELD v. HOWARD, 81 N. W. 727.

Presumption as to recitals in judgment.

Cited in *Lockard v. Lockard*, 21 S. D. 134, 110 N. W. 104, holding that recital in judgment that defendant was duly served with notice of trial, will be considered presumptively true.

12 S. D. 366, PELLETIER v. ASHTON, 81 N. W. 735.

Followed without discussion in *Coughran v. Huron*, 17 S. D. 271, 96 N. W. 92.

Removal of unplatted lands from city limits.

Cited in *Bisenius v. Randolph*, 82 Neb. 520, 118 N. W. 127, holding that a statute providing for the removal of unplatted lands from the limits of cities, by proceedings in the district court, is constitutional and not a delegation of legislative powers to the courts.

Distinguished in *Qualey v. Brookins*, 18 S. D. 581, 101 N. W. 713, holding that where it was apparent that injustice would be done, and that the territory included within the limits of the city was necessary to the city, it was error for the trial court to overrule the decision of the city council refusing the petition for removal.

Constitutionality of sections 1511 and 1512 of Political Code.

Cited in *Wickhem v. Alexandria*, 23 S. D. 556, 122 N. W. 597, holding that §§ 1511 and 1512, of Political Code are not unconstitutional as conferring legislative power upon courts.

12 S. D. 373, LARPENTEUR v. WILLIAMS, 81 N. W. 625.**12 S. D. 380, BROWN v. BROWN, 81 N. W. 627.**

Bond on appeal as necessary to give appellate court jurisdiction.

Cited in *Deardoff v. Thorstensen*, 16 N. D. 355, 113 N. W. 616, holding that on appeal from justice court, the filing of a bond on appeal is a prerequisite to the jurisdiction of the district court and the bond cannot be waived; *Miller v. Lewis*, 17 S. D. 448, 97 N. W. 364; *Doering v. Jensen*, 16 S. D. 58, 91 N. W. 343,—holding that unless there is an undertaking for costs on appeal from justice court, the circuit court acquires no jurisdiction; *Centerville v. Olson*, 16 S. D. 526, 94 N. W. 414, holding that an undertaking on appeal from the justice court which fails to provide for the costs on appeal is ineffectual and the circuit court acquires no jurisdiction.

Distinguished in *Wasem v. Bellach*, 17 S. D. 506, 97 N. W. 718, holding that where a defective undertaking on appeal was filed, and it did not contain provisions for the payment of costs on appeal the circuit court should have allowed the undertaking to be amended or a new one filed, since the court had jurisdiction for that purpose.

12 S. D. 386, Re TOD, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303.

Validity of executive warrants for fugitive.

Cited in *Hager v. Sidebottom*, 130 Ky. 687, 113 S. W. 870, holding that warrants signed in blank by the governor and filled out by his private secretary offering a reward for the apprehension of a certain criminal, were void.

Cited in note in 112 Am. St. Rep. 110, 121, 133, on extradition proceedings.

Inquiry as to validity in habeas corpus.

Cited in *Re Waterman*, 29 Nev. 288, 11 L.R.A. (N.S.) 424, 89 Pac. 291, 13 A. & E. Ann. Cas. 926, holding that in habeas corpus proceedings on extradition the trial court may go behind the executive warrant and examine into the sufficiency of the papers upon which it is based, and particularly the indictment and complaint, and the executive warrant issued.

Cited in note in 11 L.R.A. (N.S.) 426, on right of court of asylum state to examine sufficiency of papers charging offense for which extradition demanded.

Who are fugitives from justice.

Cited in note in 52 L. ed. U. S. 542, on who are fugitives from justice.

Stipulation to receive evidence in absence of court.

Cited in *State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 A. & E. Ann. Cas. 87, holding that it cannot be stipulated that verdict may be accepted in absence of court.

12 S. D. 397, WATERHOUSE v. JOSEPH SCHLITZ BREWING CO. 48 L.R.A. 157, 81 N. W. 725, Later appeal in 16 S. D. 592, 94 N. W. 587.

Inference of negligence from falling of structure.

Cited in *Chenall v. Palmer Brick Co.* 117 Ga. 106, 43 S. E. 443, holding that negligence might be inferred from the falling of an arch, injuring a servant who had been station to work beneath it.

Cited in note in 113 Am. St. Rep. 1001, on presumption of negligence from happening of accident causing personal injuries.

Liability of lessor to third persons.

Cited in note in 92 Am. St. Rep. 527, 530, 537, on liability to third persons of lessors, of real or personal property.

12 S. D. 405, BAKER v. HOGABOOM, 81 N. W. 730.

12 S. D. 411, FIRST NAT. BANK v. CALKINS, 81 N. W. 732, Later appeal in 16 S. D. 445, 93 N. W. 646.

Former adjudication.

Cited in *Calkins v. First Nat. Bank*, 20 S. D. 466, 107 N. W. 675, holding that the record in an action to set aside the sale was admissible to prove the sale void or rescinded, in later action to recover the chattels by the mortgagee from the purchaser, though the mortgagee was not a party to the action to set aside sale.

Evidence in trover and conversion.

Cited in note in 9 N. D. 635, on evidence in actions for trover and conversion.

12 S. D. 423, STATE v. FINDER, 81 N. W. 959.

12 S. D. 424, ADAMS v. GRAND ISLAND & W. C. R. CO. 81 N. W. 960.

Loss of mechanic's lien.

Cited in *Congdon & H. Hardware Co. v. Grand Island & W. C. R. Co.* 14 S. D. 575, 86 N. W. 633, holding right to lien by one furnishing supplies to subcontractor if used in building railroad, lost by failure to file lien within sixty days after materials are furnished where subcontractor had been fully paid though amount in excess of lien is still due proper contractor.

12 S. D. 428, ECKER v. LINDSKOG, 48 L.R.A. 155, 81 N. W. 965.

12 S. D. 433, STATE v. RODDLE, 81 N. W. 980.**Validity of statute creating state registry of brands and marks.**

Distinguished in *State v. Porter*, 69 Neb. 203, 95 N. W. 769, holding that under the state constitution, a statute creating a state registry of brands and marks upon live stock, and making the secretary of state a member, is unconstitutional as attempting to create a new executive office and making one state officer to take another state office.

Occupant of two public offices as entitled to salaries of both.

Cited in *State ex rel. Chatterton v. Grant*, 12 Wyo. 1, 73 Pac. 470, 2 A. & E. Ann. Cas. 382, holding that where the Secretary of State became acting Governor through the death of the Governor and Lieut-Governor, he was entitled to the salaries of both governor and secretary of state.

12 S. D. 438, KANE v. HUGHES COUNTY, 81 N. W. 894.

Followed without discussion in *Golding v. Hughes County*, 13 S. D. 53, 82 N. W. 1119.

Presumption of validity of municipal warrants.

Cited in *Rochford v. School Dist. No. 11*, 17 S. D. 542, 97 N. W. 747, holding that a school order duly issued is prima facie valid and evidence of a valid claim presented and allowed.

County orders drawn against advertising fund.

Followed in *Dakota County v. Bartlett*, 67 Neb. 62, 93 N. W. 192, holding that where a warrant was drawn against the advertising fund of the county, it was equivalent to their being drawn against the county general fund, and were payable out of that where there was no advertising fund.

Abatement of action on county warrant.

Cited in *Stewart v. Custer County*, 14 S. D. 155, 84 N. W. 764, holding affirmative proof that money for payment of registered county warrant valid and regularly issued is not in treasury and that sufficient time for collection has not elapsed essential to abatement of action thereon.

12 S. D. 448, PLANO MFG. CO. v. PERSON, 81 N. W. 897.**12 S. D. 455, KETTLESCHLAGER v. FERRICK, 76 AM. ST. REP. 623, 81 N. W. 889.****Transfer of homestead as a fraud on creditors.**

Cited in *Commercial State Bank v. Kendall*, 20 S. D. 314, 129 Am. St. Rep. 936, 106 N. W. 53, holding that it is not a fraud upon the creditors for the husband in good faith transferred the homestead to the wife, and this good faith is not overcome by the fact that the husband soon after abandoned the homestead and went elsewhere.

Who may claim homestead exemption.

Cited in note in 13 L.R.A.(N.S.) 170, on right of husband to claim homestead as exempt where title vested in wife.

12 S. D. 460, SCHULER v. LINCOLN TWP. 81 N. W. 890.**Measure of damages in eminent domain proceedings.**

Cited in *Chicago, M. & St. P. R. Co. v. Brink*, 16 S. D. 644, 94 N. W. 422, holding that the measure of damages for the taking of land by eminent domain is the value of the land taken together with the difference in value of the rest of the land before and after the strip was taken; *Bockoven v. Lincoln Twp.* 13 S. D. 317, 83 N. W. 335, holding expense of building or maintaining additional fences required by establishment of railway over land a proper element of damages.

Cited in note in 85 Am. St. Rep. 304, on elements of damages allowable in eminent domain proceedings.

Error in admission of evidence as to value.

Cited in *Overpeck v. Rapid City*, 14 S. D. 507, 85 N. W. 990, holding admission in evidence of actual cost value of necessary repairs on buggy not reversible error even though proper measure of damages was difference in value before and after injury.

12 S. D. 468, MEADE COUNTY v. HOEHN, 81 N. W. 886.**Place where property in unorganized county is taxable.**

Cited in *Meade County v. Hoehn*, 12 S. D. 500, 81 N. W. 887, holding owner of cattle ranging in unorganized county liable to assessment thereon in county of his residence, though assessment has been levied and collected in county to which the unorganized county is attached.

12 S. D. 473, STATE v. EVANS, 81 N. W. 893.**Burden of proof in criminal trials.**

Cited in *State v. Weckert*, 17 S. D. 202, 95 N. W. 924, 2 A. & E. Ann. Cas. 191, holding that it was erroneous to charge to the effect that the burden was upon the defendant in a prosecution for larceny, to show that the property was taken under an honest claim of ownership of the defendant.

Presumption as to regularity of bill of exceptions.

Cited in *Coler v. Sterling*, 15 S. D. 415, 89 N. W. 1022, holding that time for settling exceptions will be presumed to have been extended by consent or for due cause shown in absence of any showing to the contrary.

12 S. D. 478, MILLER v. KENNEDY, 81 N. W. 906.**Release of surety by acts of creditor.**

Cited in *Hoffman v. Habighorst*, 49 Or. 379, 91 Pac. 20, holding that to discharge a surety by the acts of the creditor, the latter must have had knowledge of the suretyship at the time his acts were done; *Iowa Loan & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255, holding that where the purchaser of land assumes the mortgage thereon with the consent of the mortgagee, an extension of time to such purchaser without the consent or knowledge of the original mortgagor, releases him from liability.

Cited in note in 4 L.R.A.(N.S.) 666, on effect upon mortgagor's obligation of modification between mortgagee and subsequent grantee.

12 S. D. 483, KAEPLER v. REDFIELD CREAMERY CO. 81 N. W. 907.

Liability of promoters of corporation.

Distinguished in *Harrill v. Davis*, 22 L.R.A.(N.S.) 1153, 94 C. C. A. 47, 168 Fed. 187, holding that where the dealings with the promoters was with them as a part of a business preliminary to the organization of the corporation, and not with the assurance that the corporation would be organized, the promoters are individually liable.

12 S. D. 486, LINQUIST v. JOHNSON, 81 N. W. 900.

12 S. D. 488, NEYS v. TAYLOR, 81 N. W. 901.

Presumption as to husband's assent to wife's crime.

Cited in *Richardson v. Dybedahl*, 14 S. D. 134, 84 N. W. 486, as to presumption in favor of married woman arising from presence of her husband at the time of commission by her of alleged crime.

Coercion as defense to crime.

Cited in note in 106 Am. St. Rep. 726, on coercion as defense to crime.

Elements of damages in malicious prosecution.

Cited in 33 L.R.A.(N.S.) 293, on condition of prison and treatment while in custody as elements of damages in action for malicious prosecution or false imprisonment.

12 S. D. 496, GREEN v. SABIN, 81 N. W. 904.

12 S. D. 500, MEADE COUNTY v. HOEHN, 81 N. W. 887.

Followed without discussion in *Meade County v. Hoehn*, 12 S. D. 569, 81 N. W. 1103.

12 S. D. 506, BROWN v. BROWN, 81 N. W. 883.

Necessity for findings by court.

Cited in *Cable Co. v. Rathgaber*, 21 S. D. 418, 113 N. W. 88, holding findings of facts unnecessary where agreed that conclusions could be made and judgment rendered, on stipulated facts.

12 S. D. 509, WIMSEY v. McADAMS, 81 N. W. 884.

12 S. D. 511, LOTHROP v. MARBLE, 76 AM. ST. REP. 626, 81 N. W. 885.

Validity of contract to dispose of property by will.

Cited in *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667, holding that contracts for the disposition of property by will are enforceable in equity, where they are based upon a sufficient consideration, are equitable, invade no rights of third parties, and not void under the statute of

frauds or otherwise; *McCullom v. Mackrell*, 13 S. D. 262, 83 N. W. 255, holding oral agreement to give land in consideration of life support specifically enforceable after full performance as against one to whom promisor conveyed premises with intent to defraud promisee.

Cited in notes in 9 L.R.A.(N.S.) 158, on specific performance of contract to compensate services to continue during promisor's lifetime, as affected by brevity of period elapsing before his death; 15 L.R.A.(N.S.) 469, on specific performance of oral contract to devise or convey land in consideration of services or support, where no possession taken, or improvements made.

12 S. D. 515, DEADWOOD v. WHITTAKER, 81 N. W. 908.

Dedication of street.

Cited in *Sweatman v. Bathrick*, 17 S. D. 138, 95 N. W. 422, holding that where the land owners platted the property, and afterward in different conveyances recognized the change of the location of a street by the plat of the city engineer, and never made any objection to the use of the same by the public, it was a dedication of the street as changed; *Whittaker v. Deadwood*, 12 S. D. 523, 81 N. W. 910, holding one using a recognized street claimed to have been dedicated by his grantor and knowingly permitting public to use same without objection estopped to deny dedication.

Location of mining claim.

Cited in note in 7 L.R.A.(N.S.) 789, on location of mining claim.

12 S. D. 523, WHITTAKER v. DEADWOOD, 81 N. W. 910, Later phase of same case in 12 S. D. 608, 82 N. W. 202.

Dedication of street.

Cited in *Sweatman v. Bathrick*, 17 S. D. 138, 95 N. W. 422, holding that where the land owners platted the property and afterward by different conveyances recognized the change of the location of a street by a plat of the city engineer, and never made any objection to the use of the same by the public, it was a dedication of the street as changed.

12 S. D. 529, CHASE v. REDFIELD CREAMERY CO. 81 N. W. 951.

Liability of promoters of corporation.

Cited in *Harrill v. Davis*, 22 L.R.A.(N.S.) 1153, 94 C. C. A. 47, 168 Fed. 187, holding that where the dealings with the promoters of a corporation, was with them as a part of a business preliminary to the organization of the corporation and not with the assurance that the corporation would be organized, the promoters are individually liable.

12 S. D. 535, WILSON v. BOARD OF EDUCATION, 81 N. W. 952, Affirmed on rehearing in 15 S. D. 317, 89 N. W. 480.

School indebtedness as a part of city indebtedness.

Cited in *Hyde v. Ewert*, 16 S. D. 133, 91 N. W. 474, holding that the

indebtedness of the school district cannot be considered in determining the total indebtedness of the city, though the boundaries of both coincide; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78, holding that the debts of a school district whose boundaries are coincident with those of a city cannot be included in determining whether the debts of a city exceed the constitutional limit.

12 S. D. 562, McFALL v. SIMMONS, 81 N. W. 898.

Custody of minor children.

Cited in *State ex rel. Kol v. North Dakota Children's Home Society*, 10 N. D. 493, 88 N. W. 273, holding that jurisdiction of court committing children continues during their infancy for purpose of making necessary additional orders.

12 S. D. 569, MEADE COUNTY v. HOEHN, 81 N. W. 1103.

12 S. D. 570, SMALL v. ELLIOTT, 76 AM. ST. REP. 630, 82 N. W. 92.

Abbreviation "Pt." as meaning president.

Cited in *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13, 9 A. & E. Ann. Cas. 1193, holding that parol evidence is admissible to show that the letters "Pt." following the name of the payee of a draft, were intended to show that he was the president of the bank for which the draft was intended.

12 S. D. 576, SUTTON v. CONSOLIDATED APEX MIN. CO. 82 N. W. 188, Decision on the merits in 14 S. D. 33, 84 N. W. 211, which is modified on rehearing in 15 S. D. 410, 89 N. W. 1020.

Parties upon whom notice of appeal must be served.

Cited in *Crouch v. Dakota, W. & M. River R. Co.* 22 S. D. 263, 117 N. W. 145, holding that notice of appeal from order must be served upon codefendants where reversal or modification would affect their interests.

12 S. D. 584, GUERNSEY v. TUTHILL, 82 N. W. 190.

Real party in interest to bring action.

Cited in *Odell v. Petty*, 19 S. D. 532, 104 N. W. 249, holding that the assignee of a judgment for the return of specific personal property is the only one who may maintain an action on the redelivery bond and not the original judgment creditor, as the assignment of the judgment is an assignment of the bond.

Cited in note in 64 L.R.A. 608, as to who is real party in interest with in statutes defining parties by whom action must be brought.

Evidence in trover and conversion.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

12 S. D. 595, TOLERTON & S. CO. v. PETRIE, 82 N. W. 199.

Possession of personal property as prima facie evidence of ownership.

Cited in *Amundson v. Standard Printing & Mfg. Co.* 140 Iowa, 464, 118 N. W. 789, holding that possession of personal property is prima facie evidence of ownership, good against every one but the real owner.

12 S. D. 608, WHITTAKER v. DEADWOOD, 82 N. W. 202.

Recovery of money paid under protest.

Cited in note in 94 Am. St. Rep. 431, on recovery back of voluntary payment.

Distinguished in *C. & J. Michel Brewing Co. v. State*, 19 S. D. 302, 70 L.R.A. 911, 103 N. W. 40, holding that a payment of taxes by a non-resident under the statute imposing a tax upon nonresidents maintaining wholesale establishments for the sale of liquors in the state, in order to escape the penalties imposed by the statute, were not paid under duress and cannot be recovered.

Damages for grading and improvement of street.

Cited in note in 7 L.R.A.(N.S.) 109, on damage to abutting owner by first grading and improvement of street.

12 S. D. 616, KIRBY v. MUENCH, 82 N. W. 93.

Changing cause of action by amendment.

Distinguished in *Murphy v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614, holding that a more liberal rule obtains in allowing defendant to amend his answer, than in allowing the plaintiff to amend his complaint.

12 S. D. 618, NORTHWESTERN LOAN & BKG. CO. v. JONASEN, 82 N. W. 94.

Filing of notice to quit as jurisdictional prerequisite.

Distinguished in *McLain v. Nurnberg*, 16 N. D. 144, 112 N. W. 243, holding that the filing of the notice to quit in forcible entry proceedings is not a jurisdictional prerequisite but it may be filed after summons is served.

12 S. D. 621, LONG v. COLLINS, 82 N. W. 95, Later phase of same case in 16 S. D. 625, 102 Am. St. Rep. 724, 94 N. W. 700.

Affidavit of juror to impeach verdict.

Cited in *State v. Andre*, 14 S. D. 215, 84 N. W. 783, holding that affidavit of juror in criminal case as to misconduct of jury in use of intoxicating liquors cannot be used on motion for new trial to impeach the verdict.

Validity of "quotient" verdicts.

Distinguished in *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341, holding that where there is a dispute in the affidavits of the jurors as to the

means of reaching a verdict, which it is claimed is a quotient verdict, the court will not set the verdict aside.

12 S. D. 627, MALE v. HARLAN, 82 N. W. 179, Affirmed on rehearing in 16 S. D. 178, 91 N. W. 1117.

Waiver of right of appeal.

Cited in Lounsbery v. Erickson, 16 S. D. 375, 92 N. W. 1071, holding that where the plaintiff accepts the costs paid him pursuant to an order vacating a default judgment upon condition that the defendant pay the plaintiff's costs, the plaintiff waives his right of appeal from such order.

Cited in note in 29 L.R.A.(N.S.) 12, on right to appeal from unfavorable while accepting favorable part of decree, judgment, or order.

12 S. D. 632, Mettel v. Gales, 82 N. W. 181.

Alteration of written contracts.

Cited in Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088, holding that a contract for the purchase of lands, providing for forfeiture in certain cases, cannot be altered by an executory parol contract to provide for forfeiture in another case.

Distinguished in Fransen v. Regents of Education, 66 C. C. A. 174, 133 Fed. 24, holding that the statute providing that a written contract cannot be altered except by another instrument in writing or by an executed oral contract, does not prevent the application of the principles of equitable estoppel in proper instances.

Review of sufficiency of the evidence on appeal from judgment alone.

Cited in Stephens v. Faus, 20 S. D. 367, 106 N. W. 56, holding that the sufficiency of the evidence to justify the decision of the court cannot be considered upon appeal from the judgment alone.

Appeal from orders not entered.

Cited in Stephens v. Faus, 20 S. D. 367, 106 N. W. 56, holding that appeal will not lie from an order denying a motion for a new trial where such had not been attested by the clerk and entered by him; Myers v. Longstaff, 12 S. D. 641, 82 N. W. 183, holding that appeal from judgment and order denying new trial will not be dismissed because taken before such order was entered on record.

12 S. D. 641, MYERS v. LONGSTAFF, 82 N. W. 183.

Review of the sufficiency of the evidence.

Cited in Myers v. Longstaff, 14 S. D. 98, 84 N. W. 233, holding that sufficiency of evidence will not be considered on appeal from judgment alone; Foss v. Van Wagenen, 20 S. D. 39, 104 N. W. 605, holding that the sufficiency of the evidence to support the decisions of the court cannot be reviewed upon appeal from the judgment alone, and where the appeal is taken from the judgment before the motion for new trial is made, the sufficiency of the evidence cannot be reviewed.

**12 S. D. 643, FLETCHER v. GREAT WESTERN ELEVATOR CO.
82 N. W. 184.**

Estoppel to deny recitals of warehouse receipt.

Cited in *Citizens' Nat. Bank v. Great Western Elevator Co.* 13 S. D. 1, 82 N. W. 186, holding warehouse receipts fraudulently issued by agent of warehouse man binding upon it.

Distinguished in *Union Nat. Bank v. Griswold*, 141 Ill. App. 464, holding that a reservation in a warehouse receipt that contents of package are unknown entitles warehouseman to show the true contents thereof, and no estoppel to deny statements of the receipt arises where the goods stored were not open to inspection.

Dak. Rep.—66.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 13 S. D.

13 S. D. 1, Citizens' Nat. Bank v. Great Western Elevator Co. 82 N. W. 186.

Evidence in trover and conversion.

Cited in note in 9 N. D. 634, on evidence in actions for trover and conversion.

13 S. D. 7, CUSTER COUNTY v. TUNLEY, 79 AM. ST. REP. 870, 82 N. W. 84.

Liability of sureties on official bonds.

Cited in note in 91 Am. St. Rep. 559, on acts for which sureties on official bonds are liable.

Right to fees unlawfully collected by officer.

Cited in note in 20 L.R.A.(N.S.) 1016, on right of public to fees unlawfully collected by officer.

13 S. D. 18, MINNEHAHA NAT. BANK v. HURLEY, 82 N. W. 87.

Discretion to vacate default judgment.

Cited in Kjetland v. Pederson, 20 S. D. 58, 104 N. W. 677, holding that the motion to set aside a default judgment and for leave to answer is addressed to the discretion of the court and its ruling thereon will not be disturbed except for an abuse of discretion; Corson v. Smith, 22 S. D. 501, 118 N. W. 705, holding refusal to open default for inexcusable mistake or oversight, proper.

13 S. D. 23, CHRIST v. GARRETSON STATE BANK, 82 N. W. 89.

Review of findings of trial court.

Cited in Jackson v. Prior Hill Min. Co. 19 S. D. 453, 104 N. W. 207,
1043

holding that the findings of the trial court or the referee are presumptively correct and will not be disturbed on appeal unless there is a preponderance of the evidence against them.

13 S. D. 26, OLSON v. AUSDAL, 82 N. W. 89.

13 S. D. 28, D. S. B. JOHNSTON LAND MORTG. CO. v. CASE, 82 N. W. 90.

Sufficiency of bill of exceptions.

Cited in *Narregang v. Brown County*, 14 S. D. 357, 85 N. W. 602, holding that assignment of error that the evidence is insufficient to support the judgment without specifying the particulars in which it is insufficient will not be considered on appeal; *Regan v. Whittaker*, 14 S. D. 373, 85 N. W. 863, 21 Mo. Min. Rep. 309, holding that supreme court will not review evidence where motion for new trial for insufficiency of evidence was made on minutes of court or on bill of exceptions and notice of intention or bill of exceptions does not specify particulars as to insufficiency; *Hermon v. Silver*, 15 S. D. 476, 90 N. W. 141, holding that neither the trial court nor the appellate court can review the evidence or any alleged error of law not properly specified as required by the statute; *Boettcher v. Thompson*, 17 S. D. 177, 95 N. W. 874, holding that where the motion for a new trial is made on a bill of exceptions which contains no specification of the particulars in which the evidence is insufficient the sufficiency of the evidence cannot be reviewed on appeal; *Wenke v. Hall*, 17 S. D. 305, 96 N. W. 103, holding that where the motion for a new trial is made on a bill of exceptions, it should contain a specification of the particulars wherein the evidence is insufficient to support the decision and errors of law relied on; *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95; *Clark v. Mitchell*, 17 S. D. 430, 97 N. W. 358,—holding that a bill of exceptions on motion for new trial must state the particulars in which the evidence is insufficient to sustain the decision and errors of law relied on, and if it does not it will be disregarded on appeal; *McNish v. Wolven*, 22 S. D. 621, 119 N. W. 999; *Boettcher v. Thompson*, 21 S. D. 169, 110 N. W. 108,—holding sufficiency of evidence to sustain decision not reviewable if statement of case does not contain proper specifications wherein evidence is insufficient.

Review of evidence on appeal from judgment alone.

Cited in *State ex rel. Brown v. Pierre*, 15 S. D. 559, 90 N. W. 1047, holding that evidence cannot be reviewed on appeal from judgment alone where record affirmatively shows that a motion for a new trial was heard and denied after rendition of judgment.

13 S. D. 30, NELSON v. JORDETH, 82 N. W. 90.

13 S. D. 34, AMERICAN BKG. CO. v. LYNCH, 82 N. W. 77.

13 S. D. 37, NATIONAL L. INS. CO. v. MEAD, 48 L.R.A. 785, 79 AM. ST. REP. 876, 82 N. W. 78, Rehearing denied in 13 S. D. 342, 82 N. W. 325, Later action in Federal court in 41 C. C. A. 585, 101 Fed. 665.

Power to issue funding bonds.

Cited in *Stone v. Chicago*, 207 Ill. 492, 69 N. E. 970, holding that under the issuance of bonds for the purpose of funding the city's indebtedness and the payment of judgments against it, is a pledging of the city's credit as authorized by the statute giving the power to issue bonds for such a purpose; *Pierre v. Dunscomb*, 43 C. C. A. 502, 106 Fed. 611, holding power to issue refunding bonds included in power given cities by statute to borrow money for corporate purposes and issue bonds therefor.

Computing total municipal indebtedness.

Cited in *Hyde v. Ewert*, 16 S. D. 133, 91 N. W. 474, holding that in computing the total indebtedness of a city, the indebtedness of the school district embraced within the city cannot be considered, though the boundaries of the two coincide.

—Increase by issuance of funding bonds.

Cited in *Ransom v. Pierre*, 41 C. C. A. 585, 101 Fed. 665, holding refunding bonds reciting issuance to take up prior valid indebtedness and compliance with statutory requirements not void in hands of bona fide purchasers because debt limit had been exceeded; *Pierre v. Dunscomb*, 43 C. C. A. 499, 106 Fed. 611, sustaining right of innocent purchaser to rely on certificate in municipal refunding bonds that they were issued in pursuance of statute, although the debt limitation was exceeded at time of issuance; *Ewert v. Mallery*, 16 S. D. 151, 91 N. W. 479, holding that the issuance of refunding bonds by exchanging them at par for outstanding bonds is not increasing the city indebtedness, and they cannot be considered in determining the total indebtedness; *Walling v. Lummis*, 16 S. D. 349, 92 N. W. 1063, holding that the issuance of bonds at a less per cent to pay outstanding warrants, is not an increase of the county indebtedness, and they cannot be considered as increasing the total indebtedness beyond the legal limit; *Williamson v. Aldrich*, 21 S. D. 13, 108 N. W. 1063, to point that issuance of refunding bonds does not increase city's indebtedness; *Cass County v. Wilbarger County*, 25 Tex. Civ. App. 52, 60 S. W. 988, holding that funding bonds do not constitute a new indebtedness so as to increase the total indebtedness beyond the constitutional limit.

Payment of municipal indebtedness.

Cited in *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 801 (dissenting opinion), the majority holding that where a county treasurer has in his hands the proceeds of a tax levied to pay certain bonds, the holders of the bonds have each an adequate remedy at law and cannot maintain a suit in equity against said treasurer as a trustee to compel the execution of the trust and the distribution of the money.

13 S. D. 53, GOLDING v. HUGHES COUNTY, 82 N. W. 1119.

13 S. D. 54, VINE v. JONES, 82 N. W. 82.**Supervisory control over inferior courts.**

Cited in *State ex rel. Whiteside v. First Judicial Dist. Ct.* 24 Mont. 539, 63 Pac. 395, holding that supreme court has supervisory control over inferior courts distinct and separate from its appellate jurisdiction to meet exigencies to which latter is not commensurate; *Gates v. McGee*, 15 S. D. 247, 88 N. W. 115, issuing the writ of prohibition to restrain the circuit court of one county from declaring void receivership proceedings in another county; *State ex rel. Null v. Circuit Ct.* 20 S. D. 122, 104 N. W. 1048, holding that mandamus was proper to compel an inferior court to certify to copies of lost or stolen indictments, where there was sufficient proof of their authenticity; *Raleigh v. First Judicial Dist. Ct.* 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991, discussing without deciding the scope of Mont. Const. giving the supreme court a general supervisory control over all inferior courts.

Cited in note in 51 L.R.A. 68, on superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal.

Mandamus to compel city to dismiss suit.

Cited in *State ex rel. Dakota Cent. Teleph. Co. v. Huron*, 23 S. D. 153, 120 N. W. 1008, denying mandamus to compel city to dismiss its suit, rights being private and local and remedy by appeal being adequate.

Disqualification of judge for interest.

Cited in *Re Taber*, 13 S. D. 62, 82 N. W. 398, holding county judge disqualified to act in probate proceeding where his son, as attorney, has contracted for a contingent fee to conduct prosecution of claim of certain persons that they be adjudged sole heirs.

13 S. D. 62, Re TABER, 82 N. W. 398.**Authority to punish contempts.**

Cited in note in 117 Am. St. Rep. 952, on courts, tribunals and persons authorized to punish contempts.

13 S. D. 75, MATHER v. DARST, 82 N. W. 407.**Sufficiency of notice of delinquent tax sale.**

Cited in *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227, holding void and incapable of validation by statute, tax deed issued on sale, of which insufficient notice was given.

Distinguished in *Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322, holding that the notice of delinquent tax sale which contained the words "Amount of sale" over the figures was not void because it did not show the amount of taxes due; *Bandow v. Wolven*, 20 S. D. 445, 107 N. W. 204, holding that where the columns were headed "Tax. Persl. Pnlty. & Int., Total" and underneath them respectively were the figures "26 16, 2 45, 28 61" the notice of delinquent tax sale was sufficient though the dollar sign was omitted since it was possible to tell what was meant.

13 S. D. 78, KOHN v. LAPHAM, 82 N. W. 408.**Protection of one claiming under attachment.**

Cited in *Flower v. Beasley*, 52 La. Ann. 2054, 28 So. 322, holding that La. Civil Code, § 2149, providing that payment by a debtor to his creditor, to the prejudice of a seizure or an attachment, is invalid does not apply where pending an injunction against the sale of property which is under seizure by the sheriff, said property is sold for taxes.

As against unrecorded conveyance.

Cited in *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308, holding that the purchaser at a sheriff's sale under attachment proceedings is not a purchaser in good faith so as to acquire title as against an unrecorded deed, but which had been recorded before sale; *Murphy v. Plankinton Bank*, 13 S. D. 501, 83 N. W. 575, holding purchaser of land from purchaser at attachment sale not purchaser or encumbrancer in good faith without notice for value within recording laws; *Haynie v. Bennett*, 22 S. D. 65, 115 N. W. 515, holding that execution sale conveyed no title where debtor's estate had been wholly divested by unrecorded deed.

Effect of publication of notice of lis pendens.

Cited in *McVay v. Tousley*, 20 S. D. 258, 129 Am. St. Rep. 927, 105 N. W. 932, holding that the publication of the statutory notice of lis pendens gives constructive notice only of the pendency of the action and nothing more and when the action is no longer pending the notice is of no effect.

13 S. D. 86, MOODY v. DAVIS, 82 N. W. 410.

Followed without special discussion in *LeClaire v. Wells*, 7 S. D. 426, 64 N. W. 519.

Effect of filing notice of lis pendens.

Cited in *Moulton v. Kolodzik*, 97 Minn. 423, 107 N. W. 154, 7 A. & E. Ann. Cas. 1090, holding that the filing of a notice of lis pendens does not affect the rights of the vendee in an executory contract for the sale of the land, entered into before the notice is filed.

13 S. D. 95, SHERMAN v. PORT HURON ENGINE & THRESHER CO. 82 N. W. 413.**Liability for refusal to accept goods as per contract.**

Distinguished in *Minneapolis Threshing Machine Co. v. McDonald*, 10 N. D. 408, 87 N. W. 993, holding that the liability of a vendee who refuses to accept the goods purchased upon the terms of the contract of sale is not reduced or affected by the fact that he offered to accept them on different terms.

Former decision as the law of the case.

Cited in *State v. Ruth*, 14 S. D. 92, 84 N. W. 394, holding that law announced on first appeal will even though erroneously stated be adhered to on second appeal in same action; *Dunn v. National Bank of Canton*, 15 S. D. 454, 90 N. W. 1045, holding that decision on former appeal determines law of the case at all subsequent stages where no new issues are

introduced; *First Nat. Bank v. Calkins*, 16 S. D. 445, 93 N. W. 646, holding that in so far as the record on the former trial in no way differs from that before the court, the questions there decided, have become the law of the case; *Waterhouse v. Jos. Schlitz Brewing Co.* 16 S. D. 592, 94 N. W. 587, holding a former decision to be the law of the case.

13 S. D. 103, *MACOMB v. LAKE COUNTY*, 82 N. W. 417, related case in 17 S. D. 353, 96 N. W. 702.

13 S. D. 109, *CASSILL v. MORROW*, 82 N. W. 418.

13 S. D. 115, *COUGHRAN v. SUNDBACK*, 79 AM. ST. REP. 886, 82 N. W. 507.

13 S. D. 120, *FERGUSON v. YUNT*, 82 N. W. 509.

13 S. D. 126, *STATE EX REL. COSPER v. PORTER*, 82 N. W. 415.

13 S. D. 132, *BENARD v. GRAND LODGE*, A. O. U. W. 82 N. W. 404, Affirmed on rehearing in 14 S. D. 340, 85 N. W. 596.

Equitable interest in the proceeds of life insurance policy.

Cited in *Great Camp, K. O. T. M. v. Savage*, 135 Mich. 459, 98 N. W. 26, holding that where the husband was unable to keep up his dues and would have permitted the policy to lapse but for his wife continuing the dues under the agreement that she was to have the insurance, the husband would not be allowed to transfer the policy to his brother as beneficiary without the knowledge of the wife; *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061, holding that where the plaintiff had agreed to pay the dues and to support the assured for the remainder of his life in consideration that he receive the proceeds of the policy which the beneficiaries consented to, the fact that he was not actually substituted as beneficiary did not affect his rights to the proceeds as between him and the beneficiaries named.

Cited in note in 12 L.R.A.(N.S.) 1210, on effect of consideration moving from original beneficiary in mutual-benefit certificate, upon right to change beneficiaries.

Distinguished in *Clerk v. Supreme Council*, R. A. 176 Mass. 468, 57 N. E. 787, holding that equity will not make a death benefit payable to the wife of the deceased holder because she had been induced to pay assessments thereon and advanced other money to him, in reliance upon his unfulfilled promise to have her substituted as beneficiary in the stead of his children.

13 S. D. 138, *SEIM v. SMITH*, 82 N. W. 390.

13 S. D. 140, *LEAD v. KLATT*, 82 N. W. 391, Appeal in action on appeal bond in 16 S. D. 159, 91 N. W. 582.

13 S. D. 145, FODNESS v. JUELFS, 82 N. W. 396.**Protection of sheriff by process.**

Distinguished in Fodness v. Juelfs, 13 S. D. 145, 82 N. W. 396, holding sheriff not protected by execution from justice of peace in selling property levied or where notice of sale was published in newspaper instead of being posted as required by statute.

13 S. D. 148, UNTERRAINER v. SEELIG, 82 N. W. 394.**13 S. D. 155, SHIMERDA v. WOHLFORD, 82 N. W. 393.****Right of mortgagee to possession of real estate, before foreclosure.**

Cited with approval in McClory v. Ricks, 11 N. D. 38, 88 N. W. 1042, holding that the mortgagee has not right before foreclosure to take possession of the mortgaged premises, even for conditions broken, and possession under foreclosure proceedings absolutely void, is wrongful as against the mortgagee.

When deed will be construed to be mortgage.

Cited in Bradley & Co. v. Helgersen, 14 S. D. 593, 96 N. W. 634, holding warranty deed to specified person as trustee, a mortgage when executed and delivered to secure payment of certain notes and interest.

13 S. D. 162, SMITH v. GALE, 82 N. W. 385.**Defective undertaking as common law obligation.**

Cited in Matheson v. F. W. Johnson Co. 16 S. W. 347, 92 N. W. 1083, holding that an undertaking given as security to the sheriff by the attaching creditor where the property was claimed by third parties, is valid and enforceable though given voluntarily by the creditor without the proceedings provided by statute in such cases.

Burden of proving want of consideration.

Cited in Grimsrud Shoe Co. v. Jackson, 22 S. D. 114, 115 N. W. 656, holding that party seeking to invalidate instrument has burden of proving want of consideration.

Cited in note in 135 Am. St. Rep. 769, on burden of proving want of consideration.

13 S. D. 166, STATE v. LEWIS, 82 N. W. 406.**Sufficiency of information charging abortion.**

Cited in State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, holding special description of drug or medicine administered, nor kind or character of instrument used, or manner of use, unnecessary where alleged to be unknown.

13 S. D. 169, PARKER v. AUSLAND, 82 N. W. 402.**13 S. D. 176, CHANDLER v. HILL, 82 N. W. 397.****13 S. D. 179, CARPENTER v. SCHANCHE, 82 N. W. 387.**

13 S. D. 162, PECK v. ZBOROWSKI, 82 N. W. 387.

13 S. D. 185, WEISS v. EVANS, 82 N. W. 388.

Review of the evidence on appeal.

Cited in *Kielbach v. Chicago, M. & St. P. R. Co.* 13 S. D. 629, 84 N. W. 192; *Walker v. McCaull*, 13 S. D. 512, 83 N. W. 578,—holding that verdict on conflicting evidence will not be disturbed on appeal when sustained by sufficient evidence; *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646; *Charles E. Bryant & Co. v. Arnold*, 19 S. D. 106, 102 N. W. 303,—holding that conflicting evidence will not be examined on appeal except to determine whether there is probative evidence sufficient to sustain the decision; *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 A. & E. Ann. Cas. 516; *Comeau v. Hurley*, 22 S. D. 79, 115 N. W. 521; *Schott v. Swan*, 21 S. D. 639, 114 N. W. 1005,—affirming verdict rendered on conflicting testimony because sufficiently sustained by evidence independent of that of adverse party.

13 S. D. 188, SCHULER v. CITIZENS' BANK, 82 N. W. 389.

13 S. D. 191, RE OPINION OF JUDGES, 83 N. W. 96.

13 S. D. 193, MEADE COUNTY BANK v. REEVES, 82 N. W. 751.

When law goes into effect.

Cited in *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605, holding that a law passed in an emergency clause goes into effect immediately upon its approval by the governor.

13 S. D. 199, THOMAS v. FULLERTON, 83 N. W. 45.

Granting new trial on the evidence.

Followed in *Troy Mining Co. v. Thomas*, 15 S. D. 238, 88 N. W. 106, holding that order granting new trial for insufficiency of the evidence will be disturbed only for the manifest abuse of discretion.

Cited in *State v. Crowley*, 20 S. D. 611, 108 N. W. 491, holding that granting or refusing of a new trial on questions of fact rests in the discretion of the trial court and will not be reversed except for an abuse of discretion, and a stronger case is required for a reversal where a new trial has been granted than where it was refused.

13 S. D. 201, STATE v. BRADFORD, 83 N. W. 47.

Validity of statute regulating sales of intoxicating liquors.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that the liquor laws of 1897, were valid.

13 S. D. 204, FIRST STATE BANK v. O'LEARY, 83 N. W. 45.

13 S. D. 208, RICKER v. STOTT, 83 N. W. 47.**Right to reinstatement of mortgage.**

Cited in *Home Invest. Co. v. Clarson*, 21 S. D. 72, 109 N. W. 507, holding that purchaser at second mortgage sale, who paid first mortgage and filed release under mistaken belief that rights of third mortgagee had been foreclosed is entitled to have first and second mortgages restored of record; *Home Inv. Co. v. Clarson*, 15 S. D. 513, 90 N. W. 153, subrogating a purchaser on foreclosure of a second mortgage to the rights of the first and second mortgagees against the third mortgagee, although such purchaser, under the mistaken belief that the third mortgagee had been served in the foreclosure proceedings, had procured a release of the first mortgage.

Cited in note in 58 L.R.A. 791, on right to reinstatement of mortgage when released or discharged by mistake.

13 S. D. 211, BLAIR v. GROTON, 83 N. W. 48.**13 S. D. 218, SCOTT v. FIRE ASSO. 83 N. W. 90.****13 S. D. 220, ASPEY v. BARRY, 83 N. W. 91.****Rights of heirs of entryman in homestead or tree claim.**

Cited in *Walker v. Ehresman*, 79 Neb. 775, 113 N. W. 218, holding that where the deceased took a timber culture claim and died before receiving the patent, which was not issued till after his death, he had no devisable interest in the land and the devisees in his will received no interest in the homestead; *Gould v. Tucker*, 20 S. D. 226, 105 N. W. 624, holding that the heirs of the entryman of a timber culture claim, succeed to all his rights upon a completion of the period of occupancy, and take title direct from the government and not as heirs; *Braun v. Mathieson*, 139 Iowa, 409, 116 N. W. 789, holding that as the heirs of the entryman take directly from the government and not as heirs, the widow is not entitled to dower in the homestead where by the state statutes she is not an heir.

Validity of contracts for separation between husband and wife.

Cited in note in 83 Am. St. Rep. 879, 881, on validity and effect of separation agreements.

Distinguished in *Caruth v. Caruth*, 128 Iowa, 121, 103 N. W. 103, holding that under a statute providing that one spouse had no estate in the property of the other which could be subject to contract between them, the wife could not bar her rights to share in the property of the husband by releasing her rights and living separate from the husband.

13 S. D. 228, KYES v. WILCOX, 83 N. W. 93**13 S. D. 231, PHILLIPS v. PHILLIPS, 83 N. W. 94.****Presumption of regularity of proceedings in sale by administrator when collaterally attacked.**

Cited in *Blackmann v. Mulhall*, 19 S. D. 534, 104 N. W. 250, holding

that in a collateral attack upon an administrator's sale which had been affirmed, where it does not affirmatively appear that there was no petition for the appointment of an administrator filed and no notice of hearing thereon published, it will be presumed that such petition was filed and notice given; *McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240, holding that there is a presumption in favor of the validity of proceedings in the sale by the administrator under direction of the court, where collaterally attacked so that it will be presumed that a mortgage was regularly executed in behalf of the estate by the executrix who preceded the administrator.

13 S. D. 239, GARVIN v. PETTEE, 83 N. W. 251.

Review of order granting new trial on evidence.

Limited by *Sands v. Cruikshank*, 15 S. D. 142, 87 N. W. 589, holding that order granting new trial for insufficiency of evidence on application heard by judge before whom action was tried will be reversed only in case of manifest abuse of discretion.

13 S. D. 242, STATE v. HELLEKSON, 83 N. W. 254.

When denial of requested instruction is proper.

Cited in *State v. Vey*, 21 S. D. 612, 114 N. W. 719, holding that requested instruction improper in form and unauthorized by evidence may be properly denied.

13 S. D. 248, STATE v. LINDLEY, 83 N. W. 257.

Sufficiency of evidence to sustain conviction.

Cited in *State v. Coleman*, 17 S. D. 594, 98 N. W. 175, holding that where the evidence tended to show a state of facts consistent with the defendant's guilt, and entirely inconsistent with his innocence, a conviction will be sustained.

Cited in note in 88 Am. St. Rep. 601, 602, on larceny.

13 S. D. 262, McCULLOM v. MACKRELL, 83 N. W. 255.

Specific performance of oral contract to convey land.

Cited in *Harrison v. Harrison*, 80 Neb. 103, 113 N. W. 1042, holding that an oral contract for the sale of real property will be specifically enforced where the evidence of such contract is clear and convincing and the plaintiff has fully performed his part; *Davies v. Cheadle*, 31 Wash. 168, 71 Pac. 728, holding that where the deceased placed the plaintiff in full possession of the real estate in question under an oral agreement that if she would support him for the remainder of his life he would devise the land to her, such an agreement would be specifically enforced where plaintiff performed her part.

13 S. D. 265, NORTHERN GRAIN CO. v. PIERCE, 83 N. W. 256.

Sufficiency of pleadings in suit for general accounting.

Cited in *McGraw v. Traders' Nat. Bank*, 64 W. Va. 509, 63 S. E. 396,

holding that in a bill for a general accounting, it is sufficient to show the relation of the parties which entitles the party to the accounting and a general statement of the matters pertaining to which the accounting is sought.

13 S. D. 269, STAKKE v. CHAPMAN, 83 N. W. 261.

Lien for costs where not included in judgment.

Cited in Mathewson v. Fredrich, 19 S. D. 423, 103 N. W. 656, holding that a judgment entered for the quieting of title and for costs, the amount of which was left blank, made the costs a lien upon the lands of the judgment debtor though the costs were inserted later.

13 S. D. 274, FINCH v. MARTIN, 83 N. W. 263.

Review of evidence on appeal.

Cited in Mosteller v. Holborn, 20 S. D. 545, 108 N. W. 13, holding that upon appeal the court will not review the evidence except so far as necessary to determine whether or not there is sufficient evidence to support the verdict with regard to the evidence of the other party.

13 S. D. 279, MINNEAPOLIS THRESHING MACH. CO. v. DARNALL, 83 N. W. 266.

Right to counterclaim.

Cited in Northwestern Port Huron Co. v. Iverson, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372, holding counterclaim for wrongful conversion through foreclosure not complying with statute, permissible in action on note given for purchase price.

— In actions of replevin.

Cited in McCormick Harvesting Mach. Co. v. Hill, 104 Mo. App. 544, 79 S. W. 745, holding that in an action of replevin to recover a binder, it was proper to counter-claim for the difference in the value of the binder over the unpaid purchase price; McCabe v. Desnoyers, 20 N. D. 581, 108 N. W. 341, holding that in claim and delivery to recover possession of mortgaged chattels, set-off or counterclaim for damages arising from breach of warranty must be specially pleaded.

Oral contracts for insurance.

Distinguished in Brink v. Merchants' & F. United Mut. Ins. Asso. 17 S. D. 235, 95 N. W. 929, holding that the acceptance and retention of the premium by the insurance company's agent did not constitute an oral contract of insurance unless there was an agreement that the contract should commence immediately.

13 S. D. 291, HULL v. HAYWARD, 79 AM. ST. REP. 890, 83 N. W. 270.

Release of mortgagor's liability by extension of time to one assuming mortgage.

Cited in Iowa Loan & T. Co. v. Schnose, 19 S. D. 248, 103 N. W. 22, 9 A. & E. Ann. Cas. 255, holding that where the mortgagee without mort-

gagor's consent extends the time of payment to the purchaser of the land who has assumed the mortgage with the consent of the mortgagee, it releases the original mortgagor from liability.

13 S. D. 296, STANDARD ROPE & TWINE CO. v. OLMEN, 83 N. W. 271.

Implied warranty of quality.

Cited in note in 102 Am. St. Rep. 612, on implied warranty of quality.

13 S. D. 301, LA CROSSE BOOT & SHOE MFG. CO. v. MONS ANDERSON CO. 83 N. W. 331, Reversed on rehearing in 14 S. D. 597, 86 N. W. 641.

Review on appeal according to theory of decision.

Cited in Phenix Ins. Co. v. Perkins, 19 S. D. 59, 101 N. W. 1110, holding that the rule that the granting or refusing of a temporary injunction would not be disturbed except for an abuse of discretion does not apply where there was no discretion exercised but the injunction was refused because of the want of a cause of action.

13 S. D. 309, BONHOMME COUNTY v. BERNDT, 50 L.R.A. 351, 83 N. W. 333, Appeal from final judgment in 15 S. D. 494, 90 N. W. 147.

Class legislation.

Cited in Re Watson, 17 S. D. 486, 94 N. W. 463, 2 A. & E. Ann. Cas. 321, holding that a statute imposing a license upon all peddlers dealing in wares, goods or merchandise, except nursery stock, agricultural products, milk, butter, and eggs, and not to traveling men dealing with retailers or public officers, is not unconstitutional as class legislation.

13 S. D. 317, BOCKOVEN v. LINCOLN TWP. 83 N. W. 335.

13 S. D. 329, MORRIS v. UNION NAT. BANK, 50 L.R.A. 182, 83 N. W. 252.

13 S. D. 334, SMITH v. DONAHOE, 83 N. W. 264.

13 S. D. 342, RANSOM v. MEAD, 83 N. W. 1119.

Funding bonds and debt limit.

Cited in Hyde v. Ewert, 16 S. D. 133, 91 N. W. 474, holding that the exchange of refunding bonds at par at a less rate of interest is valid as they do not increase the indebtedness and therefore are not in excess of the legal limit.

13 S. D. 342, NATIONAL L. INS. CO. v. MEAD, 83 N. W. 335.
Later action in Federal court in 41 C. C. A. 585, 101 Fed. 665.

13 S. D. 343, BRAKHAGE v. TRACY, 83 N. W. 363.

Who must bear loss.

Cited in note in 27 L.R.A. (N.S.) 234, as to who must bear loss from de-

struction or deterioration of realty before contract of sale completely performed by transfer of title.

13 S. D. 347, CHARLES BETCHER CO. v. CLEVELAND, 83 N. W. 366.

Review of findings on appeal.

Cited in *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207, holding that the findings of the trial court or the referee are presumptively correct and will not be disturbed on appeal unless there is preponderance of evidence against them.

13 S. D. 352, HANNA v. STROUD, 83 N. W. 365.

Followed without discussion in *Hall v. Fisher*, 14 S. D. 321, 85 N. W. 591.

Fixing liability of guarantor.

Cited in *Fegley v. Jennings*, 44 Fla. 203, 103 Am. St. Rep. 142, 32 So. 873, holding that where a party transfers a note guaranteeing its payment at maturity, the guarantee need not allege in an action thereon against the guarantor, presentation and notice of dishonor to the guarantee, nor need he first attempt collection from the maker.

13 S. D. 356, FIRST NAT. BANK v. McCARTHY, 83 N. W. 423,
Subsequent appeal in 18 S. D. 218, 100 N. W. 14.

13 S. D. 365, FIRST NAT. BANK v. HATTENBACH, 83 N. W. 421.

13 S. D. 370, ROSSITER v. BOLEY, 83 N. W. 428.

13 S. D. 377, MANHATTAN TRUST CO. v. RICHARDS TRUST CO. 83 N. W. 425.

Time in which to redeem.

Cited in *Bitzer v. Becke*, 120 Iowa, 66, 94 N. W. 287, holding that the time in which to redeem would be extended where it would be inequitable to decree otherwise as where the rights were in litigation when the time to redeem had expired.

13 S. D. 383, KARCHER v. GANS, 79 AM. ST. REP. 893, 83 N. W. 431.

13 S. D. 397, MC CUISE v. SMALL, 83 N. W. 426.

13 S. D. 401, BENNETT v. ELLIS, 83 N. W. 429.

13 S. D. 406, MC CONNELL v. SPICKER, 83 N. W. 435.

Permission to file undertaking after service of notice of appeal.

Cited in *Beddow v. Flage*, 20 N. D. 666, 126 N. W. 97, holding that per-

mission may be given to file undertaking later where not served with notice of appeal.

13 S. D. 409, BANK OF IPSWICH v. BROCK, 83 N. W. 436.

Right of subrogation.

Cited in *Home Inv. Co. v. Clarson*, 15 S. D. 513, 90 N. W. 153, subrogating a purchaser on the foreclosure of a second mortgage to the rights of the first and second mortgagees against the third mortgagee, although such purchaser, under the mistaken belief that the third mortgagee had been served in the foreclosure proceedings, had procured a release of the first mortgage.

Cited in notes in 99 Am. St. Rep. 518, on right of subrogation; 58 L.R.A. 793, on right to reinstatement of mortgage when released or discharged by mistake.

13 S. D. 418, REMER v. LAWRENCE COUNTY, 83 N. W. 554.

13 S. D. 420, HURON v. MEYERS, 83 N. W. 553.

13 S. D. 425, BALCOM v. O'BRIEN, 83 N. W. 562.

13 S. D. 430, STATE v. PENNINGTON COUNTY, 83 N. W. 563.

13 S. D. 433, BUNKER v. TAYLOR, 83 N. W. 555.

Effect of recital of jurisdiction of nonresident.

Cited in *Coughran v. Germain*, 17 S. D. 529, 97 N. W. 743, holding that finding of the court to the effect that a non-resident has property within the state is prima facie evidence of such fact where the judgment based thereon is collaterally attacked.

13 S. D. 446, ST. PAUL WHITE LEAD & OIL CO. v. TIBBETTS, 83 N. W. 564.

13 S. D. 450, NORTHWESTERN ELEVATOR CO. v. LEE, 83 N.

W. 565, Affirmed on rehearing in 15 S. D. 114, 87 N. W. 581.

Review of sufficiency of evidence.

Cited in *Nelson v. Jordeth*, 15 S. D. 46, 87 N. W. 140, holding that exception to order by court on trial without jury sustaining defendant's motion for judgment does not bring up for review on appeal the sufficiency of the evidence.

13 S. D. 452, BRACE v. VAN EPS, 83 N. W. 572.

13 S. D. 453, RUA v. WATSON, 83 N. W. 572.

13 S. D. 457, FRUM v. WEAVER, 83 N. W. 579.

Statutory actions to determine adverse claims.

Cited in *Buckham v. Hoover*, 18 S. D. 429, 101 N. W. 28, holding that the statute providing for the quieting of title is complied with by includ-

ing the persons named therein, as defendants, where there are no persons of the class named by a later statute which furnishes a cumulative remedy in such cases; *Bennett v. Darling*, 15 S. D. 1, 86 N. W. 751, holding sufficient, complaint in action to quiet tax title which describes the property, states that plaintiff is owner and in possession under tax deed duly executed, alleges compliance with all essential preliminary steps to valid assessment and alienation, sets forth defendant's claims and alleges them to be junior to plaintiff's and concludes with prayer that plaintiff's title be adjudged superior to defendant's claims.

— Retroactive operation of statute.

Distinguished in *Campbell v. Equitable Loan & T. Co.* 17 S. D. 31, 94 N. W. 401, holding that the grantee in a deed of lands in the adverse possession of another could maintain an action for their recovery under the statute giving such right although his deed was given before such statute was passed.

13 S. D. 459, NEILSON v. HOLSTEIN, 83 N. W. 581.

13 S. D. 460, TILLOTSON v. POTTER COUNTY, 83 N. W. 623.
Clerks for county officers.

Cited in *Jacobson v. Ransom County*, 15 N. D. 69, 105 N. W. 1107, holding that the necessity for hiring a clerk for the county treasurer and the compensation to be paid him lies in the discretion of the county commissioners, and such discretion will not be reviewed by the courts.

13 S. D. 464, STATE v. SHIELDS, 83 N. W. 559.

13 S. D. 470, STRINGER v. GOLDEN GATE MIN. & MILL. CO., 83 N. W. 561.

13 S. D. 475, RE BELL, 83 N. W. 566.

Probate of lost or destroyed wills.

Cited in note in 110 Am. St. Rep. 448, 463, on lost or destroyed wills and proceedings for their probate.

13 S. D. 482, RUTH v. WELLS, 79 AM. ST. REP. 902, 83 N. W. 568.

13 S. D. 489, LINTZ v. HOLY TERROR MIN. CO. 83 N. W. 570.

Who entitled to benefit of action for death by wrongful act.

Cited in *Stangeland v. Minneapolis, St. P. & S. Ste. M. R. Co.* 105 Minn. 224, 117 N. W. 386, holding that under a statute giving the right of action for death by wrongful action to the administrator for the benefit of the "heirs-at-law" the father of the administrator may maintain an action for the benefit of the father of the decedent where the latter leaves no
Dak. Rep.—67.

wife or children; *Satterberg v. Minneapolis, St. P. & Ste. M. R. Co.* 19 N. D. 38, 121 N. W. 70, holding that brother or sister of deceased may maintain action, when no parent, wife or child survives.

13 S. D. 497, NORDIN v. KJOS, 83 N. W. 573.

Action by the wife for damages resulting from sale of liquors to the husband.

Cited in *Stafford v. Levinger*, 16 S. D. 118, 102 Am. St. Rep. 686, 91 N. W. 462, 1 A. & E. Ann. Cas. 132, holding that the widow could maintain an action for loss of support by reason of the death of the husband caused by the sale to him of intoxicating liquors, under a statute giving the wife a right of action for all losses resulting from the sale of liquor to the husband; *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding valid the statute giving the wife a cause of action for all damages resulting from a sale of intoxicating liquors to the husband.

13 S. D. 501, MURPHY v. PLANKINTON BANK, 83 N. W. 575.

Appeal from order allowing amendment of answer in 13 S.

D. 317, 100 N. W. 614, and rehearing thereof in 20 S. D.

178, 105 N. W. 245.

Persons within protection of recording statutes.

Cited with approval in *Vallely v. First Nat. Bank*, 14 N. D. 580, 5 L.R.A. (N.S.) 387, 116 Am. St. Rep. 700, 106 N. W. 127, holding that general creditors are not within the protection of the recording laws.

Cited in *Bliss v. Tidrick*, 25 S. D. 533, 32 L.R.A. (N.S.) 855, 127 N. W. 852, holding purchaser at attachment sale under attachment levied subsequent to attachment debtor's transfer of property, not purchaser for value.

Amendment of pleadings.

Cited in *State v. Mellette*, 16 S. D. 297, 92 N. W. 395, holding that the trial court might allow an amendment of the pleadings so as to show that the deed absolute in form was a deed and the right to foreclose the same.

Evidence admissible under pleadings.

Disapproved in *Lyon v. Plankinton Bank*, 15 S. D. 400, 89 N. W. 1017, holding that evidence to prove a deed fraudulent is admissible without a reply, where such deed is set up as new matter by way of defense in an action to quiet title secured at an execution sale.

13 S. D. 512, WALKER v. McCAULL, 83 N. W. 578, Affirmed on rehearing in 16 S. D. 474, 94 N. W. 401.

Objections to pleadings not raised by demurrer or objection to evidence.

Cited in *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding that where the objection to a pleading could have been cured by amendment, and the defendant neither raised the objection by demurrer or objection to the introduction of evidence he cannot raise the objection for the first time on appeal.

Review of evidence on appeal.

Cited in *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646, holding that the court on appeal will review the evidence only to ascertain whether it sustains the verdict; *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 A. & E. Ann. Cas. 516, affirming verdict rendered on conflicting evidence there being ample evidence therefor without regard to evidence of adverse party.

13 S. D. 520, THOMAS v. DOUGLAS COUNTY, 83 N. W. 580.

Followed without discussion in *Lindsay v. Douglas County*, 13 S. D. 523, 83 N. W. 1118.

Papers incorporated in another by reference.

Cited in *Murtha v. Hubbard*, 20 S. D. 152, 105 N. W. 100, holding that where the notice of election contest referred to an attached copy of the complaint and made the same a part of the notice, the complaint should be referred to in determining the sufficiency of the notice.

13 S. D. 523, LINDSAY v. DOUGLAS COUNTY, 83 N. W. 1118.**13 S. D. 524, HARPER v. LINDSKOG, 83 N. W. 581.****13 S. D. 530, SEIM v. KRAUSE, 83 N. W. 563.****Waiver of motion for directed verdict.**

Cited in *Greder v. Stahl*, 22 S. D. 139, 115 N. W. 1129; *Rogers v. Gladfiator Gold Min. & Mill. Co.* 21 S. D. 412, 113 N. W. 86; *Torrey v. Peck*, 13 S. D. 538, 83 N. W. 585,—holding motion for judgment or direction of verdict for defendant at close of plaintiff's case waived by failure to renew after all evidence is in.

Conclusiveness of decision of arbiter.

Cited in *Brooke v. Laurens Mill. Co.* 78 S. C. 200, 125 Am. St. Rep. 780, 58 S. E. 806, holding that the decision of the arbiter on whom the parties have agreed, is conclusive where reached in the exercise of his honest judgment.

Penalty or liquidated damages.

Cited in notes in 108 Am. St. Rep. 55, on agreements purporting to liquidate damages; 34 L.R.A.(N.S.) 604, on stipulation for damages in building contract as penalty or liquidated damages.

13 S. D. 538, TORREY v. PECK, 83 N. W. 585.**Waiver of motion for directed verdict.**

Cited in *Greder v. Stahl*, 22 S. D. 139, 115 N. W. 1129; *Rogers v. Gladfiator Gold Min. & Mill. Co.* 21 S. D. 412, 113 N. W. 86,—holding that error in overruling motion for directed verdict, made at close of plaintiff's case, cannot be reviewed unless motion is renewed at close of all evidence.

13 S. D. 544, STEARNS v. WRIGHT, 83 N. W. 587, Related action in 21 S. D. 349, 112 N. W. 853.

Conclusiveness of sheriff's return.

Cited in note in 124 Am. St. Rep. 768, on conclusiveness of sheriff's return of service, and remedies of persons injured thereby.

13 S. D. 550, CONNOR v. CORSON, 83 N. W. 588.

Necessity of new notice of trial after remittitur from Supreme Court.

Cited in Re Olson, 17 S. D. 1, 94 N. W. 421, holding that it is not necessary to serve a notice of trial of an action which has been remanded by the Supreme Court if a notice of trial had been served in the case prior to its appeal to the Supreme Court; J. I. Case Thresh. M. Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82, holding new notice of trial or effect of issue not required after amendment of complaint by order of court at opening of term.

Judgment against officer as binding on surety.

Cited in note in 52 L.R.A. 175, on effect against surety on official bond, of judgment against officer.

13 S. D. 561, PITTS v. OLIVER, 79 AM. ST. REP. 907, 83 N. W. 591.

Matters concluded by judgment.

Cited in Stroup v. Pepper, 69 Kan. 241, 76 Pac. 825, holding that the rule of res judicata or estoppel by judgment does not apply to a different cause of action between the same parties except as to matters in issue which were then actually decided; Selbie v. Graham, 18 S. D. 365, 100 N. W. 755, holding that a judgment in an action dismissing an action because of a variance between the pleading and proof is not a bar to another action where there was no determination of the title as to the plaintiff; Brown v. Hollister, 21 S. D. 272, 111 N. W. 564, holding judgment in prior action not res judicata as to issues not litigated nor adjudicated therein.

Distinguished in Child v. McClosky, 14 S. D. 181, 84 N. W. 769, holding judgment for defendant in action for plow on theory that defendant's father was authorized to purchase plow for defendant, indorse his name on note and transfer same to plaintiff bar to subsequent action on substantially the same theory.

13 S. D. 571, MEADOWS v. OSTERKAMP, 83 N. W. 624, Second appeal in 19 S. D. 378, 103 N. W. 643.

Recovery for improvements made on realty under belief of title.

Cited in Hunter v. Coe, 12 N. D. 505, 97 N. W. 869, holding that in an action to enforce specific performance of a contract for the sale of land, the plaintiff must reimburse one who has purchased from the owner subsequent to the contract, and who in good faith has made valuable improvements on the land while the plaintiff failed to object.

Cited in note in 34 L.R.A.(N.S.) 550, 551, on right of holder of invalid tax deed to be reimbursed for improvement.

Vold tax deed as color of title.

Cited in *King v. Lane*, 21 S. D. 101, 110 N. W. 37, to point that void tax deed constitutes color of title.

13 S. D. 576, HENDERSON v. HUGHES COUNTY, 83 N. W. 682.

Validity of tax.

Cited in *Green v. Hellman*, 61 Neb. 875, 86 N. W. 912, holding that the failure of the county treasurer to offer land for sale in compliance with Neb. Const. Stat. chap. 77, art. 1, § 111, requiring the purchaser of real estate at a tax sale to forthwith pay to him the amount of the taxes and charges, and on failure to do so the said parcel shall at once again be offered as if no such sale had been made, does not invalidate the tax.

Injunction to restrain collection of taxes.

Cited in *Clark v. Lawrence County*, 21 S. D. 254, 111 N. W. 558, holding failure of tax officers to list large amounts of taxable property not ground to restrain collection of taxes.

Power to exempt property from taxation.

Cited in note in 29 L.R.A.(N.S.) 185, on power of municipality to exempt property from taxation.

13 S. D. 595, MULLER v. FLAVIN, 83 N. W. 687.

Deed intended as mortgage as conveying title.

Cited in note in 11 L.R.A.(N.S.) 209, as to whether deed absolute on face, but intended as mortgage, conveys title.

Right of subrogation.

Cited in *Jones v. Harris*, 90 Ark. 51, 117 S. W. 1077, holding that in order to be entitled to subrogation to the rights of the creditor, the person liable for the debts of another must pay the same in full, and a payment of the part of the debt does not give him the right of subrogation.

Exclusion of evidence as to proven fact as harmless error.

Cited in *Davis v. Holy Terror Min. Co.* 20 S. D. 399, 107 N. W. 374, holding that it was harmless error to overrule an objection to testimony, where the same facts had been testified to by another witness without objection; *Waite v. Frank*, 14 S. D. 626, 86 N. W. 645, holding error in admitting evidence not prejudicial where evidence properly admitted is sufficient to sustain findings; *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding exclusion of evidence nonprejudicial where fact is established by other competent evidence.

Docketing judgments.

Cited in note in 87 Am. St. Rep. 668, on docketing judgments.

13 S. D. 618, CONNOR v. CORSON, 84 N. W. 191.

13 S. D. 622, GALES v. BANK OF PLANKINTON, 84 N. W. 192.
Right to appeal.

Cited in note in 119 Am. St. Rep. 754, on right to appeal as a party interested or injured.

13 S. D. 624, PIONEER PRESS CO. v. GOSSAGE, 84 N. W. 195.

13 S. D. 627, HUGHES v. STEARNS, 84 N. W. 196.

Review of evidence on appeal.

Cited in Stephens v. Faus, 20 S. D. 367, 106 N. W. 56, holding that on appeal from a judgment entered before motion for new trial was made, the sufficiency of the evidence to support the findings cannot be reviewed.

13 S. D. 629, KIELBACH v. CHICAGO, M. & ST. P. R. CO. 84 N. W. 192.

Review of verdict rendered on conflicting evidence.

Cited in Coughran v. Western Elevator Co. 22 S. D. 214, 116 N. W. 1122, holding that verdict will be sustained where different impartial minds might draw different conclusions from evidence; Olson v. Day, 23 S. D. 150, 120 N. W. 883, 20 A. & E. Ann. Cas. 516, holding that verdict rendered on conflicting evidence will not be disturbed where sustained by ample evidence without regard to evidence of adverse party.

Case for jury.

Cited in Lockhart v. Hewitt, 18 S. D. 522, 101 N. W. 355, holding that where the facts are such that different impartial minds might reasonably draw different conclusions from them, the case should be submitted to the jury; Roberts v. Ruh, 22 S. D. 14, 114 N. W. 1097; Aultman Engine & Thresher Co. v. Boyd, 21 S. D. 303, 112 N. W. 151,—holding directed verdict not proper where different minds might reasonably draw different conclusions from evidence.

Distinguished in Crary v. Chicago, M. & St. P. R. Co. 18 S. D. 237, 100 N. W. 18, holding that where the evidence offered by the plaintiff did not contradict the testimony of the defendant's witnesses, and there was no dispute in the evidence as to the negligence of the defendant, it was not error to direct a verdict.

13 S. D. 637, HALE v. GULLICK, 84 N. W. 196.

Followed without discussion in Hale v. Tidball, 14 S. D. 52, 84 N. W. 1119.

13 S. D. 648, JUDD v. PATTON, 84 N. W. 199.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 14 S. D.

14 S. D. 1, BASKERVILLE v. GAAR, S. & CO. 84 N. W. 204.

Agents' right to commission.

Distinguished in *Gaar Scott & Co. v. Brundage*, 89 Minn. 412, 94 N. W. 1091, holding agent not entitled to commission where sale was made at head office a month after agent had ceased all effort to make a sale to the parties; *Ball v. Dolan*, 21 S. D. 619, 15 L.R.A.(N.S.) 272, 114 N. W. 998, holding broker engaged to find purchaser for land at over a fixed price, not entitled to any commission where he failed to find purchaser at such price, but owner sold at less price in broker's presence.

14 S. D. 7, HALLEY v. INGERSOLL, 84 N. W. 201.

14 S. D. 15, RASMUSSEN v. REEDY, 84 N. W. 205.

False representations as to ascertainable facts.

Cited in *Thompson v. Hardy*, 19 S. D. 91, 102 N. W. 299, holding that contract for exchange of property may be rescinded for false statement of one party that property had been sold for a certain price and that possession could be had soon, which induced the other party to make the exchange.

Cited in note in 14 L.R.A.(N.S.) 1211, on right of purchaser of land to rely upon representation of seller as to boundaries.

14 S. D. 24, BEATTY v. SMITH, 84 N. W. 208.

Injunction to restrain city from moving wooden building.

Cited in *Clark v. Deadwood*, 22 S. D. 233, 18 L.R.A.(N.S.) 402, 117 N. W. 131, holding that injunction will not be granted to restrain city from

moving wooden building out of fire limits in absence of allegation that city is insolvent and unable to respond in damages.

14 S. D. 33, SUTTON v. CONSOLIDATED APEX MIN. CO. 84 N. W. 211, Modified on rehearing in 15 S. D. 410, 89 N. W. 1020.

14 S. D. 44, WOODS v. POLLARD, 84 N. W. 214.

Sufficiency of affidavit for service by publication.

Cited in *Pillsbury v. J. B. Streeter, Jr. Co.* 15 N. D. 174, 107 N. W. 40, holding affidavit sufficient if it appears therein that reasonable diligence has been used in searching for the party; *Wiley v. Carson*, 15 S. D. 298, 89 N. W. 475, holding order for publication not invalid because it states that complaint was filed day before it was actually filed where it was filed prior to first publication of summons; *Allen v. Richardson*, 16 S. D. 390, 92 N. W. 1075, holding affidavit sufficient where it states that the party could not be found that summons was placed in hands of sheriff who failed to find the party, and that affiant had received letters from the party post-marked in another state.

Vacating judgment for want of jurisdiction.

Cited in *Coughran v. Markley*, 15 S. D. 37, 87 N. W. 2, holding that motion to effect judgment void for want of jurisdiction through insufficient service must be sustained whether considered as direct or collateral attack.

14 S. D. 52, HALE v. TIDBALL, 84 N. W. 1119.

14 S. D. 52, TOBIN v. MCKINNEY, 91 AM. ST. REP. 688, 84 N. W. 228, Affirmed on rehearing in 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572.

Running of limitations against certificate of deposit.

Cited in notes in 1 L.R.A.(N.S.) 1132, as to when demand must be made on certificate of deposit to prevent bar of limitations; 29 L.R.A. (N.S.) 687, as to when statute begins to run on certificate of deposit.

14 S. D. 62, BUSH v. FROELICH, 84 N. W. 220.

14 S. D. 72, BOUCHER v. CLARK PUB. CO. 84 N. W. 237.

What libelous statements are privileged.

Cited in *Rood v. Dutcher*, 23 S. D. 70, 120 N. W. 772, 20 A. & E. Ann. Cas. 480, holding that statutory definition of privileged communication does not embrace newspaper articles concerning professional conduct of physicians; *Roas v. Ward*, 14 S. D. 240, 86 Am. St. Rep. 746, 85 N. W. 182, holding privileged elector's statement innocently believed to be true by other electors that candidate for alderman was unfit for office because he had stolen former's cattle.

Cited in note in 104 Am. St. Rep. 136, on what libelous statements are privileged.

Necessity for actual malice to constitute libel.

Cited in *Schull v. Hopkins*, — S. D. —, 29 L.R.A. (N.S.) 694, 127 N. W. 550, holding proof of actual malice necessary in libel for publication charging candidate with unfitness for office.

Limits of cross-examination.

Cited in *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* 64 C. C. A. 180, 129 Fed. 668, holding that party has right to restrict cross-examination of his witness to the subjects of his direct examination; *Harold v. Oklahoma*, 94 C. C. A. 415, 169 Fed. 47, 17 A. & E. Ann. Cas. 868, on same point.

14 S. D. 84, STATE v. YOKUM, 84 N. W. 389.**Admissibility of character or reputation.**

Cited in note in 124 Am. St. Rep. 1023, on admissibility of evidence of character or reputation of deceased in homicide cases.

14 S. D. 90, GARLOCK v. CALKINS, 84 N. W. 393, Rehearing denied in 15 S. D. 459, 90 N. W. 136.**Power of district court over record of judgment in justice's court.**

Cited in *Lund v. Booth*, 33 Utah, 341, 93 Pac. 987, holding that abstract of justice's judgment, filed and docketed as required by statute cannot be ordered stricken out by district court, on motion, for want of jurisdiction which does not appear in the abstract.

14 S. D. 92, STATE v. RUTH, 84 N. W. 394.**14 S. D. 98, MYERS v. LONGSTAFF, 84 N. W. 233.****Pleading truth as defense to libel.**

Cited in *Sheibley v. Fales*, 81 Neb. 795, 116 N. W. 1035, holding answer to complaint for libel, setting up truth as justification sufficient if it gives notice of what defendant will attempt to prove.

Cited in note in 31 L.R.A. (N.S.) 139, on truth as defense to civil action for defamation.

What libelous statements are privileged.

Cited in *Ross v. Ward*, 14 S. D. 240, 86 Am. St. Rep. 746, 85 N. W. 182, holding privileged, elector's statement innocently believed to be true by other electors that candidate for alderman was unfit for office because he had stolen former's cattle.

Cited in notes in 104 Am. St. Rep. 136, on what libelous statements are privileged; 3 L.R.A. (N.S.) 697, on privileged occasion; burden of showing good faith and probable cause.

— Newspaper comment upon candidate for office.

Cited in *Coleman v. MacLennan*, 78 Kan. 711, 20 L.R.A. (N.S.) 361, 130 Am. St. Rep. 390, 98 Pac. 281, holding newspaper comment on character and official conduct of candidate for office made in good faith privileged though it may in fact be untrue; *Boucher v. Clark Pub. Co.* 14 S. D. 72, 84 N. W. 237, holding privileged, newspaper publication charging

candidate for re-election for sheriff with having promised to place certain persons on jury if they would vote for him and to elect certain other person to same office at subsequent election; *Rood v. Dutcher*, 23 S. D. 70, 120 N. W. 772, 20 A. & E. Ann. Cas. 480, holding newspaper article relating to professional conduct of physician not privileged; *Schull v. Hopkins*, — S. D. —, 29 L.R.A.(N.S.) 693, 127 N. W. 550, holding proof of actual malice necessary, in libel for publication charging candidate with unfitness for office.

Presumptions as to instructions.

Cited in *Grantz v. Deadwood*, 20 S. D. 495, 107 N. W. 832, holding instructions presumed correct where evidence is not before the court, unless clearly wrong under any state of facts which might have been proven.

Review of evidence on appeal.

Cited in *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353; *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 310, 116 N. W. 333,—holding sufficiency of evidence to sustain verdict not reviewable on appeal in absence of motion for new trial in court below.

14 S. D. 111, SUTTON v. CHICAGO & N. W. R. CO. 84 N. W. 396.

Liability of connecting carriers.

Cited in notes in 106 Am. St. Rep. 606, on liability of initial carrier for torts or negligence of connecting lines; 31 L.R.A.(N.S.) 20, 33, 34, on liability of connecting carrier for loss beyond own line.

14 S. D. 115, RE SEYDEL, 84 N. W. 397.

14 S. D. 119, STATE v. ZOPHY, 86 AM. ST. REP. 741, 84 N. W. 391.

Constitutionality of liquor laws.

Cited in *C. & J. Michel Brewing Co. v. State*, 19 S. D. 302, 70 L.R.A. 911, 103 N. W. 40, historically as deciding unconstitutionality of license fee law; *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, as recognizing constitutionality of statute governing sale of intoxicating liquors.

14 S. D. 126, RICHARDSON v. DYBEDAHL, 84 N. W. 486, Later appeal in 17 S. D. 629, 98 N. W. 164.

Estoppel to set up officer's omission of duty.

Cited in *Clark v. Tilton*, 74 N. H. 330, 68 Atl. 335, holding person arrested under criminal process estopped to set up officer's failure to produce him before the court if he voluntarily requests the officer not to do so.

14 S. D. 139, GLOVER v. BOARD OF EDUCATION, 84 N. W. 761.

What constitutes contempt.

Cited in *Carr v. District Ct.* 147 Iowa, 663, 126 N. W. 791, upholding discharge of school officers, enjoined from paying warrants, from con-

tempt for issuing new warrants, where legislature subsequently to injunction legalized original warrants.

Compulsory vaccination.

Cited in *Osborn v. Russell*, 64 Kan. 507, 68 Pac. 60, holding that school board cannot deny admission to unvaccinated pupil when no epidemic of small pox exists.

Cited in note in 17 L.R.A.(N.S.) 712, on compulsory vaccination.

14 S. D. 145, SPENCER v. FORCHT, 84 N. W. 765.

14 S. D. 149, STATE v. MARSHALL COUNTY, 84 N. W. 775.

14 S. D. 155, STEWART v. CUSTER COUNTY, 84 N. W. 764.

Action in public warrants or orders.

Cited in *Burleigh County v. Kidder County*, 20 N. D. 27, 125 N. W. 1063, holding that statute of limitations does not begin to run against claim against county until fund is provided from which it may be paid; *Brannon v. White Lake Twp.* 17 S. D. 83, 95 N. W. 284, holding that action can be brought on registered township warrant only when sufficient funds have been accumulated for its payment; *Rochford v. School Dist. No. 11*, 17 S. D. 542, 97 N. W. 747, holding that action will lie on school order duly issued but which the district refuses to pay.

Distinguished in *Blackman v. Hot Springs*, 14 S. D. 497, 85 N. W. 996, holding a city liable on warrants issued by it, although no funds are applicable thereto, if sufficient time to levy and collect the same has elapsed; *Custer County Bank v. Custer County*, 18 S. D. 274, 100 N. W. 424, holding that action may be maintained on county warrants upon which the county denies its liability.

14 S. D. 161, STATE v. HALL, 84 N. W. 766, Later appeal in 16 S. D. 6, 65 L.R.A. 151, 91 N. W. 325.

14 S. D. 169, STATE v. KEMMERER, 84 N. W. 771, Affirmed on rehearing in 15 S. D. 504, 90 N. W. 150.

Title conveyed by deed.

Cited in *Fowler v. Will*, 19 S. D. 131, 117 Am. St. Rep. 938, 102 N. W. 598, 8 A. & E. Ann. Cas. 1093, holding unrecorded warranty deed valid against subsequent recorded quit-claim deed; *Simonson v. Monson*, 22 S. D. 238, 117 N. W. 133, holding that subsequent patent to Indian inures to benefit of his prior grantee in warranty deed.

14 S. D. 176, HOUTS v. HOYNE, 84 N. W. 773.

Followed without discussion in *Walters v. Bernard*, 14 S. D. 221, 85 N. W. 1135; *Houts v. Bartle*, 14 S. D. 322, 85 N. W. 591.

Running of statute of limitations.

Cited in *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792, holding time limitation for actions for recovery of real property, not appli-

cable to equitable action by mortgagor, but such action is barred in ten years; *Houts v. Olson*, 14 S. D. 475, 85 N. W. 1015, holding action to redeem from mortgage and for accounting for rents and profits barred by lapse of ten years from foreclosure sale.

Cited in note in 34 L.R.A.(N.S.) 357, as to whether limitation runs against mortgagee in possession.

14 S. D. 181, *CHILD v. McCLOSKEY*, 84 N. W. 769.

14 S. D. 189, *McLAUGHLIN v. MICHEL*, 84 N. W. 777.

14 S. D. 197, *CITIZENS' BANK v. SHAW*, 84 N. W. 779.

Effect of satisfaction of mortgage by assignor.

Cited in *McVay v. Tousley*, 20 S. D. 258, 129 Am. St. Rep. 927, 106 N. W. 932, holding that satisfaction of mortgage by mortgagee releases the property as to subsequent innocent purchasers though mortgage had in fact been assigned to another party prior to the satisfaction.

Bona fide purchaser.

Cited in *Bernardy v. Colonial & U. S. Mortg. Co.* 17 S. D. 637, 106 Am. St. Rep. 791, 98 N. W. 166 (dissenting opinion), on what constitutes bona fide purchaser.

Cited in note in 7 L.R.A.(N.S.) 1020, on effect of assumption of obligation before notice of defective title to sustain bona fide character of purchaser of realty.

Opening case for admission of evidence.

Cited in *Work v. Braun*, 19 S. D. 437, 103 N. W. 764, holding that discretion of trial court as to opening case for admission of evidence will not be disturbed unless clearly abused.

14 S. D. 206, *TAUBMAN v. AURORA COUNTY*, 84 N. W. 784.

Mandamus to compel payment of claims.

Cited in *Howard v. Burns*, 14 S. D. 383, 85 N. W. 920, holding proceeding by mandamus proper remedy on refusal of county commissioners to order warrant for salary of state's attorney on ground of his ineligibility to office.

14 S. D. 215, *STATE v. ANDRE*, 84 N. W. 783.

Affidavit of jurors to impeach verdict.

Cited in *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527, holding affidavits of jurors inadmissible, on motion for new trial, to show intoxication of juror.

Review of order denying new trial for misconduct of jurors.

Cited in *State v. Robidou*, 20 N. D. 518, 128 N. W. 1124, holding that denial of new trial for misconduct of jurors will not be reversed, unless trial court abused its discretion.

14 S. D. 219, *BROWN v. STATE*, 84 N. W. 801.

14 S. D. 221, WALTERS v. BERNARD, 85 N. W. 1135.

14 S. D. 222, RAMSDELL v. DUXBERRY, 85 N. W. 221, Later appeal in 17 S. D. 311, 96 N. W. 132.

Who is concluded by judgment.

Cited in *Hart v. Wyndmere*, 21 N. D. 383, 131 N. W. 231, holding that one who is named as party litigant, pleads, defends, and submits his cause for arbitrament is concluded by judgment.

14 S. D. 229, REDFIELD SCHOOL DIST. NO. 12 v. REDFIELD INDEPENDENT SCHOOL DIST. NO. 20, 85 N. W. 180.

Presumption of regularity of official action.

Cited in *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393, 127 N. W. 499, holding that board of education will be presumed to have found that petition was signed by majority of voters of adjacent territory annexed.

14 S. D. 234, KENNEDY v. HULL, 85 N. W. 223.

14 S. D. 240, ROSS v. WARD, 86 AM. ST. REP. 746, 85 N. W. 182.

Privilege in publication as question of fact.

Cited in *Abraham v. Baldwin*, 52 Fla. 151, 10 L.R.A. (N.S.) 1051, 42 So. 591, 10 A. & E. Ann. Cas. 1148, holding question of privilege to be for jury where facts and circumstances are disputed; *Rood v. Dutcher*, 23 S. D. 70, 120 N. W. 772, 20 A. & E. Ann. Cas. 480, holding charge that jury should consider advertisements in determining whether article was privileged, reversible error, though in libel jury determines law.

Cited in note in 33 L.R.A. (N.S.) 211, on effect of provision that jury shall determine law and facts in libel cases.

Necessity for actual malice in libel.

Cited in *Schull v. Hopkins*, — S. D. —, 29 L.R.A. (N.S.) 694, 127 N. W. 550, holding proof of actual malice necessary, in libel charging candidate with unfitness for office.

14 S. D. 249, BROWN v. TIDRICK, 86 AM. ST. REP. 754, 85 N. W. 185.

Defenses available to sureties on attachment bond.

Cited in *McLean v. Wright*, 137 Ala. 644, 97 Am. St. Rep. 67, 35 So. 45, holding sureties on attachment bond not released because affidavit upon which attachment was based was defective.

14 S. D. 257, LOISEAU v. THRELSTAD, 85 N. W. 189.

14 S. D. 264, VAN DOREN v. MILLER, 85 N. W. 187.

Exemption of lands acquired under Federal land laws, from liability for debts.

Cited in *McKorkell v. Herron*, 128 Iowa, 324, 111 Am. St. Rep. 201, 103

N. W. 983, holding homestead exempt from liability for debts of homesteader contracted prior to issuance of patent, and such exemption cannot be lost by abandonment; *Stark v. Fallis*, 26 Okla. 357, 109 Pac. 66, holding mortgage on land entered under homestead act before issuance of patent, void; *Adams v. Church*, 42 Or. 270, 59 L.R.A. 782, 95 Am. St. Rep. 740, 70 Pac. 1037, holding timber culture claim by partnership not liable for debts of partnership incurred before issuance of final receipt; *Gould v. Tucker*, 18 S. D. 281, 100 N. W. 427, holding land acquired under timber culture act not liable for a debt created by entryman before issuance of final receipt though entryman died before deed was issued.

Cited in note in 34 L.R.A.(N.S.) 411, on liability of claim or interest in public lands for debts contracted before patent issued.

14 S. D. 270, WHITE v. AMRHIEN, 85 N. W. 191.

Evidence to establish section corner.

Cited in *Nystrom v. Lee*, 16 N. D. 561, 114 N. W. 478, holding field notes competent but not essential to establish location of lost monument showing section corner.

14 S. D. 273, AUSLAND v. PARKER, 85 N. W. 192.

14 S. D. 276, COMMERCIAL STATE BANK v. INTERSTATE ELEVATOR CO. 86 AM. ST. REP. 760, 85 N. W. 219.

Certainty of description in chattel mortgage.

Cited in *Union State Bank v. Hutton*, 61 Neb. 571, 85 N. W. 535, holding a chattel mortgage on property described as 25 cattle, consisting of 10 cows, 7 steers, and 8 heifers, void for uncertainty where the mortgagor had more steers and heifers than the number named.

Effect on chattel mortgage, of noncompliance with statute.

Cited in note in 137 Am. St. Rep. 481, on effect of failure to execute and record chattel mortgage as prescribed by statute.

14 S. D. 284, STATE EX REL. LAVIN v. BACON, 85 N. W. 225.

Term of office of appointee to vacancy.

Cited in *State ex rel. Lavin v. Bacon*, 14 S. D. 394, 85 N. W. 605, sustaining power of legislature to pass law providing that members of state board of charities and corrections appointed to fill vacancies shall hold only until next legislative session.

14 S. D. 300, WYMAN v. WERNER, 85 N. W. 584.

14 S. D. 303, ZERFING v. SEELIG, 85 N. W. 585.

Action on warranty of title or seisin.

Cited in note in 17 L.R.A.(N.S.) 1184, on necessity of eviction to maintenance of action on warranty of title or seisin.

**14 S. D. 312, LITTLEJOHN v. COUNTY LINE CREAMERY CO.
85 N. W. 588.**

Findings of fact on appeal.

Cited in *Clarke v. Conners*, 18 S. D. 600, 101 N. W. 883, holding that findings of fact by trial court will not be disturbed unless it clearly appear from the record that a preponderance of evidence is against them; *Empson v. Reliance Gold Min. Co.* 23 S. D. 412, 122 N. W. 346, holding that findings of court will not be disturbed, unless evidence clearly preponderates against them; *Krueger v. Dodge*, 15 S. D. 159, 87 N. W. 965, holding that finding of fact will be presumed on appeal to be sustained by weight of evidence.

14 S. D. 316, STATE v. DUNNING, 85 N. W. 589.

Validity of statute governing sale of intoxicating liquors.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, as recognizing validity of state statute.

14 S. D. 321, HALL v. FISHER, 85 N. W. 591.

14 S. D. 322, HOUTS v. BARTLE, 85 N. W. 591.

14 S. D. 323, ROBERTS v. PARKER, 85 N. W. 591.

Power to impound rents and profits pending foreclosure.

Cited in note in 7 L.R.A.(N.S.) 1008, on power of equity where mortgage does not convey title, to impound rents and profits pending foreclosure.

Construction of statutes.

Cited in *Lawrence v. Ewert*, 21 S. D. 580, 114 N. W. 709 (dissenting opinion), to point that acts re-enacted in Codes of 1877 must be construed as passed on same day and as parts of same statute.

Limitation of proceedings to enforce money obligations of school district.

Cited in *Coler v. Sterling*, 15 S. D. 415, 89 N. W. 1022, holding that proceedings by mandamus and by civil action to enforce the money obligations of a school district are both subject to the statute of limitations.

14 S. D. 331, PLANO MFG. CO. v. MILLAGE, 85 N. W. 594.

Ratification of agents act by suit.

Cited in *Dolvin v. American Harrow Co.* 125 Ga. 699, 28 L.R.A.(N.S.) 785, 54 S. E. 706, on suit by principal as ratification of act of agent.

**14 S. D. 334, WAMPOL v. KOUNTZ, 86 AM. ST. REP. 765,
85 N. W. 595.**

Estoppel to assert title to land.

Cited in *Hanson v. Sommers*, 105 Minn. 434, 117 N. W. 842, holding that failure to assert title for more than fifteen years created an estoppel;

Murphy v. Dafoe, 18 S. D. 42, 99 N. W. 86, holding owner estopped to assert title to land which he had abandoned, and which another party under claim of title had improved and paid taxes upon for twenty-three years.

Distinguished in Troy v. Brown, 18 S. D. 11, 99 N. W. 76, holding record owner not estopped to assert title where his failure to pay taxes and assert title had not caused any injury to the other party.

14 S. D. 340, BENARD v. GRAND LODGE A. O. U. W. 85 N. W. 596.

14 S. D. 341, LYMAN COUNTY v. LYMAN COUNTY, 85 N. W. 597.

14 S. D. 346, SIXTA v. HEISER, 85 N. W. 598.

Statement of claims against estates of decedents.

Cited in note in 130 Am. St. Rep. 314, on statement of claims against estates of decedent.

14 S. D. 350, ELROD v. ASHTON, 85 N. W. 599.

14 S. D. 352, THURBER v. MILLER, 85 N. W. 600.

Statement of claims against estate of decedents.

Cited in note in 130 Am. St. Rep. 315, on statement of claims against estates of decedents.

14 S. D. 357, NARREGANG v. BROWN COUNTY, 85 N. W. 602.

Followed without discussion in State ex rel. Lavin v. Bacon, 14 S. D. 394, 85 N. W. 605.

Best evidence of bill enacted by legislature.

Cited in Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, holding properly authenticated statute in file in office of secretary of state best evidence of bill enacted by legislature.

14 S. D. 369, HEDLUN v. HOLY TERROR MIN. CO. 85 N. W. 861.

When bill of exceptions is settled.

Cited in Juckett v. Fargo Mercantile Co. 18 S. D. 347, 100 N. W. 742, holding that exceptions may be settled after appeal has been perfected.

— Amendment by supreme court.

Cited in Jones v. Sioux Falls, 18 S. D. 477, 101 N. W. 43, holding that supreme court has no power to amend a bill of exceptions, nor will it determine whether certain matters should have been included therein.

Cited in note in 31 L.R.A.(N.S.) 208, on power of trial court to correct record after appeal or writ of error.

14 S. D. 373, REGAN v. WHITTAKER, 85 N. W. 863, 21 MOR. MIN. REP. 309.

14 S. D. 333, HOWARD v. BURNS, 85 N. W. 920.**Mandamus to restore to office.**

Cited in *Gray v. Beadle County*, 21 S. D. 97, 110 N. W. 36, holding that mandamus to compel county commissioners to recognize relator as commissioner and restore him to office is not precluded by fact that he can appeal from decision declaring office vacant.

Cited in note in 19 L.R.A.(N.S.) 54, 56, 75, on mandamus to restore to office one illegally removed.

Appeal from order of county commissioners as cumulative remedy.

Cited in *Campbell County v. Overby*, 20 S. D. 640, 108 N. W. 247, holding that county may recover money paid under allowance by county commissioners of an illegal demand, though county might have appealed from the board's decision.

Transaction of legal business by disbarred or suspended attorney.

Cited in note in 24 L.R.A.(N.S.) 754-756, on right of disbarred or suspended attorney or unlicensed person to transact legal business for another.

Who is "learned in law."

Distinguished in *Danforth v. Egan*, 23 S. D. 43, 139 Am. St. Rep. 1030, 119 N. W. 1021, 20 A. & E. Ann. Cas. 418, holding attorney, disbarred for violation of legal ethics, not "learned in law."

14 S. D. 394, STATE EX REL. LAVIN v. BACON, 85 N. W. 605.**Emergency enactments.**

Cited in *Oklahoma City v. Shields*, 22 Okla. 265, 100 Pac. 559; *Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710,—holding question whether law comes under emergency exception to be for the legislature exclusively.

Disapproved in *Sears v. Multnomah County*, 49 Or. 42, 88 Pac. 522, holding that law subject to referendum can not be made to take effect at once except under emergency exception to referendum amendment.

Charitable and penal institutions.

Cited in *Thomas v. State*, 17 S. D. 579, 97 N. W. 1011, on power of legislature as to boards in charge of charitable and penal institutions of the state.

14 S. D. 410, SIOUX FALLS SAV. BANK v. LIEN, 85 N. W. 924.

Followed without special discussion in *Kirby v. Crisp*, 15 S. D. 33, 87 N. W. 1103.

Right of interpleader.

Cited in note in 91 Am. St. Rep. 595, 604, on right of interpleader.

14 S. D. 426, RUSSELL v. WHITCOMB, 85 N. W. 860.**Appealable orders.**

Cited in *Robertson Lumber Co. v. Jones*, 13 N. D. 112, 99 N. W. 1082, holding order granting change of venue appealable.

14 S. D. 429, Re ADMISSION TO PRACTICE, 85 N. W. 992.

Dak. Rep.—68.

14 S. D. 434, **JENSEN v. PETTY**, 85 N. W. 923.

14 S. D. 436, **DISCHNER v. PIQUA MUT. AID & ACOL. ASSO.**
85 N. W. 928.

14 S. D. 440, **RICHARDS v. MODERN WOODMEN**, 85 N. W.
999.

14 S. D. 443, **CHURCH v. MINNEAPOLIS & ST. L. R. CO.** 85
N. W. 1001.

Validity of rebates.

Cited in notes in 14 L.R.A.(N.S.) 401; 52 L. ed. U. S. 682,—on effect of statutory provisions against rebates upon contracts for transportation at less than regular rate.

Recovery of damages for expulsion from train.

Cited in *Melody v. Great Northern R. Co.* 25 S. D. 606, 30 L.R.A.(N.S.) 570, 127 N. W. 543, holding that passenger, accepting unlawful ticket from carrier, cannot recover damages for expulsion.

14 S. D. 447, **BRADY v. SHIRLEY**, 85 N. W. 1002, *Later appeal*
in 18 S. D. 608, 101 N. W. 886, 5 A. & E. ANN. CAS. 972.

14 S. D. 454, **PLUNKETT v. HANSCHKA**, 85 N. W. 1004.

Right to levy on property conveyed by trust deed.

Cited in *Joas v. Jordan*, 21 S. D. 379, 113 N. W. 73, holding that amount due creditors for whose benefit trust deed was executed must be paid or tendered before property can be levied on.

Effect of want of revenue stamp.

Cited in *Wheaton v. Liverpool & London & Globe Ins. Co.* 20 S. D. 62, 104 N. W. 850, holding that question of want of revenue stamp on insurance policy cannot be raised in state court.

Cited in note in 84 Am. St. Rep. 190, on failure to comply with statute requiring stamping of writings.

14 S. D. 461, **PORT HURON ENGINE & THRESHER CO. v. SHERMAN**, 85 N. W. 1008.

Material alteration of written instruments.

Cited in notes in 86 Am. St. Rep. 104, on unauthorized alteration of written instruments; 31 L.R.A.(N.S.) 645, on alteration of note by inserting place of payment.

14 S. D. 468, **MANKEY v. CHICAGO, M. & ST. P. R. CO.** 85 N.
W. 1013.

Liability of railroad for failure to give signals as required by statute.

Cited in *Miller v. Chicago & N. W. R. Co.* 21 S. D. 242, 111 N. W. 553,

holding failure to give statutory signals insufficient to render railroad liable for striking animals on track 25 rods from crossing.

Cited in note in 9 L.R.A. (N.S.) 345, 347, 367, 369, on private action for violation of statute not expressly conferring it.

Distinguished in *Dougherty v. Chicago, M. & St. P. R. Co.* 20 S. D. 46, 104 N. W. 672, holding company liable where injury resulted from failure to give signals at crossing.

14 S. D. 475, HOUTS v. OLSON, 85 N. W. 1015.

14 S. D. 476, LARSON v. DUTIEL, 85 N. W. 1006.

Construing deed to be mortgage.

Cited in *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714, holding conditional agreement for reconveyance on repayment of consideration paid insufficient to raise a presumption that a mortgage was intended.

Findings of fact on appeal.

Cited in *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207, holding that findings of trial court will not be disturbed unless the preponderance of evidence is clearly against them.

14 S. D. 483, CAMPBELL v. EQUITABLE LOAN & T. CO. 85 N. W. 1015.

Complaint in action to quiet title.

Cited in *Bennett v. Darling*, 15 S. D. 1, 86 N. W. 751, holding sufficient, complaint in action to quiet tax title which describes the property, states that plaintiff is owner and in possession under tax deed duly executed, alleges compliance with all essential preliminary steps to valid assessment and alienation, sets forth defendant's claims and alleges them to be junior to plaintiff's and concludes with prayer that plaintiff's title be adjudged superior to defendant's claims; *Buckham v. Hoover*, 18 S. D. 429, 101 N. W. 28, holding sufficient in action to quiet title complaint alleging ownership, and that defendants claimed some interest in the land without any right.

Reassessment where illegal tax is set aside.

Cited in *Moran v. Thomas*, 19 S. D. 469, 104 N. W. 212, holding that where assessment is declared illegal, the property should be reassessed, and payments under illegal assessment refunded; *Salmer v. Clay County*, 20 S. D. 307, 105 N. W. 623, on reassessment by board of equalization where assessment has been declared void; *Pettigrew v. Moody County*, 17 S. D. 275, 96 N. W. 94, holding that party asking for recovery of illegal taxes paid, or to set aside illegal tax sale need not tender taxes justly due.

Recovery of taxes paid by holder of void tax deed.

Cited in *Easton v. Cranmer*, 19 S. D. 224, 102 N. W. 944, holding that where tax deed is declared void, holder may recover taxes paid on the property which had been legally assessed against it and paid by him.

14 S. D. 486, EDMISON v. SIOUX FALLS WATER CO. 85 N. W. 1016.

Recovery on injunction bond of attorney's fees.

Cited in note in 16 L.R.A.(N.S.) 56, on recovery on injunction bond of attorneys' fees necessarily expended in dissolving injunction.

14 S. D. 490, PIONEER SAV. & L. ASSO. v. WILKINS, 85 N. W. 994.

Followed without discussion in *Pioneer Sav. & L. Co. v. Dyer*, 15 S. D. 133, 87 N. W. 1135.

Liability of building and loan association to shareholder.

Followed in *Hammerquist v. Pioneer S. & L. Co.* 15 S. D. 70, 87 N. W. 524, holding definite period of maturity and fixed valuation not dependent on financial condition of loan association assured by certificate containing agreement to pay specified sum at end of the designated period.

Cited in *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 185, 90 N. W. 717, holding building and loan association liable for full par value of stock to shareholder who has made the payments prescribed in the contract.

14 S. D. 497, BLACKMAN v. HOT SPRINGS, 85 N. W. 996, Later appeal in 17 S. D. 378, 97 N. W. 7.

Findings of fact on appeal.

Cited in *Reder v. Bellemore*, 16 S. D. 356, 92 N. W. 1065; *Whitney v. Akin*, 19 N. D. 638, 125 N. W. 470,—holding that, on appeal from judgment alone and in absence of all the testimony at the trial, findings will be presumed to be sustained by the evidence; *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding that upon appeal from judgment alone, entered before denial of motion for new trial, sufficiency of evidence to sustain findings will not be reviewed.

Action on warrants on public funds.

Cited in *Custer County Bank v. Custer County*, 18 S. D. 274, 100 N. W. 424, holding that action can be maintained in county warrants on which it denies its liability and fails to make provision for payment.

14 S. D. 505, MATHEWS v. SILVANDER, 85 N. W. 998.

Objection to evidence.

Cited in *Davis v. Holy Terror Min. Co.* 20 S. D. 399, 107 N. W. 374, holding general objection insufficient for review upon appeal; *McCabe v. Deanyers*, 20 S. D. 581, 108 N. W. 341, holding general objection to evidence insufficient unless it clearly appear that objection could not have been removed if pointed out.

Error in instructions.

Cited in *Bolte v. Equitable F. Asso.* 23 S. D. 240, 121 N. W. 773, holding instruction that company is liable on policy, not reversible, when answer admits issuance of policy and undisputed evidence establishes loss.

Presumption from marriage ceremony.

Cited in note in 16 L.R.A.(N.S.) 99, on presumptions flowing from marriage ceremony.

14 S. D. 507, OVERPECK v. RAPID CITY, 85 N. W. 990.

Measure of damages for injury caused by defective bridge.

Cited in Layton v. Sarpy County, 83 Neb. 628, 120 N. W. 179, holding cost of repair to be proper measure where traction engine was injured through defect in bridge.

14 S. D. 512, PLANO MFG. CO. v. AULD, 86 AM. ST. REP. 769n, 86 N. W. 21.

Liability of bank for collections.

Cited in Page County v. Rose, 130 Iowa, 296, 5 L.R.A.(N.S.) 886, 106 N. W. 744, 8 A. & E. Ann. Cas. 114, holding that insolvent bank is chargeable with funds collected for county treasurer on tax receipts, as trust funds.

Cited in note in 86 Am. St. Rep. 803, on right to recover money deposited with or collected by bank upon its insolvency.

Distinguished in McCormick H. M. Co. v. Yankton S. Bank, 15 S. D. 196, 87 N. W. 974, holding corporation not entitled to preference in cash assets of insolvent bank for amount collected by the bank within less than two months before closing its doors and credited by it to general agent of corporation in accordance with previous custom though in violation of instructions.

14 S. D. 520, DYEA ELECTRIC LIGHT CO. v. EASTON, 86 N. W. 23, Later phase of same case in 15 S. D. 572, 90 N. W. 859.

When appeal lies from order.

Cited in Stephens v. Faus, 20 S. D. 367, 106 N. W. 56, holding that appeal will not lie from an order not attested at time appeal is taken.

14 S. D. 525, MORRIS v. HUBBARD, 86 N. W. 25.

Nonprejudicial error in admission of incompetent evidence.

Cited in Neeley v. Roberts, 23 S. D. 604, 122 N. W. 655, holding admission of incompetent evidence not reversible error, where facts are established by other competent evidence.

14 S. D. 537, GIRA v. HARRIS, 86 N. W. 624.

Forfeiture of option by default in payment.

Cited in Hanschka v. Vodopich, 20 S. D. 551, 108 N. W. 28, holding that where purchaser fails to make payments required under the contract, his rights are terminated and he cannot subsequently enforce specific performance; Herman v. Winter, 20 S. D. 196, 105 N. W. 457, holding that time is of essence of option contract and payment must be made within time limited.

Cited in note in 24 L.R.A.(N.S.) 95, on tender or payment as condition precedent to suit for specific performance of option contract to convey realty.

Presumptive evidence of consideration.

Cited in Grimsend Shoe Co. v. Jackson, 22 S. D. 114, 115 N. W. 656, holding written agreement presumptive evidence of sufficient consideration.

14 S. D. 543, MAGOWAN v. GRONEWEG, 86 N. W. 626, Later appeal in 16 S. D. 29, 91 N. W. 335.

14 S. D. 545, STATE v. HAMMOND, 86 N. W. 627.

Competency of jurors.

Cited in note in 68 L.R.A. 882, on competency of jurors who have served in same or similar case.

Question for jury.

Cited in State v. Page, 15 S. D. 613, 91 N. W. 313, holding that question whether instrument used in causing death or serious injury of person was a dangerous or deadly weapon because of manner of use, may be question for jury.

14 S. D. 552, ADAMS v. RATHBUN, 86 N. W. 629.

14 S. D. 553, DEADWOOD C. R. CO. v. BARKER, 86 N. W. 619.

Rights in underground waters.

Cited in Herriman Irrig. Co. v. Keel, 25 Utah, 96, 69 Pac. 719, holding that underground waters in undefined streams or percolating or standing under surface are incident to the land, and no recovery can be had for interference therewith by adjoining owner incidental to work on his land.

Cited in note in 21 L.R.A. (N.S.) 77, on appropriation of percolating waters on public lands.

14 S. D. 575, CONGDON & H. HARDWARE CO. v. GRAND ISLAND & W. C. R. CO. 86 N. W. 633.

14 S. D. 578, PEOPLE'S BANK v. MEARS, 86 N. W. 634.

14 S. D. 579, HOWARD v. BRAUN, 86 N. W. 635.

Demand in action for replevin.

Cited in Denver Live Stock Commission Co. v. Parks, 41 Colo. 164, 91 Pac. 1110, 14 A. & E. Ann. Cas. 814, holding proof of demand unnecessary where defendant claims ownership and right of possession; Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, holding demand or proof thereof unnecessary where defendant sets up claim in answer which shows that demand would have been ineffectual.

14 S. D. 587, MILLER v. DURST, 86 N. W. 631.

Presumption of prejudice in error.

Cited in Tosini v. Cascade Mill. Co. 22 S. D. 377, 117 N. W. 1037, holding prejudice presumed, unless record clearly shows that error could not have been prejudicial.

14 S. D. 593, DAVID BRADLEY & CO. v. HELGERSON, 86 N. W. 634.

14 S. D. 597, LA CROSSE BOOT & SHOE MFG. CO. v. MONS ANDERSON CO. 86 N. W. 641.

14 S. D. 600, PIER v. LEE, 86 N. W. 642.

Waiver of forfeiture for defaults in contract for purchase of land.

Cited in *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947, holding forfeiture of land contract waived by treating it as subsisting after default; *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088; *Timmins v. Russell*, 13 N. D. 487, 99 N. W. 48,—holding forfeiture for failure to make payments when due, waived by delay in declaring such forfeiture; *Keator v. Ferguson*, 20 S. D. 473, 129 Am. St. Rep. 947, 107 N. W. 678, holding forfeiture for failure to make payments promptly, waived by acceptance of prior payments some time after they were due; *Hanschka v. Vodopich*, 20 S. D. 551, 108 N. W. 28, on purchaser as not being held to strict compliance with terms as to payment, if demand is not made promptly by seller; *Spolek v. Hatch*, 21 S. D. 386, 113 N. W. 75, holding stipulation that time is of essence of contract waived by extension of time to pay balance.

14 S. D. 611, WHITTAKER v. WARREN, 86 N. W. 636.

Time for application to vacate judgment.

Cited in *Williams v. Fairmount School Dist.* 21 N. D. 198, 129 N. W. 1027, holding that courts have inherent power to vacate collusive and fraudulent judgment though more than one year has elapsed.

14 S. D. 621, SMALL v. SMITH, 86 AM. ST. REP. 807, 86 N. W. 649.

Extraterritorial powers of receiver.

Cited in note in 4 L.R.A.(N.S.) 826, on power of receiver to sue out of jurisdiction of appointment.

14 S. D. 626, WAITE v. FRANK, 86 N. W. 645.

Validity of contracts for future delivery.

Cited in *Hallet v. Aggergaard*, 21 S. D. 554, 14 L.R.A.(N.S.) 1251, 114 N. W. 696, holding transactions in wheat to be settled by payment of differences, void.

Cited in note in 22 L.R.A.(N.S.) 177, on influence as to character of transaction on margin.

Distinguished in *Winward v. Lincoln*, 23 R. I. 476, 64 L.R.A. 160, 51 Atl. 106, holding valid purchase and sale of stock where contract required delivery if desired; *Hallet v. Aggergaard*, 21 S. D. 554, 14 L.R.A.(N.S.) 1251, 114 N. W. 696, holding valid purchase and sale of property not owned by the parties where actual delivery in the future was intended.

Testimony as to intent.

Cited in note in 23 L.R.A. (N.S.) 398, on right of one to testify as to his intent.

14 S. D. 638, SMITH v. HAWLEY, 86 N. W. 652.

14 S. D. 644, HALE v. HALE, 86 N. W. 650.

14 S. D. 648, HOWIE v. BRATRUD, 86 N. W. 747.

Right of broker to commissions.

Cited in *Watters v. Dancy*, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430, holding that to recover commissions, broker must produce purchaser ready and able to contract on prescribed terms.

When direction of verdict is proper.

Cited in *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516, holding verdict properly directed, where verdict for other party would be set aside.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 15 S. D.

15 S. D. 1, BENNETT v. DARLING, 86 N. W. 751.

Presumption of regularity in tax proceeding.

Cited in *Overstreet v. Levee Dist. No. 1*, 80 Ark. 462, 97 S. W. 676, holding copies of records of directors and assessors of levee district were prima facie evidence of regularity of assessment; *Easton v. Cranmer*, 19 S. D. 224, 102 N. W. 944, holding that admission that records in county treasurer's office showed party had paid taxes duly assessed and legally taxable was sufficient to sustain recovery of such taxes where paid at void tax sale; *Cornelius v. Ferguson*, 17 S. D. 481, 97 N. W. 388 (reversing on rehearing, 16 S. D. 113, 91 N. W. 460), holding presumption was that parcels of land included in a single tax deed were sold separately.

Tax deed as evidence of sale in bulk.

Cited in *Shelton v. Franklin*, 224 Mo. 342, 135 Am. St. Rep. 537, 123 S. W. 1084, holding tax deed was not in itself evidence of the fact of a sale en masse.

15 S. D. 8, SCHULL v. NEW BIRDSALL CO. 86 N. W. 654, Re-affirmed on later appeal in 17 S. D. 39, 95 N. W. 276.

Recovery for unauthorized act of agent.

Cited in *Elfring v. New Birdsall Co.* 16 S. D. 252, 92 N. W. 29, holding one who delivered second-hand machinery in partial payment for new machinery to an agent not authorized to receive such second-hand machinery could not recover therefore from principal; *J. I. Case Thresh. M. Co. v. Eichinger*, 15 S. D. 530, 91 N. W. 82, holding that a principal may show an agent's authority actual and ostensible, in an action against a defendant who seeks to charge the plaintiff for acts of the agent.

Ratification of agent's acts.

Cited in *Wilson v. Mitchell*, 17 S. D. 515, 65 L.R.A. 158, 106 Am. St. Rep. 784, 97 N. W. 741, holding party could not recover for use of his well where city which approved its servant's bill for connecting same with its water mains had no knowledge that it was plaintiff's well; *Reeves & Co. v. Lewis*, 25 S. D. 44, 29 L.R.A.(N.S.) 82, 125 N. W. 289, holding that knowledge by agent of unauthorized modification of contract is not notice to principal, so that his acting on contract will constitute ratification.

Cited in note in 88 Am. St. Rep. 781, on liability of principal for unauthorized acts of agent.

Instruction as to ratification.

Cited in *Quale v. Hazel*, 19 S. D. 483, 104 N. W. 215, holding an instruction as to ratification bad where it omitted the element of full knowledge.

15 S. D. 20, *SUMMERS v. GLENWOOD GOLD & S. MIN. CO.*
86 N. W. 749.

15 S. D. 26, *NADDY v. DIETZE*, 86 N. W. 753.

15 S. D. 33, *KIRBY v. CRISP*, 86 N. W. 1103.

15 S. D. 34, *SMITHSON v. FALL RIVER COUNTY*, 87 N. W. 1.

15 S. D. 37, *COUGHRAN v. MARKLEY*, 87 N. W. 2.

Showing for order of publication.

Cited in *Pillsbury v. J. B. Streeter, Jr.* Co. 15 N. D. 174, 107 N. W. 40, holding court had jurisdiction to make an order of publication where it reasonably appeared that due diligence had been exercised to find party; *Peterson v. Peterson*, 15 S. D. 462, 90 N. W. 136, sustaining the sufficiency of an affidavit for publication of summons in a divorce proceeding where the defendant did not move to have the default set aside with leave to answer, but appeared specially for the sake of a motion to vacate the judgment.

Time for application to vacate judgment.

Cited in *Skjelbred v. Shafer*, 15 N. D. 539, 125 Am. St. Rep. 614, 108 N. W. 487, holding the limitation of one year for application to vacate judgment on default has no application to judgments totally void from want of jurisdiction.

Collateral attack on judgment.

Cited in *Coughran v. Germain*, 17 S. D. 529, 97 N. W. 743, holding recital in order for publication that "defendants or one of them" had property within state sustained judgment against averment that it was without jurisdiction.

15 S. D. 46, NELSON v. JORDETH, 87 N. W. 140.

Specification of error in court findings.

Cited in *Boettcher v. Thompson*, 17 S. D. 177, 95 N. W. 874, holding the question of sufficiency of evidence could not be reviewed where the bill of exceptions failed to state particulars wherein evidence was insufficient; *Boettcher v. Thompson*, 21 S. D. 69, 110 N. W. 108, holding sufficiency of evidence not reviewable on motion for new trial, when statement of case does not specify particulars of insufficiency.

15 S. D. 52, MULLER v. FLAVIN, 87 N. W. 518.

15 S. D. 55, HUBBELL v. CUSTER CITY, 87 N. W. 520.

15 S. D. 63, MATTICE v. STREET, 87 N. W. 522.

15 S. D. 66, KOUNTZ v. KOUNTZ, 87 N. W. 523.

Double appeal.

Cited in *McVay v. Bridgman*, 17 S. D. 424, 97 N. W. 20, holding an appeal from an order denying a new trial taken with an appeal from the judgment rendered before the order was made should not be dismissed as a double appeal; *Meade County Bank v. Decker*, 17 S. D. 590, 98 N. W. 86, holding an appeal from an order refusing to vacate a judgment by default and for leave to answer and one from order denying leave to renew motion to vacate a judgment and leave to answer does not constitute a double appeal as the last order is not appealable and will be treated as surplusage; *Sucker State Drill Co. v. Brock*, 18 N. D. 8, 118 N. W. 348, holding appeal from judgment and from two orders denying new trial, not double.

Distinguished in *Gordon v. Kelley*, 20 S. D. 70, 104 N. W. 605, holding an appeal from a default judgment and from an order denying a motion to vacate it and for leave to answer constituted it a double appeal.

15 S. D. 70, HAMMERQUIST v. PIONEER SAV. & L. CO. 87 N. W. 524.

Value of building and loan association stock at maturity.

Cited in *Field v. Eastern Bldg. & L. Asso.* 117 Iowa, 185, 90 N. W. 717, holding a building and loan association, which represented to subscribers that it would pay par value on its shares at the expiration of a specified time, the subscriber making specified monthly payment, was bound to pay face value at the expiration of that time and not the value based upon its financial condition.

Cited in note in 15 L.R.A.(N.S.) 504, on estoppel of building association to assert illegality of provision that stock will mature at fixed time.

15 S. D. 75, HOLM v. FIRST NAT. BANK, 87 N. W. 526.

15 S. D. 77, COCHRAN v. GERMAIN, 87 N. W. 527, Affirmed
on rehearing in 17 S. D. 529, 97 N. W. 743.

Showing for service by publication.

Followed in 17 S. D. 529, 97 N. W. 743, holding record showing of jurisdiction by published service was sufficient.

Cited in Pillsbury v. J. B. Streeter, Jr. Co. 15 N. D. 174, 107 N. W. 40, holding order of publication would be upheld where it fairly appeared from affidavit that parties could not be found within state after diligent search; Allen v. Richardson, 16 S. D. 390, 92 N. W. 1075, upholding finding that sufficient probative facts of exercise of due diligence were shown to authorize order of publication.

15 S. D. 80, HENRY v. HENRY, 87 N. W. 522.

General appearance.

Cited in McGuinness v. McGuinness, 71 N. J. Eq. 1, 62 Atl. 937, holding party entered a general appearance where party sought to have whole decree in a divorce proceeding set aside and complainant's bill dismissed.

15 S. D. 84, HOOD v. FAY, 87 N. W. 528.

Discretion in granting or refusing continuances.

Cited in Crouch v. Dakota, W. & M. R. Co. 18 S. D. 540, 101 N. W. 722; Chambers v. Modern Woodmen, 18 S. D. 173, 99 N. W. 1107,—holding granting or refusal of a continuance was discretionary with the court and would not be reversed on appeal in the absence of a showing of manifest abuse of discretion.

— Absence of witnesses.

Cited in State v. Phillips, 18 S. D. 1, 98 N. W. 171, 5 A. & E. Ann. Cas. 760, holding court did not abuse its discretion in refusing to grant a continuance to secure witnesses where it was shown that insufficient diligence had been exercised in endeavoring to secure their attendance at the trial; Deere & W. Co. v. Hinckley, 20 S. D. 359, 106 N. W. 138, holding continuance was properly refused where affidavit made for purpose of securing continuance disclosed no diligence in securing witnesses other than the statement that party had been unable to secure his witnesses.

15 S. D. 89, BURNETT v. COSTELLO, 87 N. W. 575.

Presumption of continuing life.

Cited in Renard v. Bennett, 76 Kan. 848, 93 Pac. 261, 14 A. & E. Ann. Cas. 240, holding inference of death from seven years unexplained absence did not arise when one had removed his residence permanently and no diligent inquiry had been made of the persons from whom and at the places where tidings would most probably be had.

Cited in note in 104 Am. St. Rep. 200, on presumption of death.

15 S. D. 98, McCONNELL v. SPICKER, 87 N. W. 574.

Pleading statute of limitations.

Cited in State ex rel. Berge v. Patterson, 18 S. D. 251, 100 N. W. 162,

holding the statute of limitations as a defense must be pleaded in the answer and is not available on demurrer.

Sufficiency of allegations.

Cited in *Bank of Miller v. Moore*, 81 Neb. 566, 116 N. W. 167, holding answer sufficiently pleaded the statute of limitations where it stated that the "cause of action did not accrue" within statutory period preceding the commencement of the action.

Cited in note in 28 L.R.A.(N.S.) 552, on defamation: necessity that plea of justification or privilege correspond to words imputed to defendant.

15 S. D. 103, WILSON v. SEAMAN, 87 N. W. 577.

Discretionary powers of court.

Cited in *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107, holding court did not abuse its discretion in refusing to grant a continuance where it was sought to enable associate counsel to be present and it was not shown that injury resulted from such refusal.

—New trials.

Cited in *State v. Coleman*, 17 S. D. 594, 98 N. W. 175, holding new trial was properly refused within courts' discretion where newly discovered evidence upon which it was sought was cumulative and there was no probability that it would change the result; *Grigsby v. Wolven*, 20 S. D. 623, 108 N. W. 250, holding granting or refusing new trial on ground of newly discovered evidence was largely discretionary and would not be disturbed unless there had been manifest abuse of such discretion; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150; *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960,—holding that new trial should be granted only when new evidence would probably change result; *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, upholding denial of new trial, where new evidence does not tend to prove or disprove issue, but only to discredit or impeach witness; *Kelley v. Anderson*, 15 S. D. 107, 87 N. W. 579, refusing to disturb decision on motion for new trial for newly discovered evidence except for abuse of discretion.

15 S. D. 107, KELLY v. ANDERSON, 87 N. W. 579.

Sufficiency of general allegation of negligence.

Cited in *Jones v. Great Northern R. Co.* 12 N. D. 343, 97 N. W. 535, holding complaint stated a cause of action which alleged that railroad in operating a train "negligently and carelessly and wrongfully struck and killed" certain live stock.

Duty of landowner to adjoining proprietors.

Cited in note in 123 Am. St. Rep. 578, on duty and liability of land owners to adjoining proprietors.

15 S. D. 114, NORTHWESTERN ELEVATOR CO. v. LEE, 87 N. W. 581.

Review of verdict.

Cited in *Mosteller v. Holborn*, 20 S. D. 545, 108 N. W. 13, holding

appellate court will not review evidence further than to determine whether it was sufficient to support the jury's verdict.

Motion to dismiss case tried by court.

Cited in *Weeks v. Crammer*, 17 S. D. 173, 95 N. W. 875, holding motion properly denied where grounded on want of evidence to support judgment for plaintiff.

Necessity of findings by court.

Cited in *Thomas v. Issenhuth*, 18 S. D. 303, 100 N. W. 436, holding court erred in entering judgment without first making and filing findings of fact and conclusions of law.

15 S. D. 118, DAVIS v. NOVOTNEY, 87 N. W. 582.

15 S. D. 124, ELDER v. HORSESHOE MIN. & MILL. CO. 102 AM. ST. REP. 681, 87 N. W. 586, 21 MOR. MIN. REP. 510, Affirmed in 194 U. S. 248, 48 L. ed. 960, 24 Sup. Ct. Rep. 643.

Notice by publication to pay assessment work on mining claim.

Cited in *Field v. Tanner*, 32 Colo. 278, 75 Pac. 916, on the sufficiency of notice of forfeiture of mining claim for nonpayment of assessments.

15 S. D. 126, GIONNONATTI v. MICHELLETTI, 87 N. W. 587.

Estoppel to deny written instrument to be mortgage.

Cited in *McDonald v. Beatty*, 10 N. D. 511, 88 N. W. 281, holding mortgagor estopped to show oral agreement with purchasers on foreclosure that they should hold sheriff's certificate as a mortgage only, where third party has been permitted to redeem without notice thereof.

15 S. D. 133, PIONEER SAV. & L. CO. v. DYER, 87 N. W. 1135.

15 S. D. 134, POLLOCK v. WRIGHT, 87 N. W. 584.

Right of subrogation.

Cited in note in 99 Am. St. Rep. 522, on right of subrogation.

15 S. D. 142, SANDS v. CRUIKSHANK, 87 N. W. 589.

Presumption as to grant or refusal of new trial.

Cited in *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207, holding findings of trial court are presumptively right and will be reversed only when there is a clear preponderance of evidence against them.

— When made by successor of trial judge.

Cited in *Lavin v. Kreger*, 20 S. D. 80, 104 N. W. 909; *Tyler v. Haggart*, 19 S. D. 167, 102 N. W. 682, holding rule that a trial court's ruling granting a new trial will be reversed only in case of the abuse of a court's discretion does not obtain where order was made by one who did not preside at the trial.

Presumption as to findings of court.

Cited in *Hill v. Whale Min. Co.* 15 S. D. 574, 90 N. W. 853, holding that findings on disputed question of fact are presumptively right.

Location of mining claim.

Cited in note in 7 L.R.A. (N.S.) 829, on location of mining claim.

15 S. D. 148, STATE v. BRADLEY, 87 N. W. 590.

Followed without discussion in *State v. Sanford*, 15 S. D. 153, 87 N. W. 592.

Plural subjects in title of act.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding an act which provided for the regulation and restriction of the sale of intoxicating liquors and for the prohibition of the sale or gift of intoxicating liquors to certain classes of persons was not in violation of a constitutional provision prohibiting embracing more than one subject in a law.

Defense to prosecution for illegal liquor sale.

Cited in note in 25 L.R.A. (N.S.) 670, on ignorance of minority of purchaser of liquor as defense to prosecution for sale.

15 S. D. 153, STATE v. SANFORD, 87 N. W. 592.**Statutes regulating sale of intoxicating liquors.**

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding the validity of law making it unlawful to sell or give away intoxicating liquors to a minor was unquestioned.

Defense to prosecution for illegal liquor sale.

Cited in note in 25 L.R.A. (N.S.) 670, on ignorance of minority of purchaser of liquor as defense to prosecution for sale.

15 S. D. 154, JOHNSON v. PLOTNER, 87 N. W. 926.**Sufficiency of agreement to authorize specific performance.**

Cited in *McCauley v. Schatzley*, 44 Ind. App. 262, 88 N. E. 972, holding contract for exchange of farms too indefinite for specific performance; *Phillips v. Swenson*, 16 S. D. 357, 92 N. W. 1065, on the sufficiency of a contract to support specific performance; *Meyer Land Co. v. Pecor*, 18 S. D. 466, 101 N. W. 39, holding unilateral memorandum was insufficient to support specific performance, where one party might decline to perform and terms of payment were uncertain; *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142, denying specific performance because no definite contract was made by correspondence.

15 S. D. 159, KRUEGER v. DODGE, 87 N. W. 965.**Review of court findings.**

Cited in *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646; *Clarke v. Conners*, 18 S. D. 600, 101 N. W. 883,—holding trial court's findings of fact where tried without jury are presumptively justified unless there is a clear preponderance of facts against them.

15 S. D. 167, STATE v. CADDY, 91 AM. ST. REP. 666, 87 N. W. 927.

Acquittal or conviction as to included crimes.

Cited in *Warren v. State*, 79 Neb. 526, 113 N. W. 143, holding acquittal of murder was not a bar to conviction for robbery.

Cited in notes in 92 Am. St. Rep. 141, on identity of offenses on plea of former jeopardy; 31 L.R.A. (N.S.) 734, on right to convict for several offenses growing out of same facts.

Distinguished in *People v. McDaniels*, 137 Cal. 192, 59 L.R.A. 578, 92 Am. St. Rep. 81, 69 Pac. 1006, holding conviction for a battery was a bar to prosecution for assault with intent to commit murder where it arose out of same act.

Contradictory and consistent statements.

Cited in *Driggers v. United States*, 21 Okla. 60, 1 Okla. Crim. Rep. 180, 95 Pac. 612, 17 A. & E. Ann. Cas. 66, holding impeaching force of contradictory statements may be overcome by consistent statements made when there could be no motive to falsify.

15 S. D. 177, CORE v. ECKERT, 87 N. W. 972.

15 S. D. 182, WILLIAMS v. TURNER, TWP. 87 N. W. 968.

15 S. D. 196, McCORMICK HARVESTING MACH. CO. v. YANKTON SAV. BANK, 87 N. W. 974.

15 S. D. 206, ORMSBY v. HALE, 88 N. W. 101.

15 S. D. 211, BASKERVILLE v. GAAR, 88 N. W. 103.

15 S. D. 216, CHAMBERLAIN v. WOOD, 56 L.R.A. 187, 91 AM. ST. REP. 674, 88 N. W. 109.

Writing candidates' names on official ballot.

Cited in *Eckerson v. Des Moines*, 137 Iowa, 452, 115 N. W. 177, on the validity of statutes which limit the right of a voter to write names on official ballot; *State ex rel. Howells v. Metcalf*, 18 S. D. 393, 67 L.R.A. 331, 100 N. W. 923, holding the names of candidates not regularly certified could not be written on the official ballot; *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121 (dissenting opinion), on constitutionality of primary election law, limiting voter's choice to names printed on ballot.

Validity of requirement of fee for filing nominating petitions.

Cited in *Ballinger v. McLaughlin*, 22 S. D. 206, 116 N. W. 70, holding void, act requiring payment of fees for filing nominating petitions under primary election law.

15 S. D. 234, CRANMER v. BROTHERS, 88 N. W. 105.

15 S. D. 238, TROY MIN. CO. v. THOMAS, 88 N. W. 106.

Discretion as to new trial.

Cited in *State v. Crowley*, 20 S. D. 611, 108 N. W. 491, holding an order granting or refusing a new trial on questions of fact will not be disturbed on appeal in the absence of an affirmative showing of the manifest abuse of discretion.

15 S. D. 242, COLEMAN v. STALNACKE, 88 N. W. 107.

15 S. D. 247, GATES v. McGEE, 88 N. W. 115.

Superintending control over inferior tribunals.

Cited in notes in 111 Am. St. Rep. 963, 975, on writ of prohibition; 20 L.R.A. (N.S.) 949, 953, on superintending control over inferior tribunals.

15 S. D. 257, TOBIN v. MCKINNEY, 91 AM. ST. REP. 694, 88 N. W. 572.

Maturity of certificate of deposit.

Cited in *Elliott v. Capital City State Bank*, 128 Iowa, 275, 1 L.R.A. (N.S.) 1130, 11 Am. St. Rep. 198, 103 N. W. 777, holding a certificate of deposit made payable upon its return to the bank was not due and payable until actual demand was made.

Cited in note in 29 L.R.A. (N.S.) 687, as to when statute begins to run on certificate of deposit.

15 S. D. 259, LONG v. COLLINS, 88 N. W. 571, Related case in 16 S. D. 625, 102 AM. ST. REP. 724, 94 N. W. 700.

Exemption of judgment for conversion of exempt property.

Cited in *Long v. Collins*, 16 S. D. 625, 102 Am. St. Rep. 724, 94 N. W. 700, for history of litigation also holding that costs of obtaining a judgment for the conversion of exempt property were exempt as was the judgment.

Cited in note in 16 L.R.A. (N.S.) 494, on right to set off judgment against another founded upon claim for exempt property or services.

15 S. D. 263, KOLBE v. HARRINGTON, 88 N. W. 572.

15 S. D. 266, GARVIN v. PETTEE, 88 N. W. 573.

Estoppel to deny title to negotiable instruments.

Cited in note in 29 L.R.A. (N.S.) 255, on effect of putting transferable paper or securities into another's possession, to estop owner as against purchaser in good faith.

15 S. D. 271, RECTOR & W. CO. v. MALONEY, 88 N. W. 575.

Statutory form of tax deeds.

Cited in *Horswill v. Farnham*, 16 S. D. 414, 93 N. W. 1032, holding tax deed was void on its face which omitted certain statutory requirements.

Dak. Rep.—69.

15 S. D. 280, **MERCHANTS' NAT. BANK v. STEBBINS**, 89 N. W. 674.

15 S. D. 291, **GILSON v. KUENERT**, 89 N. W. 472.

15 S. D. 292, **WEBSTER v. LAMB**, 89 N. W. 473.

Burden of proving physician's compliance with law.

Cited in note in 8 L.R.A. (N.S.) 1239, on burden of proof as to physician's license in suit for services.

15 S. D. 296, **SCHILLING v. TWITCHELL**, 89 N. W. 474.

15 S. D. 298, **WILEY v. CARSON**, 89 N. W. 475.

15 S. D. 304, **HARRISON v. STATE BKG. & TRUST CO.** 89 N. W. 477.

15 S. D. 310, **BEDTKEY v. BEDTKEY**, 89 N. W. 479.

Discretion as to new trial.

Cited in *State v. Smith*, 18 S. D. 341, 100 N. W. 740, holding denial of new trial upon ground of newly discovered evidence was justified where no reasonable diligence was exercised in discovering evidence relative to age of party where it was shown in the information.

Matter for record or bill of exceptions.

Cited in *Easton v. Cranmer*, 19 S. D. 224, 102 N. W. 944, holding order of confirmation and papers on which it was made need not be brought up on bill of exceptions.

15 S. D. 317, **WILSON v. BOARD OF EDUCATION**, 89 N. W. 480.

15 S. D. 318, **COUGHRAN v. HOLLISTER**, 89 N. W. 647.

15 S. D. 322, **WILSON v. COMMERCIAL UNION INS. CO.** 89 N. W. 649.

Denials upon information and belief.

Cited in note in 133 Am. St. Rep. 124, as to when denials on information and belief are permissible.

Necessity of finding upon all the issues.

Cited in *Taylor v. Vandenberg*, 15 S. D. 480, 90 N. W. 142, holding findings of court trying case without jury were insufficient to support the judgment where, not made upon all issues pleaded.

Cited in note in 24 L.R.A. (N.S.) 7, 9, on what special verdict must contain.

15 S. D. 330, **MATTESS v. ENGEL**, 89 N. W. 651.

Right of broker to commissions.

Cited in *Watters v. Dancy*, 23 S. D. 481, 139 Am. St. Rep. 1071, 122

N. W. 430, holding broker not entitled to commissions, where he obtained contract to purchase running to himself.

— On sale which falls through.

Cited in *Weaver v. Richards*, 144 Mich. 395, 6 L.R.A.(N.S.) 855, 108 N. W. 382, holding it was for the jury under the evidence to say whether or not there was contract to sell land upon commission and whether broker had a right to assume that vendor would tender a marketable title; *Yoder v. Randol*, 16 Okla. 308, 3 L.R.A.(N.S.) 576, 83 Pac. 537, holding broker was entitled to commission where he found an acceptable purchaser with whom employer entered into binding enforceable contract for sale of land.

15 S. D. 339, FINCH v. PARK, 89 N. W. 654

15 S. D. 344, PENDO v. BEAKEY, 89 N. W. 655.

Followed without discussion in *Pendo v. Blythe*, 15 S. D. 358, 89 N. W. 1135.

Color of title as necessary to adverse possession.

Cited in note in 15 L.R.A.(N.S.) 1221, 1253, on necessity of color of title, not expressly made a condition by statute, in adverse possession.

Abandonment of possession.

Cited in *Encley v. Coolbaugh*, 160 Mich. 307, 125 N. W. 279, holding prior possession was lost by abandonment where for three years there was no act indicative of either actual or constructive possession and the property in question was shown to be vacant.

15 S. D. 358, PENDO v. BLYTHE, 89 N. W. 1135.

15 S. D. 359, MADISON v. HORNER, 89 N. W. 474.

Followed without discussion in *Madison v. Cameron*, 15 S. D. 361, 89 N. W. 1134.

Notice of appeal in quasi criminal actions.

Cited in *Centerville v. Olson*, 16 S. D. 526, 94 N. W. 414, holding action for violation of city ordinance was not such civil action that oral notice of appeal was insufficient.

Nature of conviction under city ordinance.

Cited in *Koch v. State*, 126 Wis. 470, 3 L.R.A.(N.S.) 1086, 106 N. W. 531, 5 A. & E. Ann. Cas. 389, holding a conviction under a city ordinance was not conviction of a misdemeanor within a statute providing that one convicted of a criminal offense was a competent witness but whose credibility might be affected by proof of such conviction.

Cited in note in 4 L.R.A.(N.S.) 783, on character of proceeding for violation of ordinance as civil or criminal.

15 S. D. 361, MADISON v. CAMERON, 89 N. W. 1134.

15 S. D. 362, PERSONS v. VAN TASSAL, 89 N. W. 861.

15 S. D. 366, McCARRIER v. HOLLISTER, 91 AM. ST. REP. 695, 89 N. W. 862.

Liability for negligence of independent contractor.

Cited in *Cameron Mill & Elevator Co. v. Anderson*, 34 Tex. Civ. App. 105, 78 S. W. 8, holding company liable for negligence of its independent contractor in leaving a pit unguarded and unlighted in street.

Cited in note in 65 L.R.A. 834, 843, on liability for injuries caused by performance of work by independent contractor which is dangerous unless certain precautions are observed.

Who are independent contractors.

Cited in note in 65 L.R.A. 456, as to who are independent contractors.

15 S. D. 370, MELDRUM v. KENEFICK, 89 N. W. 863.

Promise to answer for debt of another.

Cited in *Haynes v. Johnson*, 141 Mo. App. 506, 126 S. W. 177, holding party was charged with original promise where laborer performed his work on faith of his engagement to see that he was paid; *McGowan Commercial Co. v. Midland Coal & Lumber Co.* 41 Mont. 211, 108 Pac. 655, holding that oral promise to see that goods delivered to another are paid for is original, where credit is given exclusively to promisor; *Atlas Lumber & Coal Co. v. Flint*, 20 S. D. 118, 104 N. W. 1046, holding party was original debtor where building material was furnished to another on strength of statement to do so and he would pay for it.

Cited in notes in 126 Am. St. Rep. 492, on contract to answer for or pay debt of another within statute of frauds; 15 L.R.A.(N.S.) 218, on contemporary promise to pay where benefit inures to another as within statute of frauds.

Objection not raised in trial court.

Cited in *Schuyler v. Wheeler*, 17 N. D. 161, 115 N. W. 259, holding appellate court will not consider invalidity of contract under statute of frauds where that point is not raised in the trial court.

15 S. D. 377, BOHN MFG. CO. v. KEENAN, 89 N. W. 1009.

Effect of filing excessive mechanic's lien.

Cited in note in 29 L.R.A.(N.S.) 317, on effect of filing excessive mechanics' lien.

15 S. D. 383, STATE v. EDWARDS, 89 N. W. 1011.

Defamatory publication as contempt of court.

Cited in *Ex parte Green*, 46 Tex. Crim. Rep. 576, 580, 66 L.R.A. 727, 108 Am. St. Rep. 1035, 81 S. W. 723, holding publication defamatory of a court was not contempt of court where not written and published in reference to a pending case.

Cited in notes in 68 L.R.A. 256, on statement with respect to ended cause as contempt; 21 L.R.A.(N.S.) 907, on offense of attempt to influence officers of court.

15 S. D. 387, STATE EX REL. COSPER v. PORTER, 89 N. W. 1012.

15 S. D. 391, PETERS v. FELL, 89 N. W. 1014.

15 S. D. 395, ANDERSON v. JORDAN, 89 N. W. 1015.

15 S. D. 400, LYON v. PLANKINTON BANK, 89 N. W. 1017, Related cases in 18 S. D. 317, 100 N. W. 614; 20 S. D. 178, 105 N. W. 245.

Followed without discussion in Grigsby v. Plankinton Bank, 15 S. D. 431, 89 N. W. 1135; Murphy v. Plankinton Bank, 15 S. D. 431, 89 N. W. 1135.

Denial of new matter by reply.

Cited in Scott v. Northwestern Port Huron Co. 17 N. D. 91, 115 N. W. 192, holding denial of new matter, not relating to a counterclaim, by reply was surplusage and left issues made by the answer unchanged; Craig v. Craig, 22 S. D. 417, 118 N. W. 712, holding that new matter in answer is legally deemed controverted and issue of fact is created, where no reply is made to new matter.

When new trial will be ordered.

Cited in Craig v. Craig, 22 S. D. 417, 118 N. W. 712, holding that judgment will be reversed and new trial ordered, where no finding is made on material issue.

15 S. D. 410, SUTTON v. CONSOLIDATED APEX MIN. CO. 89 N. W. 1020.

Pleading estoppel.

Cited in McQueen v. Bank of Edgemont, 20 S. D. 378, 107 N. W. 208, on necessity of pleading action taken in reliance upon acts constituting alleged estoppel.

Estoppel to plead statute of frauds.

Cited in note in 134 Am. St. Rep. 176, on estoppel to plead statute of frauds in actions on contracts not to be performed within a year.

Impairment of contracts.

Cited in Hahn v. Sleepy Eye Mill Co. 21 S. D. 324, 112 N. W. 843, holding thrasher's lien law not invalid as impairing contracts.

15 S. D. 415, COLER v. STERLING, 89 N. W. 1022.

Construction of statutes enacted at different times.

Cited in Lawrence Ewert, 21 S. D. 580, 114 N. W. 709 (dissenting opinion), on effect of being enacted later on construction of statutes.

15 S. D. 421, STOKES v. ALLEN, 89 N. W. 1023.

Description of lands in tax proceedings.

Cited in Moran v. Thomas, 19 S. D. 469, 104 N. W. 212, holding de-

scription of land sought to be assessed where it consisted of a meaningless array of letters and figures was insufficient to authorize sale for nonpayment of taxes under assessment.

Distinguished in *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267, holding description was sufficient under statute where lands were described in tax proceedings by means of letters and figures. Void tax deed as color of title.

Cited in *King v. Lane*, 21 S. D. 101, 110 N. W. 37, on void tax deed as color of title.

15 S. D. 425, JENCKS v. MURPHY, 89 N. W. 1121.

Title and rights of chattel mortgagor after condition broken.

Cited in notes in 96 Am. St. Rep. 684, on title and rights of holder of chattel mortgage after condition broken; 137 Am. St. Rep. 897, on actions maintainable by chattel mortgagor against third persons after condition broken.

15 S. D. 431, GRIGSBY v. PLANKINTON BANK, 89 N. W. 1135.

15 S. D. 431, MURPHY v. PLANKINTON BANK, 89 N. W. 1135.

15 S. D. 432, MACH v. BLANCHARD, 58 L.R.A. 811, 91 AM. ST. REP. 698, 90 N. W. 1042.

Errors open on collateral attack.

Cited in *Weiland v. Ashton*, 18 S. D. 331, 100 N. W. 737, holding failure to record verdict before judgment was entered thereon was mere error and did not render judgment void for want of jurisdiction and assailable for the first time on appeal.

Default judgment for more relief than prayed.

Cited in *Cohen v. Cohen*, 150 Cal. 99, 88 Pac. 267, 11 A. & E. Ann. Cas. 520, holding judgment on default in a divorce proceeding was not void nor assailable in collateral attack where it granted alimony on prayer which asked for divorce "and other relief" as was just.

Cited in note in 11 L.R.A.(N.S.) 807, on default judgments beyond scope of relief asked.

Disapproved in *Sache v. Wallace*, 101 Minn. 169, 11 L.R.A.(N.S.) 803, 118 Am. St. Rep. 612, 112 N. W. 386, 11 A. & E. Ann. Cas. 348, holding a default judgment in a proceeding to determine adverse claims to real property was totally void where it went beyond the prayer for relief.

Termination of action.

Cited in *Bright v. Juhl*, 16 S. D. 440, 93 N. W. 648, holding trial court could not grant a new trial after the expiration of the statutory time, for appeal from judgment.

15 S. D. 444, KIRBY v. BERGUIN, 90 N. W. 856.

Evidence to prove fraud as varying writing.

Cited in *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522, holding that evidence tending to prove fraud in obtaining note is not inadmissible as varying writing.

Constructive notice of fraud.

Cited in *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511, holding indorsee of note, having knowledge of suspicious circumstances sufficient to put ordinarily prudent person on inquiry, not bona fide holder; *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522, holding holder chargeable with notice of fraud, where he has knowledge of circumstances which followed up by inquiry would reveal fraud in obtaining note.

Cited in note in 29 L.R.A.(N.S.) 375, on what circumstances sufficient to put purchaser of negotiable paper on inquiry.

Burden of proof of good faith of holder.

Cited in *McGill v. Young*, 16 S. D. 360, 362, 92 N. W. 1066, holding burden was on indorsee to prove that he was a purchaser in good faith for value and without notice where it was shown that note was fraudulent in its inception; *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31; *Mee v. Carlson*, 22 S. D. 365, 29 L.R.A.(N.S.) 351, 117 N. W. 1033; *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522,—holding burden on holder to show bona fides, where instrument is shown to have been obtained by fraud.

15 S. D. 454, DUNN v. NATIONAL BANK, 90 N. W. 1045.

Burden of proving good faith.

Cited in *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31, holding that when fraud in inception of transaction is shown, burden of proving good faith is on purchaser.

15 S. D. 459, GARLOCK v. CALKINS, 90 N. W. 136.

15 S. D. 460, HUGHES v. RUDY, 90 N. W. 136.

15 S. D. 462, PETERSON v. PETERSON, 90 N. W. 136.

15 S. D. 464, KNAPP v. SAUNDERS, 90 N. W. 137.

Presumption as to agency of bank cashier.

Cited in *First Nat. Bank v. Bakken*, 17 N. D. 224, 116 N. W. 92, holding it was a jury question whether persons shipping grain through a bank cashier and drawing against the proceeds dealt with the bank or with the cashier individually.

15 S. D. 466, DENNETT v. REISDORFER, 90 N. W. 138.

15 S. D. 470, EDMONDS v. RILEY, 90 N. W. 139.

Statutory requirement as to filing of decision as directory.

Cited in *Bruegger v. Cartier*, 20 N. D. 72, 126 N. W. 491; *Carney v.*

Twitchell, 22 S. D. 521, 118 N. W. 1030, holding that statute requiring filing of decision within 30 or 60 days after submission of case is directory and noncompliance does not affect judgment.

15 S. D. 476, HERMON v. SILVER, 90 N. W. 141.

Review of defective bill of exceptions.

Cited in Clark v. Mitchell, 17 S. D. 430, 97 N. W. 358, holding bill of exceptions which failed to give particulars in which evidence was insufficient and not specifying error of law was not cured by assignment of errors presented for first time on appeal.

15 S. D. 480, TAYLOR v. VANDENBERG, 90 N. W. 142.

Necessity for findings upon material issue of fact.

Cited in McPherson v. Swift, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76, holding it error for trial court to refuse or fail to find upon any material issue of fact.

15 S. D. 486, YANKTON SAV. BANK v. GUTTERSON, 90 N. W. 144.

Construction of statute adopted from another state.

Cited in State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 360, holding that constitutional or statutory provisions are presumed to have been adopted with construction of courts of state whence they came.

Effect of death of party after judgment.

Cited in note in 61 L.R.A. 375, on effect of death of party after judgment upon remedy by execution.

15 S. D. 494, BON HOMME COUNTY v. BERNDT, 90 N. W. 147.

Class legislation.

Cited in Re Watson, 17 S. D. 486, 97 N. W. 463, 2 A. & E. Ann. Cas. 321, sustaining statute requiring licensing of peddlers except those handling certain commodities.

Payment for maintenance of person at state institution.

Cited in Kaiser v. State, 80 Kan. 364, 24 L.R.A.(N.S.) 295, 102 Pac. 454, sustaining statute which charged taxable insane person's estate with his maintenance in a state institution; State ex rel. McCue v. Lewis, 18 N. D. 125, 119 N. W. 1037, holding valid, act requiring county to pay for its indigent insane in state hospital.

15 S. D. 501, CHICAGO & N. W. R. CO. v. FAULK COUNTY, 90 N. W. 149.

Outstanding debts of county.

Cited in Fremont, E. & M. Valley R. Co. v. Pennington County, 20 S. D. 270, 105 N. W. 929, on outstanding debts as meaning bonded debts only in determining annual tax levy to meet same.

15 S. D. 504, STATE v. KEMMERER, 90 N. W. 150.

15 S. D. 507, DISTAD v. SHANKLIN, 90 N. W. 151.

Telegram as evidence.

Cited in note in 110 Am. St. Rep. 768, on admissibility of telegrams as evidence.

Exclusion of evidence as reversible error.

Cited in Breeden v. Martens, 21 S. D. 357, 112 N. W. 960, holding error in excluding evidence not reversible, where it tends to prove facts established by other competent evidence.

15 S. D. 513, HOME INVEST. CO. v. CLARSON, 90 N. W. 153,

Later appeal in 21 S. D. 72, 109 N. W. 507.

Title by foreclosure sale.

Cited in MacGregor v. Pierce, 17 S. D. 51, 95 N. W. 231, holding until the sheriff's deed is made to the purchaser the legal title remains in the mortgagor the certificate of sale constituting only a lien.

Laches in claiming right of subrogation.

Cited in Anthes v. Schroeder, 74 Neb. 172, 103 N. W. 1072, holding right of subrogation was not barred by laches where the rights of third parties were not shown to have been prejudiced by the alleged laches.

15 S. D. 519, LONE TREE DITCH CO. v. CYCLONE DITCH CO.

91 N. W. 352, Modified on rehearing in — S. D. —, 128 N. W. 596.

Commencement of entryman's rights in public lands.

Followed in Stenger v. Tharp, 17 S. D. 13, 94 N. W. 402, holding rights of a riparian owner to use waters of a stream for irrigation attach at the time of his settlement upon the land for the purpose of holding same as homestead or pre-emption.

Cited in Nicholson v. Congdon, 95 Minn. 188, 103 N. W. 1034, holding application to locate land though unaccompanied by purchase price vested legal and equitable rights in entryman.

Common law of waters and irrigation.

Cited in Crawford Co. v. Hathaway, 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 781, holding the common law was not displaced in arid regions by the necessity of rising water for irrigation.

15 S. D. 530, J. I. CASE THRESHING MACH. CO. v. EICHINGER,

91 N. W. 82.

Amendment of pleading by additional allegations.

Cited in Hardman v. Kelley, 19 S. D. 608, 104 N. W. 272, holding denial of motion for leave to amend by inserting an additional defense because inconsistent with prior defense was misuse of court's discretion; Kennedy v. Agricultural Ins. Co. 21 S. D. 145, 110 N. W. 116, holding denial of motion to put case over term not reversible error, where defendant is not surprised or rendered unable to try case by amendment of complaint.

Necessary showing for continuance.

Cited in Deere & W. Co. v. Hinckley, 20 S. D. 359, 106 N. W. 138, holding

showing was insufficient where affidavit for a continuance failed what effort had been made to procure the attendance of witnesses sought and no reasons given why their depositions had not been taken, if their attendance could not be procured.

New notice of trial on amended complaint.

Cited in *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197, holding it unnecessary to serve new notice of trial and new note of issue after filing an amended complaint.

Agreement "for" sale with warranty.

Cited in *Baskerville v. Johnson*, 20 S. D. 88, 104 N. W. 913, holding contract was "an agreement for sale" with a warranty and the right of inspection and rescission in case of a breach where it contained written guaranty that machine was "well made and of good material" and that title and right of possession remained in vendor until full settlement according to terms.

15 S. D. 541, FRIEDERICH v. FERGEN, 91 N. W. 328.

15 S. D. 547, DOWAGIAC MFG. CO. v. HIGINBOTHAM, 91 N. W. 330.

Countermand of executory contract of sale.

Cited in note in 94 Am. St. Rep. 125, on countermand of executory contract of sale.

Distinguished in *International Harvester Co. v. Hayworth*, 23 S. D. 514, 122 N. W. 412, holding that vendor cannot recover price on refusal of vendee to accept offer of delivery by vendor's agent upon compliance with conditions as to payment.

15 S. D. 551, PARK v. ROBINSON, 91 N. W. 344.

Effect of noncompliance with statute relating to chattel mortgages.

Cited in note in 137 Am. St. Rep. 486, on effect of failure to execute and record chattel mortgage as prescribed by statute.

Extinction of judgment against principal by sureties' payment.

Cited in note in 68 L.R.A. 529, 533, on extinction of judgments against principals by sureties' payment.

Presumption from form of judgment in claim and delivery.

Cited in *Larson v. Hanson*, 21 N. D. 411, 131 N. W. 229, holding that judgment for value of property, in claim and delivery, does not, as against sureties, raise presumption that property had been lost or destroyed.

15 S. D. 559, STATE EX REL. BROWN v. PIERRE, 90 N. W. 1047.

Proof of generally denied allegations.

Cited in *Baker v. Warner*, 16 S. D. 292, 92 N. W. 393, holding indorsement must be proved where complaint alleged the note was endorsed by payee and the answer having denied all allegations of the complaint except such as it specifically admitted did include such indorsement.

Review of evidence upon appeal from judgment alone.

Cited in *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605, holding sufficiency of evidence could not be reviewed upon appeal from judgment alone where judgment was entered before order denying motion for new trial.

Specification of errors.

Cited in *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687, on necessity for specification of particulars as to insufficiency of evidence.

Collateral attack on validity of municipal act.

Cited in *State v. Several Parcels of Land*, 80 Neb. 11, 113 N. W. 810, on the laches of an individual barring him from attacking a municipal incorporation.

15 S. D. 572, DYEA ELECTRIC LIGHT CO. v. EASTON, 90 N. W. 859.

Rejection of bill of exceptions for erasures.

Explained in *Kelly v. Wheeler*, 22 S. D. 611, 119 N. W. 994, holding that proposed bill of exceptions duly settled will not be rejected in appellate court for few unimportant erasures of notation of exceptions.

15 S. D. 574, HILL v. WHALE MIN. CO. 90 N. W. 853.

Review of court findings.

Cited in *Carlson v. Stuart*, 22 S. D. 560, 119 N. W. 41, 18 A. & E. Ann. Cas. 285, holding that finding of court will not be disturbed where there is evidence to support it.

Distinguished in *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646, holding on verdict the evidence will be reviewed simply to ascertain whether there was sufficient legal evidence to support the verdict assuming it to be uncontradicted.

15 S. D. 580, STATE v. DE MASTERS, 90 N. W. 852.

Withdrawal of evidence to cure error of admission.

Cited in *State v. Rees*, 40 Mont. 571, 107 Pac. 893, holding incompetent hearsay testimony though withdrawn from jury was prejudiced where it was the only direct evidence showing malice.

Evidence admissible in prosecution for incest.

Cited in notes in 26 L.R.A.(N.S.) 466, on admissibility of evidence of prior or subsequent intercourse in prosecution for incest; 111 Am. St. Rep. 29, on crime of incest.

Admissions of co-party.

Cited in *Peterson v. State*, 84 Neb. 76, 120 N. W. 1110, holding corroborative declarations of woman in an incest prosecution were inadmissible if made in the absence of the defendant; *Skidmore v. State*, 57 Tex. Crim. Rep. 497, 26 L.R.A.(N.S.) 466, 123 S. W. 1129, on same point.

15 S. D. 586, LEE v. MELLETTE, 90 N. W. 855.

15 S. D. 588, IOWA & D. TELEPH. CO. v. SCHAMBER, 91 N. W. 78.

Pleading amount of legal tax in action for relief from illegal tax.

Cited in *Ricketts v. Crewdson*, 13 Wyo. 284, 79 Pac. 1042, holding complaint for injunction was defective which omitted amount of taxes appearing on tax roll against plaintiff on personal property where such omission rendered it impossible to determine whether his tender covered all plaintiff's taxes.

Injunction against collection of tax.

Cited in note in 16 L.R.A.(N.S.) 811, on injunction against collection of tax on excessive assessment.

15 S. D. 601, REICHELT v. PERRY, 91 N. W. 459.

Nature of action to determine adverse claim to land.

Cited in *Burleigh v. Hecht*, 22 S. D. 301, 117 N. W. 367, holding action to determine adverse claims to land, one at law.

15 S. D. 606, LOOMIS v. BROWN COUNTY, 91 N. W. 399.

15 S. D. 611, NORDIN v. BERNER, 91 N. W. 308.

Review of findings on appeal.

Cited in *Clark v. Mitchell*, 17 S. D. 430, 97 N. W. 358, holding facts presumptively justified the conclusions of law and the judgment in the absence of argument or assignment of error raising their sufficiency and where the bill of exceptions contained no such specifications; *Edgemont Implement Co. v. N. S. Tubbs Sheep Co.* 22 S. D. 142, 115 N. W. 1130, holding that assignments of error not discussed in appellant's brief will be presumed to have been abandoned.

15 S. D. 613, STATE v. PAGE, 91 N. W. 313.

What are deadly weapons.

Cited in note in 21 L.R.A.(N.S.) 507, on what weapons may be considered deadly under law of homicide and assault.

15 S. D. 619, BOHL v. DELL RAPIDS, 91 N. W. 315.

Municipal liability for defects in streets.

Cited in notes in 103 Am. St. Rep. 273, on municipal liability to persons injured by defects in, or want of, repair of, streets; 13 L.R.A.(N.S.) 1167, on duty to light streets; 20 L.R.A.(N.S.) 683, on liability of municipality for defects or obstructions in streets.

Negligence and contributory negligence as fact questions.

Cited in *Jones v. Sioux Falls*, 18 S. D. 477, 101 N. W. 43, holding it was for the court to determine whether the evidence, where undisputed, was sufficient to authorize a finding of negligence; *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972, holding the question of negligence or contributory negligence were for the jury unless the facts were such that fair-minded men could draw but one conclusion therefrom.

15 S. D. 628, STATE v. WRIGHT, 91 N. W. 311.

Proof of amount in prosecution for grand larceny.

Cited in *State v. Montgomery*, 17 S. D. 500, 97 N. W. 716, holding evidence of larceny of two hogs as described and worth more than \$20 sufficient though there was variance as to two others and value of all was laid at \$40.

15 S. D. 635, CATLETT v. STOKES, 91 N. W. 310.

15 S. D. 638, STATE v. BERGLAND, 91 N. W. 318.

15 S. D. 642, LEE v. NEUMEN, 91 N. W. 320.

15 S. D. 648, DOYLE v. EDWARDS, 91 N. W. 322.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 16 S. D.

16 S. D. 1, COLE v. BAKER, 91 N. W. 324.

Limitation of actions.

Cited in note in 136 Am. St. Rep. 488, on limitation of actions on obligations payable on or after demand.

— To recover money collected by agent.

Cited in *Somerville v. Missouri Glass Co.* 144 Mo. App. 463, 129 S. W. 474, holding that statute of limitations does not begin to run on principals right of action against agent until accounting.

Cited in note in 17 L.R.A. (N.S.) 664, as to when statute commences to run against action to recover money collected by agent.

16 S. D. 6, STATE v. HALL, 65 L.R.A. 151, 91 N. W. 325.

Change of venue in criminal case.

Cited in *State v. Winchester*, 18 N. D. 534, 122 N. W. 1111 (rereported in 19 N. D. 756), denying change of venue in prosecution for illegal sale of liquors on ground that impartial trial cannot be had; *State v. Callahan*, 18 S. D. 145, 99 N. W. 1099, holding that where the affidavits showed that the prejudice was confined to a limited portion of the county and the record shows that an impartial jury was quickly secured, there was no error in overruling an application for a change of venue.

Challenge of special panel for bias of sheriff.

Cited in *State v. Hayes*, 23 S. D. 596, 122 N. W. 652, holding overruling of challenge to special panel for bias of sheriff, not error, where sheriff did not confer with or attempt to influence jurors, though he had formed opinion.

Competency of witness as to handwriting.

Cited in *Woolbridge v. State*, 49 Fla. 137, 38 So. 3, holding that one

who had opportunities for becoming acquainted with the handwriting of the accused was competent to testify as to the genuineness of the signature on the alleged forged instrument, where the only objection to the testimony was that the witness was not competent to testify as an expert; *Frank v. Berry*, 128 Iowa, 223, 103 N. W. 358, holding that a witness was competent to testify as to the handwriting of the defendant, though the only chance that he had to observe his writing was in seeing him write a receipt and sign it.

16 S. D. 17, EPIPHANY ROMAN CATHOLIC CHURCH v. GERMAN INS. CO. 91 N. W. 332.

16 S. D. 25, HEYLER v. WATERTOWN, 91 N. W. 334.

Municipal duty with respect to drainage.

Cited in note in 61 L.R.A. 674, on duty and liability of municipality with respect to drainage.

General laws as applying to cities operating under special charters.

Cited in *Coughran v. Huron*, 17 S. D. 271, 96 N. W. 92, holding that the statute providing for the removal of unplatted lands from cities, applies to cities operating under special charters, since it does not make an exception in their favor.

"Any" as meaning "every."

Cited in *Winnebago County State Bank v. Hustel*, 119 Iowa, 115, 93 N. W. 70, holding that where the note sued on provided "that the drawers and indorsers waive * * * all defenses on the ground of any extension of the time of payment," the word any, is analogous to every.

16 S. D. 29, MAGOWAN v. GRONEWEG, 91 N. W. 335.

16 S. D. 33, PATTERSON v. JOS. SCHLITZ BREWING CO. 91 N. W. 336.

Liability for dangerous premises.

Cited in *Waller v. Ross*, 100 Minn. 7, 12 L.R.A.(N.S.) 721, 117 Am. St. Rep. 661, 110 N. W. 252, 12 A. & E. Ann. Cas. 715, holding defendant liable for injuries to a traveller upon a public highway caused by the falling of an awning from defendant's building; *Waterhouse v. Jos. Schlitz Brewing Co.* 16 S. D. 592, 94 N. W. 587, holding defendant liable for the death of a person lawfully in front of the defendant's building when it collapsed, though the building had been leased to another who was in possession.

Cited in notes in 92 Am. St. Rep. 527, 533, 537, on liability to third persons of lessors, of real or personal property; 113 Am. St. Rep. 1010, on presumption of negligence from happening of accident causing personal injuries; 17 L.R.A.(N.S.) 1163, on liability of owner for injury to tenant's guests or employees by defect in premises.

16 S. D. 46, PIERSON v. HICKEY, 91 N. W. 339.**Recording statutes.**

Cited in *Pringle v. Canfield*, 19 S. D. 506, 104 N. W. 223, holding that the statute providing that a conditional sale shall vest the title in the vendee as to third persons with notice thereof, unless the contract of sale be in writing and recorded, is constitutional as not depriving persons of property without due process of law.

16 S. D. 49, BANK OF SPEARFISH v. GRAHAM, 91 N. W. 340.**Statement or expression of opinion, as a question for the jury.**

Cited in *Larson v. Calder*, 16 N. D. 248, 113 N. W. 103, holding that whether a representation by the seller in answer to a question, was a warranty or a mere expression of opinion, is a question for the jury.

16 S. D. 58, DOERING v. JENSEN, 91 N. W. 343.

Followed without discussion in *Braudreith v. Minneapolis & St. L. R. Co.* 17 S. D. 569, 97 N. W. 1119.

Sufficiency of undertaking on appeal from justice court.

Cited in *Miller v. Lewis*, 17 S. D. 448, 97 N. W. 364, holding that where the undertaking on appeal from justice court contained no provision for the payment of costs on appeal, the circuit court is without jurisdiction.

Distinguished in *Wasem v. Bellach*, 17 S. D. 506, 97 N. W. 718, holding that where the undertaking on appeal contained no provision for the payment of costs on appeal, that the circuit court had jurisdiction sufficient to permit the appellant to file a new undertaking or amend the old.

16 S. D. 62, STATE v. VINCENT, 91 N. W. 347.**Sufficiency of foundation for evidence, as question for jury.**

Cited in *State v. Doris*, 51 Or. 136, 16 L.R.A.(N.S.) 660, 94 Pac. 44, holding that if it is disputed whether the deceased was in the proper frame of mind to make a dying declaration, the question should have been submitted to the jury.

Sufficiency of property to support indictment for larceny.

Cited in *People v. Nunley*, 142 Cal. 105, 75 Pac. 676, holding that where one partner had the possession, control, and management of the stolen horse, which in fact belonged to the firm, it was sufficient in an indictment for larceny of the horse to allege ownership in such partner.

Cited in note in 21 L.R.A.(N.S.) 312, as to whether indictment involving felonious taking may lay ownership in one in possession as agent, bailee, etc.

Distinguished in *State v. Ham*, 21 S. D. 598, 114 N. W. 713, holding that under information for larceny insufficiently identifying property, evidence of different ownership than alleged is fatal variance.

**16 S. D. 73, KELLY v. FARGO MERCANTILE CO. 91 N. W. 350.
Dak. Rep.—70.**

16 S. D. 78, STATE v. McDONALD, 91 N. W. 447.

Sufficiency of indictment charging commission of offense "on or about" a certain time.

Distinguished in *Morgan v. State*, 51 Fla. 76, 40 So. 828, 7 A. & E. Ann. Cas. 773, holding that an information or indictment charging that the offense was committed on or about, is not sufficient, under the common law rule.

Sufficiency of verdict, "Guilty as charged."

Cited in *State v. Hayes*, 17 S. D. 128, 95 N. W. 296, holding that where the information stated a charge amounting only to rape in the second degree as defined by the statute, the verdict finding defendant guilty as charged was sufficient.

Error in refusing new trial for misconduct of juror.

Cited in *State v. Bobidou*, 20 N. D. 518, 128 N. W. 1124, holding that refusal of new trial for misconduct of juror will not be reversed, except in case of abuse of discretion by trial court.

16 S. D. 86, OEHLER v. BIG STONE CITY, 91 N. W. 450.

Followed without discussion in *Camus v. Big Stone City*, 16 S. D. 133, 91 N. W. 1126.

16 S. D. 92, COOK v. SHEEHAN, 91 N. W. 452.**16 S. D. 96, WILSON v. McWILLIAMS, 91 N. W. 453.**

Construing deed to be mortgage.

Cited in *Krug v. Kautz*, 21 S. D. 461, 113 N. W. 623, holding that absence of written obligation is of no great significance in determining whether deed is mortgage.

16 S. D. 109, McGRAY v. MONARCH ELEVATOR CO. 91 N. W. 457.

Monuments as controlling in location of boundary lines.

Cited in *Propper v. Wohlwend*, 16 N. D. 110, 112 N. W. 967, holding that where the original monuments can be located definitely, they control absolutely over other evidence including plats and field notes; *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646, sustaining an instruction that if there was a discrepancy between the field notes and the actual location of the corner upon the ground, the latter prevails.

Presumption of correctness of findings on appeal.

Cited in *Lee v. Dwyer*, 20 S. D. 464, 107 N. W. 674; *Jackson v. Prior Hill Min. Co.* 19 S. D. 453, 104 N. W. 207,—holding that the findings of the court of referee are presumptively correct and will not be disturbed on appeal unless there is a preponderance of evidence against them; *Breedon v. Martens*, 21 S. D. 357, 112 N. W. 960, holding that findings of court must stand, unless evidence clearly preponderates against them.

16 S. D. 113, CORNELIUS v. FERGUSON, 91 N. W. 460, Reversed on rehearing in 17 S. D. 481, 97 N. W. 388, Mandamus to compel trial after remittitur in 18 S. D. 38, 99 N. W. 84, Later appeal in 23 S. D. 187, 121 N. W. 91.

Validity of tax deed reciting sale in gross.

Cited in *North Real Estate Loan & T. Co. v. Billings Loan & T. Co.* 36 Mont. 356, 93 Pac. 40, holding that a tax deed which showed that several disconnected town lots were assessed together and sold for taxes en masse, the deed was void under the statute providing that each tract should be sold separately.

16 S. D. 118, STAFFORD v. LEVINGER, 102 AM. ST. REP. 686, 91 N. W. 462, 1 A. & E. ANN. CAS, 132, Later appeal in 20 S. D. 333, 106 N. W. 133.

Right of action in wife for damages resulting from sale of liquor to the husband.

Followed in *Garrigan v. Thompson*, 17 S. D. 132, 95 N. W. 294, holding that the widow has a right of action for loss of support, under the statute giving the wife a cause of action for all damages resulting from the sale of intoxicating liquor to the husband, where the husband died as a result of such sale.

Cited in *Bistline v. Ney Bros.* 134 Iowa, 172, 13 L.R.A.(N.S.) 1158, 111 N. W. 422, 13 A. & E. Ann. Cas. 196, holding person selling husband intoxicating liquors, liable for the death of the husband by suicide, under a statute giving the wife a cause of action for all damages resulting from a sale of liquors to the husband.

— Validity of act.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that the statute of 1897 giving the wife a cause of action for all damages resulting from a sale of intoxicating liquors to the husband, is valid; *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150, on constitutionality of civil damage act.

16 S. D. 126, F. C. AUSTIN MFG. CO. v. TWIN BROOKS TWP. 91 N. W. 470.

Powers of town supervisors.

Followed with approval in *Huston v. Sioux Falls Twp.* 17 S. D. 280, 96 N. W. 88, holding that neither the board of supervisors nor any member thereof cannot enter into a contract with any person for the repair of a road whereby a debt will be created, even though the town accepts the benefits of the contract it will not be liable.

16 S. D. 133, CAMUS v. BIG STONE CITY, 91 N. W. 1126.

16 S. D. 133, HYDE v. EWERT, 91 N. W. 474.

Determining total municipal indebtedness.

Cited in *Vallelly v. Park Comrs.* 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111

N. W. 615, holding that the debts of the school district cannot be considered when computing the total indebtedness of the city; *Ewert v. Mallery*, 16 S. D. 151, 91 N. W. 479, holding that funding bonds exchanged at par, bearing a reduced rate of interest, do not increase the debt of the municipality, and so cannot be considered in computing the total indebtedness of the same; *Walling v. Lummis*, 16 S. D. 349, 92 N. W. 1063, holding that the issuance of funding bonds bearing interest less than the warrants to be refunded, do not increase the indebtedness of the city and cannot be considered in computing the total indebtedness of the same; *Williamson v. Aldrich*, 21 S. D. 13, 108 N. W. 1063, holding that sinking fund applicable to bonded indebtedness not yet matured should be deducted in determining debt limit.

16 S. D. 151, EWERT v. MALLERY, 91 N. W. 479.

Determining total municipal indebtedness.

Cited in *Walling v. Lummis*, 16 S. D. 349, 92 N. W. 1063, holding that funding bonds bearing a lesser rate of interest than the warrants to be refunded, do not increase the indebtedness of the city so that they cannot be considered in determining the total indebtedness of the city.

16 S. D. 159, LEAD v. KLATT, 91 N. W. 582.

16 S. D. 162, THEO. HAMM BREWING CO. v. FOSS, 91 N. W. 584.

Necessity of assent of voters for licensing of sale of liquors.

Cited in *State ex rel. Crothers v. Barber*, 19 S. D. 1, 101 N. W. 1078, holding that the assent of the voters to the granting of licenses to sell intoxicating liquors, under the statutes, gives assent only to the sales for the ensuing year and the question must be annually submitted and the assent secured if possible; *State v. McIlvenna*, 21 S. D. 489, 113 N. W. 878, holding sale of liquors prohibited within municipality, unless authorized by majority of voters.

16 S. D. 166, STATE v. PRITCHARD, 91 N. W. 583.

16 S. D. 170, STATE v. HALPIN, 91 N. W. 605.

Admissibility of evidence tending to prove commission of other crimes.

Cited in *State v. Stevens*, 16 S. D. 309, 92 N. W. 420, holding that in a prosecution of a bank cashier for receiving money in an insolvent bank, false statements of the condition of the bank made by the cashier, are admissible as a part of the *res gestae*, and bear directly upon the crime charged, though it tends to prove another crime; *State v. Coleman*, 17 S. D. 594, 98 N. W. 175, holding that in a prosecution for murder, where it was alleged that the motive was the securing of insurance money, it was proper to admit evidence showing that the application for additional insurance and like papers were forged by the defendant; *State v. Jack-*

son, 21 S. D. 494, 113 N. W. 880, 16 A. & E. Ann. Cas. 87, holding prior false reports admissible, in prosecution of bank cashier for making false reports to state examiner.

Cited in note in 62 L.R.A. 315, on evidence of other crimes in criminal cases.

Meaning of "feloniously."

Cited in *State v. Hughes*, 31 Nev. 270, 102 Pac. 562, holding word "feloniously" in indictment for assault to rob, sufficient averment of intent; *McGinnis v. State*, 16 Wyo. 72, 91 Pac. 936 (dissenting opinion), on the meaning of the word, feloniously.

16 S. D. 178, MALE v. HARLAN, 91 N. W. 1117.

16 S. D. 180, STATE v. KIEFER, 91 N. W. 1117, 1 A. & E. ANN. CAS. 268, 12 AM. CRIM. REP. 619.

Affidavit of jurors to impeach verdict.

Cited in *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527, holding affidavits of jurors inadmissible to show that juror was intoxicated during trial.

Communication by judge with jury as prejudicial error.

Cited in note in 17 L.R.A.(N.S.) 610, on effect of judge communicating with jury, not in open court.

16 S. D. 185, APLAND v. POTT, 92 N. W. 19.

Subjects reviewable on the appeal of an equitable action.

Cited in *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14, holding the conduct of the court in an action for the foreclosure of a mortgage in the submission of issues to the jury, the conduct of the counsel and of the jury were not subject to review on appeal; *Lellman v. Mills*, 15 Wyo. 149, 87 Pac. 985, holding the misdirection of the jury in an equitable action to set aside a chattel mortgage was not grounds for reversal.

16 S. D. 198, WOODCOCK v. REILLY, 92 N. W. 10.

16 S. D. 206, HOLLISTER v. DONAHOE, 92 N. W. 12.

16 S. D. 210, MOEN v. MOEN, 92 N. W. 13.

Legitimation of children to inherit from father.

Cited in *Townsend v. Meneley*, 37 Ind. App. 127, 74 N. E. 274, holding under a statute providing that an illegitimate child might inherit from its father upon his acknowledging such child during his lifetime, a child acknowledged prior to the date of the statute might inherit.

Vesting of right to inherit.

Cited in *Morin v. Holliday*, 39 Ind. App. 201, 77 N. E. 861, holding no vested right to inherit exists until the death of the ancestor.

Conflict of laws as to land.

Cited in *Dal v. Fischer*, 20 S. D. 426, 107 N. W. 534, holding the va-

lidity of a contract for the sale of real property situated in this state where it is to be performed will be determined according to the laws of this state although executed in another state.

16 S. D. 219, STATE EX REL HAYES v. BOARD OF EQUALIZATION, 92 N. W. 16.

16 S. D. 228, STATE v. FORD, 92 N. W. 18.

16 S. D. 231, LOVEJOY v. CAMPBELL, 92 N. W. 24.

Liability for servant's negligence while on own business.

Cited in note in 9 L.R.A.(N.S.) 1034, 1035, on liability for injury by horse or automobile used by servant for own purposes.

16 S. D. 241, HUNT v. NORTHWESTERN MORTG. TRUST CO. 92 N. W. 23.

16 S. D. 244, THOMPSON v. DONAHOE, 92 N. W. 27.

16 S. D. 248, DYE v. BANK OF PLANKINGTON, 92 N. W. 28.

16 S. D. 252, ELFRING v. NEW BIRDSALL CO. 92 N. W. 29.
Appeal from taxation of costs in 17 S. D. 350, 96 N. W. 703.

16 S. D. 261, HEDLUN v. HOLY TERROR MIN. CO. 92 N. W. 31.

Right to attack the validity of release.

Cited in *St. Louis & S. F. R. Co. v. Richards*, 23 Okla. 256, 23 L.R.A.(N.S.) 1032, 102 Pac. 92, holding in an action for personal injuries a plaintiff is not precluded from attacking a release fraudulently obtained and set up as a defense on the ground that he had not restored or tendered back the amount received by him at the time of the execution of the lease.

Necessity that assignments of error correspond with the specifications of error on motion for new trial.

Cited in *Davis v. Holy Terror Min. Co.* 20 S. D. 399, 107 N. W. 374, holding it would be presumed that an assignment of error corresponded with the specifications of error in the bill of exceptions or statement of the case upon which the motion for a new trial was based.

Duty to warn servant of dangers.

Cited in note in 19 L.R.A.(N.S.) 998, on duty to warn servant engaged in blasting of dangers therefrom.

16 S. D. 285, SCOTT v. GAGE, 92 N. W. 37.

Consideration of assignments of error not discussed in brief.

Cited in *Edgemont Implement Co. v. N. S. Tubbs Sheep Co.* 22 S. D.

142, 115 N. W. 1130, holding that assignments of error not discussed in appellant's brief will not be considered on appeal.

16 S. D. 287, SPENCER v. FORCHT, 92 N. W. 392.

16 S. D. 292, BAKER v. WARNER, 92 N. W. 393.

Sufficiency of proof of execution of note.

Cited in *Bruce v. Wanzer*, 18 S. D. 161, 112 Am. St. Rep. 788, 99 N. W. 1102, holding where the execution of notes is denied the burden is on the complainant not only to prove the existence but also the execution of the notes; *Stoddard v. Lyon*, 18 S. D. 207, 99 N. W. 1116, holding the possession of a note was not sufficient proof of its execution in an action where the execution of the note was denied.

16 S. D. 297, STATE v. MELLETTE, 92 N. W. 395, Later appeal in 21 S. D. 404, 113 N. W. 83.

Protection of purchaser.

Cited in note in 32 L.R.A.(N.S.) 1047, 1050, on protection of purchaser from apparent vendee under instrument intended as mortgage.

16 S. D. 302, ALEXANDER v. RANSOM, 92 N. W. 418.

Bar of statute of limitations on foreclosure.

Cited in *Bruce v. Wanzer*, 20 S. D. 277, 105 N. W. 282, holding an action to foreclose a mortgage was not barred by the six year statutory limitation.

Cited in note in 95 Am. St. Rep. 664, on effect of bar of statute of limitations.

Competency of witnesses.

Cited in note in 29 L.R.A.(N.S.) 1181, on competency of interested witness to testify as to transactions with deceased in which he did not participate.

16 S. D. 309, STATE v. STEVENS, 92 N. W. 420.

Followed without discussion in *Mason v. Stevens*, 16 S. D. 324, 92 N. W. 424.

Insolvency of bank.

Cited in *Parriah v. Com.* 136 Ky. 77, 123 S. W. 339, holding an instruction that a bank was "insolvent" within the meaning of a statute when its assets and property are such that it cannot meet its demands in the ordinary course of business was correct.

Cited in note in 20 L.R.A.(N.S.) 444, as to when bank is insolvent within statute penalizing receipt of deposits.

Evidence of prejudice or unfriendliness on part of witness.

Cited in *State v. Kight*, 106 Minn. 371, 119 N. W. 56, holding where it is found on the cross-examination of a witness in a criminal prosecution

that he was unfriendly to the defendant it was not proper on redirect examination to allow a showing of the cause of such unfriendliness.

What is de facto corporation.

Cited in note in 118 Am. St. Rep. 255, on what constitutes a corporation de facto.

16 S. D. 320, MASON v. STEVENS, 92 N. W. 424.

16 S. D. 324, ANDERSON v. MEDBERY, 92 N. W. 1089.

16 S. D. 329, ANDERSON v. MEDBERY, 92 N. W. 1087.

16 S. D. 337, SMITH v. JONES, 92 N. W. 1084.

16 S. D. 347, MATHESON v. F. W. JOHNSON CO. 92 N. W. 1083.

Effect given to findings of sheriff's jury.

Cited in Pfeifer v. Hatton, 17 N. D. 99, 138 Am. St. Rep. 698, 115 N. W. 191, holding in an action for claim and delivery it is no defense that a sheriff's jury prior to the commencement of the action found that the title to the property was in the defendant in execution.

16 S. D. 349, WALLING v. LUMMIS, 92 N. W. 1063.

16 S. D. 356, REDER v. BELLEMORE, 92 N. W. 1065.

16 S. D. 357, PHILLIPS v. SWENSON, 92 N. W. 1065.

16 S. D. 360, MCGILL v. YOUNG, 92 N. W. 1066.

Right to disregard the uncontradicted testimony of witnesses.

Cited in Blount v. Medbery, 16 S. D. 562, 94 N. W. 428, upholding the doctrine that the testimony of a witness although not directly contradicted may be disregarded as not entitled to weight; Rochford v. Albaugh, 16 S. D. 628, 94 N. W. 701, recognizing that the uncontradicted testimony of witnesses is not conclusive upon the jury.

Distinguished in Crary v. Chicago, M. & St. P. R. Co. 18 S. D. 237, 100 N. W. 18, holding trial court properly directed a verdict for the defendants on the uncontradicted testimony of the defendant's witnesses where it was not shown that such witnesses were interested in the result of the action; Lyon v. Phillips, 20 S. D. 607, 108 N. W. 554, holding the trial court did not err in directing a verdict where the evidence was uncontradicted and there were no circumstances tending to throw any suspicion on the transaction.

Constructive notice to purchaser of negotiable paper.

Cited in note in 29 L.R.A.(N.S.) 380, on what circumstances sufficient to put purchaser of negotiable paper on inquiry.

Good faith of indorsee as jury question.

Cited in Iowa Nat. Bank v. Sherman, 19 S. D. 238, 117 Am. St. Rep.

941, 103 N. W. 19, holding where the only evidence of the good faith of a bank in the purchase of a note was the uncontradicted testimony of the president of the bank, the question of such good faith might be submitted to the jury.

Burden of proving good faith.

Cited in *Mee v. Carlson*, 22 S. D. 365, 29 L.R.A.(N.S.) 351, 117 N. W. 1033; *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522,—holding burden on indorsee to show good faith, where fraud in obtaining note is proved.

16 S. D. 365, STATE BANK v. HAYES, 92 N. W. 1068.

16 S. D. 370, CHICAGO, M. & ST. P. R. CO. v. NIELD, 92 N. W. 1069.

16 S. D. 375, LOUNSBERY v. ERICKSON, 92 N. W. 1071.

Appeal from part of order or judgment.

Cited in note in 29 L.R.A.(N.S.) 26, on right to appeal from unfavorable while accepting favorable part of decree, judgment or order.

16 S. D. 377, SAASTAD v. OKESON, 92 N. W. 1072.

Review of order refusing continuance.

Cited in *State v. Pirkey*, 22 S. D. 550, 118 N. W. 1042, 18 A. & E. Ann. Cas. 192, holding refusal of continuance not abuse of discretion, where other persons were present at place in question and swear that absent witness was not.

16 S. D. 380, PLANO MFG. CO. v. MURPHY, 102 AM. ST. REP. 692, 92 N. W. 1072.

Mistake as grounds for setting aside default judgment.

Cited in *Keenan v. Daniells*, 18 S. D. 102, 99 N. W. 853, holding a default judgment would not be set aside because of the mistaken belief of the defendant that the payment of delinquent taxes and costs was essential to a right to defend the action and she had no funds for that purpose.

Sufficiency of proof of service of process.

Cited in *Matchett v. Liebig*, 20 S. D. 169, 105 N. W. 170, holding the affidavit of the person making service of process was sufficient proof of the making thereof.

16 S. D. 383, SING YOU v. WONG FREE LEE, 92 N. W. 1073.

16 S. D. 390, ALLEN v. RICHARDSON, 92 N. W. 1075.

Recitals in order of publication.

Cited in *Pillsbury v. J. B. Streeter, Jr. Co.* 15 N. D. 174, 107 N. W. 40, considering the conclusiveness of recitals in an order of publication.

16 S. D. 395, RECKITT v. KNIGHT, 92 N. W. 1077.

Followed without discussion in *Thompson v. Roberts*, 16 S. D. 403, 92 N. W. 1079; *Sprague v. Lovett*, 20 S. D. 328, 106 N. W. 134.

Validity of tax deed.

Cited in *King v. Lane*, 21 S. D. 101, 110 N. W. 37, holding void, tax deed conforming to prior repealed statute and reciting that land sold was least quantity that would sell for amount of tax; *Battelle v. Wolven*, 22 S. D. 39, 115 N. W. 99; *Batelle v. Knight*, 23 S. D. 161, 120 N. W. 1102, 20 A. & E. Ann. Cas. 456,—holding void on face, tax deed reciting that land sold was least quantity that would sell for amount of tax.

16 S. D. 403, THOMPSON v. ROBERTS, 92 N. W. 1079.**Validity of tax deed.**

Cited in *King v. Lane*, 21 S. D. 101, 110 N. W. 37, holding void, tax deed conforming to prior repealed statute and reciting that land sold was least quantity that would sell for amount of tax; *Battelle v. Wolven*, 22 S. D. 39, 115 N. W. 99, holding void on face, tax deed reciting that land sold was least quantity that would sell for amount of tax.

16 S. D. 406, HARDING v. HARDING, 102 AM. ST. REP. 694, 92 N. W. 1080.**Alimony as lien on realty.**

Cited in notes in 102 Am. St. Rep. 703, on power of courts to create and enforce liens to secure payment of alimony; 25 L.R.A.(N.S.) 138, on money decree for alimony or separate maintenance as lien on realty.

Contempt proceedings to enforce payment of alimony.

Cited in note in 137 Am. St. Rep. 875, on contempt proceedings to enforce payment of alimony.

16 S. D. 414, HORSWILL v. FARNHAM, 92 N. W. 1082.**Application of limitations to void tax deed.**

Cited in *Batelle v. Knight*, 23 S. D. 161, 120 N. W. 1102, 20 A. & E. Ann. Cas. 456, holding that three year limitations does not run in favor of tax deed void on face.

Cited in note in 27 L.R.A.(N.S.) 348, 356, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes.

16 S. D. 417, BENNETT v. STATE, 93 N. W. 643.**Change of compensation of public officials.**

Cited in *Thomas v. State*, 17 S. D. 579, 97 N. W. 1011, holding that the legislature having once fixed the compensation of charity board members is not thereby precluded from changing it.

Cited in note in 26 L.R.A.(N.S.) 290, on applicability to nonconstitutional officer of constitutional provision against increase of salary during term.

16 S. D. 422, STATE v. FINSTAD, 93 N. W. 640.

16 S. D. 424, HENRY v. TAYLOR, 93 N. W. 641.

Proof of marriage.

Cited in *Clarke v. Barney*, 24 Okla. 455, 103 Pac. 598, holding that no presumption of marriage arises, where one party had living undivorced spouse, to knowledge of both, and their relations continued unchanged after death of said spouse; *Riddle v. Riddle*, 26 Utah, 268, 72 Pac. 1081, holding that cohabitation with one woman and holding out to the world that she is the man's wife does not amount to a common law marriage where the alleged husband cohabits with other women as plural wives.

Cited in note in 124 Am. St. Rep. 114, on common law marriages.

— Between Indians.

Cited in *Kalyton v. Kalyton*, 45 Or. 116, 74 Pac. 491, holding that testimony showing an established Indian marriage custom and compliance with that custom, is sufficient proof of a valid marriage.

Conclusiveness of findings of court.

Cited in *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding that findings of court must stand unless evidence clearly preponderates against them.

16 S. D. 433, KIEFFER v. SMITH, 93 N. W. 645.

16 S. D. 436, STATE v. McELWAIN, 93 N. W. 647.

16 S. D. 440, BRIGHT v. JUHL, 93 N. W. 648.

16 S. D. 445, FIRST NAT. BANK v. CALKINS, 93 N. W. 646,

Related case in 20 S. D. 466, 107 N. W. 675.

Correction of excessive verdict.

Cited in *Mosteller v. Holborn*, 20 S. D. 545, 108 N. W. 13, holding that court can properly reduce verdict in excess of amount asked in complaint instead of granting new trial.

16 S. D. 451, LONE TREE DITCH CO. v. RAPID CITY ELECTRIC & GASLIGHT CO. 93 N. W. 650.

Necessity for exceptions.

Cited in *Kelly v. Wheeler*, 22 S. D. 611, 119 N. W. 994, holding exceptions unnecessary to review of findings of fact or sufficiency of evidence to support them.

Rights in use of stream.

Cited in note in 7 L.R.A.(N.S.) 289, on right to use stream for power during night as well as day.

16 S. D. 462, ADVANCE THRESHER CO. v. ROCKAFELLOW, 93 N. W. 652.

Redemption by subsequent mortgagee as canceling mortgage debt.

Cited in *Work v. Braun*, 19 S. D. 437, 103 N. W. 764, holding that subsequent mortgagee does not have the right under redemption statute to redeem from purchaser when such redemption does not have the effect to satisfy any portion of his own indebtedness.

16 S. D. 465, HUNTEMER v. ARENT, 93 N. W. 653.

Right of broker to commissions on sale on different terms.

Cited in *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253, holding that vendor of land is liable for commissions named in agency contract by which agent is to obtain purchaser at stipulated terms where a purchaser is supplied who is allowed to purchase on different terms with consent of vendor who does not demand a change of agency contract; *Ball v. Dolan*, 21 S. D. 619, 15 L.R.A.(N.S.) 272, 114 N. W. 998, holding broker not entitled to commissions, where vendors sold to purchaser procured by broker at reduced price, without objection by broker; *Eggland v. South*, 22 S. D. 467, 118 N. W. 719, holding broker entitled to commissions, though vendor sold to broker's purchaser on different terms as to payments; *Walters v. Dancy*, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430, holding that broker to obtain commissions must procure purchaser ready and able to buy on prescribed terms.

Distinguished in *Ball v. Dolan*, 21 S. D. 619, 15 L.R.A.(N.S.) 272, 114 N. W. 998, where purchaser was not supplied who was willing and ready to pay stipulated price and sale was made at highest price obtainable which was less than stipulated price.

16 S. D. 471, PAULSON v. LANGNESS, 93 N. W. 655.

Action for injury or death following unlawful sale of liquor.

Cited in note in 34 L.R.A.(N.S.) 1038, on right of action in absence of civil damage act, for injury or death following unlawful sale of liquor.

Title of act.

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, holding that a provision giving married woman right of action for sale of liquor to her husband comes within an act entitled "an act to provide for licensing, restriction and regulation of sale of intoxicating liquors."

What constitutes joint tort.

Cited in *Kennedy v. Garrigan*, 23 S. D. 265, 121 N. W. 783, holding that sales by several saloon keepers to plaintiff's deceased husband does not constitute joint tort.

16 S. D. 474, WALKER v. MCCAULL, 94 N. W. 401.**16 S. D. 475, NICHOLS & S. CO. v. CUNNINGHAM, 94 N. W. 389.**

16 S. D. 481, DODSON v. CROCKER, 94 N. W. 391, Later appeal in 20 S. D. 312, 105 N. W. 929.

Conclusiveness of court's findings.

Cited in *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding that findings of court will be reversed only when evidence clearly preponderates against them.

16 S. D. 489, WELLS v. SWEENEY, 102 AM. ST. REP. 813, 94 N. W. 394.

Partition of homestead.

Cited in note in 4 L.R.A.(N.S.) 791, on partition of homestead.

Recovery for improvements by life tenant.

Cited in note in 13 L.R.A.(N.S.) 515, on right of life tenant, or one claiming under him, to recover for improvements.

16 S. D. 500, WARD v. DU PREE, 94 N. W. 397.

16 S. D. 509, ROBBINS v. WEISS, 94 N. W. 399.

16 S. D. 513, ANCIENT ORDER OF UNITED WORKMEN v. SHOBER, 94 N. W. 405.

16 S. D. 517, STATE EX REL. LA FOLLETTE v. CHICAGO, M. & ST. P. R. CO. 94 N. W. 406.

16 S. D. 526, CENTERVILLE v. OLSON, 94 N. W. 414.

Nature of proceedings for violation of ordinance.

Cited in note in 4 L.R.A.(N.S.) 783, on character of proceeding for violation of ordinance as civil or criminal.

16 S. D. 531, SHELBY v. BOWDEN, 94 N. W. 416.

Estoppel by conduct to question title.

Cited in *Murphy v. Dafoe*, 18 S. D. 42, 99 N. W. 86, holding that a patentee and those holding under him are estopped from asserting title to land abandoned for five years followed by a 23-year holding unmolested under tax deed.

Distinguished in *Kenny v. McKenzie*, 23 S. D. 111, — L.R.A.(N.S.) —, 120 N. W. 781, holding mortgagors, acquiescing in supposed valid foreclosure, not estopped from asserting their rights against purchaser at foreclosure sale.

16 S. D. 547, WELLS v. SIOUX FALLS, 94 N. W. 425.

Contraction of indebtedness beyond constitutional limit.

Cited in *Sioux Falls v. Farmers' Loan & T. Co.* 69 C. C. A. 373, 136 Fed. 721 (reversing 131 Fed. 890), holding that the Federal court is bound to follow the state decisions that a ten per cent bonded indebtedness in excess of constitutional limit for water purposes was valid.

Singleness of question submitted to voters.

Cited in note in 26 L.R.A.(N.S.) 672, on what objects or purposes may be combined in single question submitted to voters.

16 S. D. 553, RILEY v. GRANT, 94 N. W. 427.

Authority to sell land.

Cited in *Harris Bros. v. Reynolds*, 17 N. D. 16, 114 N. W. 369, holding that the statement of terms on which owner is willing to sell made to a person who stated that a purchaser might be found does not authorize the latter to obtain a purchaser and demand commission such purchaser being willing to buy on terms stated.

Cited in note in 17 L.R.A.(N.S.) 213, on power of real-estate broker to make contract of sale.

16 S. D. 558, STEARNS v. CLAPP, 94 N. W. 430.

Acceptance of offer to sell.

Cited in *Richards Trust Co. v. Beach*, 17 S. D. 432, 97 N. W. 358, holding that the acceptance of an offer to sell land for stipulated amount accompanied by a request for abstract at expense of vendor is not unconditional and does not constitute a contract.

Procurement of purchaser by broker at terms.

Cited in *Jepsen v. Marohn*, 22 S. D. 593, 21 L.R.A.(N.S.) 935, 119 N. W. 988, holding that a broker employed to find a purchaser to buy on part cash with rest on time at ten per cent does not fulfill his agreement by finding a cash purchaser; *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142, holding that specific performance will be denied, where correspondence does not show price; *Lichty v. Daggett*, 23 S. D. 380, 121 N. W. 862, holding that purchaser, agreeing to pay interest on mortgage, does not consent to proposal that he assume mortgage with interest.

16 S. D. 562, BLOUNT v. MEDBERRY, 94 N. W. 428.

Credibility of interested witness.

Cited in *Iowa Nat. Bank v. Sherman*, 19 S. D. 238, 117 Am. St. Rep. 941, 103 N. W. 19, holding that good faith of a bank in a transaction with a corporation is a question for the jury where the evidence thereof is furnished by president and cashier of bank both of whom are officers of the corporation.

16 S. D. 569, BENJAMIN v. HUSTON, 94 N. W. 584, Later phases of same case in 21 S. D. 318, 112 N. W. 842; 21 S. D. 446, 113 N. W. 459.

16 S. D. 579, CUSTER COUNTY BANK v. W. H. WALLING MERCANTILE CO. 94 N. W. 582.

16 S. D. 584, McCARTHY v. SPEED, 94 N. W. 411.

Right of executor to object to order in personal capacity.

Cited in *Meyer v. O'Rourke*, 150 Cal. 177, 88 Pac. 706, holding that an executor of an estate who is aggrieved individually in order to object thereto must connect himself with the action in his individual capacity as distinct from his capacity as representing the estate.

16 S. D. 592, WATERHOUSE v. JOS. SCHLITZ BREWING CO. 94 N. W. 587.

Review of qualification of expert witness.

Cited in *Borneman v. Chicago, St. P. M. & O. R. Co.* 19 S. D. 459, 104 N. W. 208, holding that ruling of trial court that a witness is competent to testify on speed of a passing train should only be disturbed on showing of palpable error.

16 S. D. 602, REYNOLDS v. HINRICHS, 94 N. W. 694.

Telegrams as evidence.

Cited in note in 110 Am. St. Rep. 765, on admissibility of telegrams as evidence.

16 S. D. 606, ROCHFORD v. McGEE, 61 L.R.A. 335, 102 AM. ST. REP. 719, 94 N. W. 695.

Effect of detachment from note of paper modifying terms.

Cited in note in 22 L.R.A. (N.S.) 265, on effect of detachment of paper, modifying terms bill or note upon rights of subsequent bona fide purchaser.

16 S. D. 610, GEDDIS v. FOLLIETT, 94 N. W. 431.

Change of referee's report by court.

Cited in *Babcock v. Ormsby*, 18 S. D. 358, 100 N. W. 759, on the power of the circuit court to change or modify the findings of referee on his conclusions of law.

16 S. D. 615, MURPHY v. REDEKER, 102 AM. ST. REP. 722, 94 N. W. 697.

Tax deed as color of title.

Cited in *Stiles v. Granger*, 17 N. D. 502, 117 N. W. 777, holding that a good faith purchase of property at tax sale by the owner himself constitutes merely a payment of taxes for which it was sold and tax deed is invalid, constituting no title whatever.

16 S. D. 618, HOWELL v. DINNEEN, 94 N. W. 698.

16 S. D. 625, LONG v. COLLINS, 102 AM. ST. REP. 724, 94 N. W. 700.

Right to set off one judgment against another.

Cited in note in 16 L.R.A. (N.S.) 494, on right to set off judgment against another founded upon claim for exempt property or services.

16 S. D. 628, ROCHFORD v. ALBAUGH, 94 N. W. 701.

Showing to procure reversal of order granting new trial.

Cited in *State v. Crowley*, 20 S. D. 611, 108 N. W. 491, holding that in order to secure the reversal of an order granting a new trial a stronger showing and a clearer case must be made than is required to reverse an order overruling such motion; *Rex Buggy Co. v. Dineen*, 23 S. D. 474, 122 N. W. 433, holding stronger case necessary to secure reversal, where new trial was granted than when denied.

16 S. D. 631, SMITH v. TERRY PEAK MINERS' UNION, 94 N. W. 694.**16 S. D. 633, PORTLAND CONSOL. MIN. CO. v. ROSSITER, 102 AM. ST. REP. 726, 94 N. W. 702.**

Preference of directors who are creditors.

Cited in *City Nat. Bank v. Goshen Woolen Mills Co.* 35 Ind. App. 562, 69 N. E. 206, holding that the director creditors of an insolvent private corporation are not allowed to prefer themselves as creditors by their own act.

16 S. D. 639, JOHNSON v. CRESSEY, 94 N. W. 703.**16 S. D. 644, RUSSELL v. DEADWOOD DEVELOPMENT CO. 94 N. W. 693.****16 S. D. 644, CHICAGO, M. & ST. P. R. CO. v. BRINK, 94 N. W. 422.**

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 17 S. D.

17 S. D. 1, RE OLSON, 94 N. W. 421.

17 S. D. 7, STATE v. BURT, 62 L.R.A. 172, 106 AM. ST. REP. 759, 94 N. W. 409.

Husband or wife as competent witness against other.

Cited in *State v. Kniffen*, 44 Wash. 485, 87 Pac. 837, 12 A. & E. Ann. Cas. 113, holding first wife was not a competent witness against her husband in a prosecution for bigamy under a statute making husband or wife competent witness in prosecution for a crime committed by one against the other.

Cited in note in 2 L.R.A. (N.S.) 865, on husband or wife as witness against other in criminal case.

17 S. D. 13, STENGER v. THARP, 94 N. W. 402.

17 S. D. 25, SKELLY v. WARREN, 94 N. W. 408.

17 S. D. 31, CAMPBELL v. EQUITABLE LOAN & T. CO. 94 N. W. 401.

Right of action to quiet title.

Cited in *Burke v. Scharf*, 19 N. D. 228, 124 N. W. 79 (dissenting opinion), as to who may bring action to determine adverse claims and to quiet title.

17 S. D. 35, SAXTON v. MUSSELMAN, 95 N. W. 291.

17 S. D. 39, SCHULL v. NEW BIRDSALL CO. 95 N. W. 276.
Dak. Rep.—71. 1121

17 S. D. 44, BURGESS v. BURGESS, 95 N. W. 279.

Collusive agreement, to enable divorce.

Cited in *Wiemer v. Wiemer*, 21 N. D. 371, 130 N. W. 1015, holding that agreement which related wholly to property rights and obligations of respondent toward adopted daughter could not be termed collusion.

17 S. D. 51, MCGREGOR v. PIERCE, 95 N. W. 281.

Necessity for service of notice of intention to appeal.

Cited in *Traxinger v. Minneapolis, St. P. & S. Ste. M. R. Co.* 23 S. D. 90, 120 N. W. 770, holding service on adverse party of notice of intention prerequisite to motion for new trial.

Redemption by prior lien holder.

Cited in *North Dakota Horse & Cattle Co. v. Serungard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453, holding a prior lienor being not entitled to redeem, who nevertheless did redeem and was given a certificate of redemption stood as a redemptioner between the parties.

— Creditor.

Cited in *North Dakota Horse & Cattle Co. v. Serungard*, 17 N. D. 475, 29 L.R.A.(N.S.) 508, 117 N. W. 453, holding that person who redeems, though not entitled to by statute, is entitled to rights of redemptioner, where his payment is accepted and retained.

Explained in *Hardin v. Kelley*, 75 C. C. A. 355, 144 Fed. 353, holding creditors have not right to redeem from an execution sale of real estate unless they be of class of creditors named in the redemption law.

17 S. D. 61, GRANTZ v. DEADWOOD TERRA MIN. CO. 95 N. W. 277.**17 S. D. 67, STATE v. KIEFFER, 95 N. W. 289.**

Former acquittal as jury question.

Cited in *State v. Irwin*, 17 S. D. 380, 97 N. W. 7, holding trial court erred in refusing to submit the issue of former acquittal.

17 S. D. 72, BOARD OF EDUCATION v. MANSFIELD, 106 AM. ST. REP. 771, 95 N. W. 286.

Location of mining claims.

Cited in note in 7 L.R.A.(N.S.) 797, on location of mining claim.

17 S. D. 83, BRANNON v. WHITE LAKE TWP. 95 N. W. 284.

Running of statute of limitations against municipal obligations.

Cited in *Burleigh County v. Kidder County*, 20 N. D. 27, 125 N. W. 1063, holding that statute of limitations does not begin to run against municipal warrant until fund is provided from which it may be paid.

Cited in note in 10 L.R.A.(N.S.) 479, on beginning of statute to run against action upon obligations of municipal, or quasi municipal, body payable out of particular fund.

17 S. D. 91, LA RUE v. ST. ANTHONY & D. ELEVATOR CO. 95 N. W. 292.

Action by mortgagee for invasion of rights.

Cited in note in 109 Am. St. Rep. 446, on mortgagees' right of action against third persons for invasion of their rights.

17 S. D. 98, McPHERSON v. JULIUS, 95 N. W. 428.

Time for settling bill of exceptions.

Distinguished in Bishop & B. Co. v. Schleuning, 19 S. D. 367, 103 N. W. 387, upholding the extension of time for settling a bill of exceptions where the delay was a short one and good cause was shown therefor.

Amendment of bill of exceptions.

Cited in Tilton v. Flormann, 22 S. D. 324, 117 N. W. 377, holding that court cannot permit amendment of bill of exceptions eight months after it was settled, without good cause shown.

Validity of placer claim excessive in size.

Cited in Zimmerman v. Funchion, 89 C. C. A. 53, 161 Fed. 859, holding placer mining claim was void only as to the part in excess of the legal limit.

Cited in note in 7 L.R.A. (N.S.) 826, 827, 850, 855, 862, on location of mining claim.

Judgment as evidence.

Followed in State v. Coughran, 19 S. D. 271, 103 N. W. 31, holding a judgment was not admissible as evidence against strangers to the action.

Cited in Chapman v. Greene, 18 S. D. 505, 101 N. W. 351, holding it was error to admit judgment record in evidence against one not a party thereto and which was not a link in a chain of title.

17 S. D. 128, STATE v. HAYES, 95 N. W. 296.

17 S. D. 132, GARRIGAN v. THOMPSON, 95 N. W. 294, Related case in 20 S. D. 182, 105 N. W. 278.

Followed without discussion in Garrigan v. Huntimer, 17 S. D. 352, 96 N. W. 1135; Garrigan v. Kennedy, 17 S. D. 258, 96 N. W. 89.

Joint action under civil damage act.

Cited in Kennedy v. Garrigan, 23 S. D. 265, 121 N. W. 783, holding that civil damage act does not give right to maintain joint action against different saloon keepers whose acts contributed to injury.

17 S. D. 138, SWEATMAN v. BATHRICK, 95 N. W. 422.

Conveyance as carrying title to center of street.

Distinguished in Wegge v. Madler, 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 228, holding one who conveyed a certain tract of land beginning at a point east of the northwest corner of a lot did not convey from the center of the intersection of the streets bounding such lot.

17 S. D. 161, NEELEY v. ROBERTS, 95 N. W. 921, Later appeal in 23 S. D. 604, 122 N. W. 655.

Followed without discussion in *Meadows v. Osterkamp*, 19 S. D. 378, 103 N. W. 643.

Findings of referee.

Cited in *Babcock v. Ormsby*, 18 S. D. 358, 100 N. W. 759, holding court was without power to change or modify any act of referee, and where he was regularly appointed and substantially complied with the law his report would be accepted as a matter of course.

17 S. D. 173, WEEKS v. CRANMER, 95 N. W. 875, Affirmed on rehearing in 18 S. D. 441, 101 N. W. 32.

Proof in action to determine adverse claims to real property.

Cited in *Harmon v. Goggins*, 19 S. D. 34, 101 N. W. 1088, holding in action to determine adverse claims to real property party claiming through a deed must show a chain of title from the paramount source where he is not in possession and the parties do not claim through a common grantor.

17 S. D. 177, BOETTCHER v. THOMPSON, 95 N. W. 874, Affirmed on rehearing in 21 S. D. 169, 110 N. W. 108.

17 S. D. 179, ROOT v. SWEENEY, 95 N. W. 916.

Dismissal of action for failure to prosecute.

Cited in *Bessie v. Northern P. R. Co.* 18 N. D. 507, 121 N. W. 618, holding attorney's forgetting about it insufficient cause to prevent dismissal of cause for failure to prosecute; *Meadows v. Osterkamp*, 23 S. D. 462, 122 N. W. 419, holding void stipulation for continuance not good cause for failure to prosecute action within year.

17 S. D. 185, KELLY v. OKSALL, 95 N. W. 913, Modified in 17 S. D. 392, 97 N. W. 11.

Followed without discussion in *Kelly v. Kvello*, 17 S. D. 190, 95 N. W. 1135.

Reference of long accounts.

Cited in *Dreveskracht v. First State Bank*, 16 N. D. 555, 113 N. W. 1032, holding to authorize compulsory reference of long accounts it must affirmatively appear that the trial will necessarily require their examination; *Ewart v. Kass*, 17 S. D. 220, 95 N. W. 915, holding it was error to order reference of claim for labor for and money loaned to party and counterclaim for damages arising therefrom where pleadings showed no need for reference.

17 S. D. 190, KELLY v. KVELLO, 95 N. W. 1135.

17 S. D. 190, ALDOUS v. OLVERSON, 95 N. W. 917.

Validity of gift by husband to wife.

Cited in *Clark v. Else*, 21 S. D. 112, 110 N. W. 88, holding that hus-

band when free from debt may give property to wife, if not done to defraud future creditors.

17 S. D. 202, STATE v. WECKERT, 95 N. W. 924, 2 A. & E. ANN. CAS. 191.

Burden of proof of crime.

Cited in *State v. Schmidt*, 19 S. D. 585, 104 N. W. 259, holding burden of proof is upon the state throughout a criminal trial.

Distinguished in *State v. Calkins*, 21 S. D. 24, 109 N. W. 515, holding omission of words "beyond reasonable doubt" after phrase "if you believe defendant guilty" not reversible error where court repeatedly charged that jury must be satisfied of guilt beyond reasonable doubt.

17 S. D. 207, MURPHY v. PIERCE, 95 N. W. 925.

Color of title by tax deed.

Cited in *Murphy v. Dafee*, 18 S. D. 42, 99 N. W. 86, holding parties claiming under tax deed had color of title and such instrument was sufficient for the purpose of founding claim of adverse possession.

Cited in note in 11 L.R.A.(N.S.) 778, 785, on invalid tax deed as color of title within general statutes of limitations.

— Indian deed.

Cited in *Murphy v. Nelson*, 19 S. D. 197, 102 N. W. 691, holding deed from Indian, made before expiration of five years from issuance of patent, constituted color of title upon which to base claim of adverse possession.

17 S. D. 211, HEZEL v. SCHATZ, 95 N. W. 926.

17 S. D. 215, WAITE v. FISH, 95 N. W. 928.

17 S. D. 220, EWART v. KASS, 95 N. W. 915.

Order of reference of accounts.

Cited in *Dreveckracht v. First State Bank*, 160 N. D. 555, 113 N. W. 1032, holding it must affirmatively appear to the court that the trial will necessarily involve the examination of long accounts to authorize an order of reference.

17 S. D. 225, ANDERSON v. MATHENY, 95 N. W. 911.

Parol evidence of undisclosed principal of written contract.

Cited in *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536, holding evidence that party acted for undisclosed principal was not admissible to contradict an unambiguous written contract.

17 S. D. 235, BRINK v. MERCHANTS' & F. UNITED MUT. INS. ASSO. 95 N. W. 929.

What constitutes insurance contract.

Cited in *Nordness v. Mutual Cash Guaranty F. Ins. Co.* 22 S. D. 1, 114 N.

W. 1092, holding that there is no contract where neither amount of premium nor period of insurance is agreed upon.

17 S. D. 240, RESERVATION STATE BANK v. HOLST, 70 L.R.A. 799, 95 N. W. 931.

Title to growing crops on relinquished land.

Cited in *Moore v. Linn*, 19 Okla. 279, 91 Pac. 910, holding purchaser of relinquishment acquired absolute right of possession and title to all improvements and growing crops on relinquished lands.

17 S. D. 247, PRICE & B. CO. v. MADISON, 95 N. W. 933.

Revocation of license to enter upon lands of another.

Cited in *Polk v. Carney*, 17 S. D. 436, 97 N. W. 380, holding contract between owner and another under which that other is to cut growing timber on owner's land is revoked by conveyance of the fee; *Polk v. Carney*, 21 S. D. 295, 130 Am. St. Rep. 719, 112 N. W. 147, holding that written contract to cut timber not acknowledged is mere revocable license.

17 S. D. 256, JONES v. JONES, 95 N. W. 88, Affirmed on rehearing in 19 S. D. 372, 103 N. W. 641. Appeal from taxation of costs 19 S. D. 592, 104 N. W. 267.

17 S. D. 258, GARRIGAN v. KENNEDY, 96 N. W. 89, Related case in 20 S. D. 182, 105 N. W. 278.

17 S. D. 260, HUSTON v. SIOUX FALLS TWP. 96 N. W. 88.

17 S. D. 262, REINKE v. GERMAN EVANGELICAL LUTHERAN TRINITY CHURCH, 96 N. W. 90.

17 S. D. 267, STOCKER v. PUCKETT, 96 N. W. 91.

17 S. D. 270, EMERICK v. SWEENEY CATTLE CO. 96 N. W. 93.
Surplusage.

Cited in *Cressy v. Republic Creosoting Co.* 108 Minn. 349, 122 N. W. 484, on matters which may be expunged from a pleading by motion or ignored on demurrer.

17 S. D. 271, COUGHRAN v. HURON, 96 N. W. 92.

Detachment and exclusion of territory from incorporated cities.

Distinguished in *Weiland v. Ashton*, 17 S. D. 621, 98 N. W. 87, holding petition for the detachment and exclusion of territory from incorporated cities must be properly entitled showing parties plaintiff and defendant, and must affirmatively show that all preliminary steps have been taken in conformity with the statute.

17 S. D. 275, PETTIGREW v. MOODY COUNTY, 96 N. W. 94.**Payment of taxes due as condition of relief from illegal tax.**

Cited in McKinney v. Minnehaha County, 17 S. D. 410, 97 N. W. 15, holding it was within the equitable powers of the court to require that party attacking tax deed should reimburse the purchasers in the just amount of tax collectible and also to direct sale of premises to satisfy such purchaser's lien for such taxes; Easton v. Cranmer, 19 S. D. 224, 102 N. W. 944, holding purchaser of void tax deed was entitled to recover amount paid thereon where it was shown that property was duly assessed and legally taxable, and it was admitted that county treasurer's records showed he had paid such amount; Salmer v. Clay County, 20 S. D. 307, 105 N. W. 628, holding court on annulling on certiorari proceedings an assessment should render judgment for just amount of taxes due or order a reassessment.

17 S. D. 279, GRETHER v. SMITH, 96 N. W. 93.**17 S. D. 283, TENNEY v. RAPID CITY, 96 N. W. 96.****Res gestæ.**

Cited in Fallon v. Rapids City, 17 S. D. 570, 97 N. W. 1009, holding evidence that one claiming damages for injury had told others on returning home after the injury that it was received as result of stepping in a hole in the sidewalk, and six months later had again complained of it to parent and had told physician it was so received was inadmissible; Klingaman v. Fish & H. Co. 19 S. D. 139, 102 N. W. 601, holding it was error to permit a witness to testify to complaints or statements of physical condition, not indicative of present existing pain, and made in answer to question or interrogation descriptive or narrative in their nature.

17 S. D. 288, PEARL TWP. v. THORP, 96 N. W. 99.**17 S. D. 293, BROOKINGS LAND & T. CO. v. BERTNESS, 96 N. W. 97.****Trusts of land within statute of frauds.**

Cited in Morris v. Reigel, 19 S. D. 26, 101 N. W. 1086, holding trust need not be evidenced by any writing where it arose by operation of law out of agency agreement to purchase land and agent purchased property for principal but took it in his own name.

17 S. D. 305, WENKE v. HALL, 96 N. W. 103.**Specifications of errors on motion for new trial.**

Cited in Boettcher v. Thompson, 21 S. D. 169, 110 N. W. 108, holding sufficiency of evidence not reviewable on motion for new trial, if statement of case does not specify particulars of insufficiency.

17 S. D. 310, ROBESON v. DUNN, 96 N. W. 104.

17 S. D. 311, RAMSDELL v. DUXBERRY, 96 N. W. 132.**Waiver of jurisdictional objection by appearance.**

Cited in *Miller v. Lewis*, 17 S. D. 448, 97 N. W. 364, holding party could not question court's jurisdiction though on valid jurisdictional objection, where he had interposed a counterclaim and had trial on all the issues; *Bowler v. First Nat. Bank*, 21 S. D. 449, 130 Am. St. Rep. 725, 113 N. W. 618, holding that person, by appearing generally, is estopped from objecting to jurisdiction of court over his person; *Hart v. Wyndmere*, 21 N. D. 383, 131 N. W. 231, holding that one who voluntarily invokes jurisdiction and procures rendition of judgment, is bound thereby.

17 S. D. 314, KIRBY v. WATERMAN, 96 N. W. 129.**Power of legislature to determine priority of liens.**

Cited in *Baldwin v. Moroney*, 173 Ind. 574, 30 L.R.A.(N.S.) 761, 91 N. E. 3, holding that legislature may make drainage assessment lien superior to existing mortgage.

Cited in note in 30 L.R.A.(N.S.) 762, on superiority of lien of local assessment over prior lien.

17 S. D. 321, STATE v. MULCH, 96 N. W. 101.**Error in admission of evidence.**

Cited in *State v. Frazer*, 23 S. D. 304, 121 N. W. 790, holding it not reversible error to refuse to allow person assaulted to be asked on cross-examination whether he told accused that he intended to injure his dog.
— Of previous unchaste conduct in prosecution for statutory rape.

Cited in *State v. Smith*, 18 S. D. 341, 100 N. W. 740, holding it was not admissible either upon the question of credibility or that of guilt to show in a prosecution for statutory rape that prosecuting witness had been unchaste with other men.

17 S. D. 326, STRAIT v. EUREKA, 96 N. W. 695.**Municipal liability for defective street.**

Cited in *Fritz v. Watertown*, 21 S. D. 280, 111 N. W. 630, holding city under duty to repair sidewalk permitted to be used after street is vacated, so as to be liable for injury thereon.

Sufficiency of complaint in damage suit against municipality.

Cited in note in 21 L.R.A.(N.S.) 48, on sufficiency of allegation of facts in regard to defect in street or highway, in damage suit against municipality.

17 S. D. 331, RE BIGSLOW, 96 N. W. 698.**17 S. D. 335, BLACK v. LINN, 96 N. W. 697.****17 S. D. 339, BROOKE v. EASTMAN, 96 N. W. 699.****17 S. D. 350, ELFRING v. NEW BIRDSSELL CO. 96 N. W. 763.**

17 S. D. 352, GARRIGAN v. HUNTIMER, 96 N. W. 1135, Later appeal in 20 S. D. 182, 105 N. W. 278.

17 S. D. 353, WILLIAMSON v. LAKE COUNTY, 96 N. W. 702.

17 S. D. 357, SHIPLEY v. PLATTS, 97 N. W. 1.

Debts arising out of fiduciary capacity.

Cited in Haggerty v. Badkin, 72 N. J. Eq. 473, 66 Atl. 420, holding party acted in fiduciary capacity within the meaning of bankruptcy act exempting from discharge debts arising from misappropriation while acting in such capacity, where he received from intestate pursuant to a proposed partnership agreement funds for proposed firm and upon intestate's death converted them to his personal use.

17 S. D. 362, KIRBY v. CITIZENS' TELEPH. CO. 97 N. W. 3, 2 A. & E. ANN. CAS. 152, Later appeal in 20 S. D. 154, 105 N. W. 95.

Additional uses of highways for telephones.

Cited in Cumberland Teleph. & Teleg. Co. v. Avritt, 120 Ky. 40, 85 S. W. 204, 8 A. & E. Ann. Cas. 955; Frazier v. East Tennessee Teleph. Co. 115 Tenn. 416, 3 L.R.A.(N.S.) 323, 112 Am. St. Rep. 856, 90 S. W. 620, 5 A. & E. Ann. Cas. 838; McCann v. Johnson County Teleph Co. 69 Kan. 210, 66 L.R.A. 171, 76 Pac. 870, 2 A. & E. Ann. Cas. 156,—holding construction and maintenance of a telephone line was not an additional burden upon a highway for which adjacent owners must be compensated.

Cited in note in 106 Am. St. Rep. 264, on what are additional servitudes in highways.

Distinguished in Cosgriff v. Tri-State Teleph. & Teleg. Co. 15 N. D. 210, 5 L.R.A.(N.S.) 1142, 107 N. W. 525, holding use of public highway for telephone line was a new use for which abutting owners should be compensated.

17 S. D. 372, MORRISON v. O'BRIEN, 97 N. W. 2.

Undertaking on appeal.

Followed in Donovan v. Woodcock, 18 S. D. 29, 99 N. W. 82, holding an undertaking, filed a year after sureties were excepted to and they never having justified was insufficient where not accompanied by notice of appeal as not having been served or filed as required by the Code.

Cited in Beddow v. Flage, 20 N. D. 66, 126 N. W. 97, holding that failure to serve undertaking with notice of appeal is not jurisdictional and may be remedied.

17 S. D. 374, GREAT NORTHERN R. CO. v. VIBORG, 97 N. W. 6.

17 S. D. 378, BLACKMAN v. HOT SPRINGS, 97 N. W. 7.

Amendment of bill of exceptions.

Cited in Tilton v. Flormann, 22 S. D. 324, 117 N. W. 377, holding that

bill of exceptions cannot be amended without cause shown eight months after settlement.

17 S. D. 380, STATE v. IRWIN, 97 N. W. 7.

17 S. D. 392, KELLY v. OKSALL, 97 N. W. 11.

17 S. D. 396, IOWA NAT. BANK v. SHERMAN, 106 AM. ST. REP. 778, 97 N. W. 12, Modified on rehearing in 19 S. D. 238, 117 Am. St. Rep. 941, 103 N. W. 19.

Notice as a question for the jury.

Cited in Iowa Nat. Bank v. Sherman, 19 S. D. 238, 117 Am. St. Rep. 941, 103 N. W. 19, for the facts and also holding that where officers of a bank were also officers of a corporation interested in the collection of a certain note the question should have gone to the jury whether they thereby took constructive notice of the defenses of note.

Bona fide purchaser of negotiable instrument.

Cited in American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99, holding that it must be shown that indorsee had actual knowledge of infirmity or defect, or knowledge of such facts as to amount to bad faith to defeat recovery.

17 S. D. 407, MCKINNEY v. MINNEHAHA COUNTY, 97 N. W. 15.

17 S. D. 410, DAVIS v. JEWETT BROS. & JEWETT, 97 N. W. 16.

17 S. D. 413, SMITH v. DETROIT & D. GOLD MIN. CO. 97 N. W. 17.

Forfeiture of option contract for purchase of land.

Cited in Hanschka v. Vodopich, 20 S. D. 551, 108 N. W. 28, holding time is of the essence in an option contract that an owner will convey land if the holder of the option will pay certain specified sums at specified times.

Cited in note in 30 L.R.A.(N.S.) 873, 874, on waiver of purchaser's right to rescind land contract.

17 S. D. 424, McVAY v. BRIDGMAN, 97 N. W. 20.

Time for perfecting appeal.

Cited in Northwestern Mortg. Trust Co. v. Ellis, 20 S. D. 543, 108 N. W. 22, holding that 60 day limitation on appeals from orders denying new trial did not apply to prevent the review of evidence, where the order and the judgment were appealed together within two years.

Double appeal.

Distinguished in Gordon v. Kelley, 20 S. D. 70, 104 N. W. 605, holding appeal from judgment and from order overruling motion to vacate default and leave the answer taken by one notice of appeal and undertaking was a double appeal.

17 S. D. 430, CLARK v. MITCHELL, 97 N. W. 358.

Specification of errors on motion for new trial.

Cited in Boettcher v. Thompson, 21 S. D. 169, 110 N. W. 108, holding sufficiency of evidence not reviewable on motion for new trial, if statement of case does not specify particulars of insufficiency.

17 S. D. 432, RICHARDS TRUST CO. v. BEACH, 97 N. W. 358.

Acceptance of offer.

Cited in Phelan v. Neary, 22 S. D. 265, 117 N. W. 142, holding that offer must be accepted in terms and form submitted or there is no valid assent; Jepsen v. Marohn, 22 S. D. 593, 21 L.R.A.(N.S.) 935, 119 N. W. 988, holding that offer to sell for price probable in instalments is not accepted by offer of price in cash; Lichty v. Daggett, 23 S. D. 380, 121 N. W. 862, holding that requirement that purchaser assume mortgage with interest is not accepted by offer to allow seller the interest.

Real estate broker's compliance with terms of contract.

Cited in Jepsen v. Marohn, 22 S. D. 593, 21 L.R.A.(N.S.) 935, 119 N. W. 988, holding one who was authorized to sell land did not comply with contract of employment in furnishing a purchaser for land at price stated but on different terms.

17 S. D. 436, POLK v. CARNEY, 97 N. W. 360, Reaffirmed on later appeal in 21 S. D. 295, 130 Am. St. Rep. 719, 112 N. W. 147.

Discretion in granting or refusing new trial.

Cited in State v. Crowley, 20 S. D. 611, 108 N. W. 491, holding that an order granting or refusing new trial is peculiarly within the discretion of the court in a criminal case.

17 S. D. 439, HARRIS v. STEARNS, 97 N. W. 361, Reversed on rehearing in 20 S. D. 622, 108 N. W. 247.

Evidence of payment of taxes.

Cited in King v. Lane, 21 S. D. 101, 110 N. W. 37, holding possession of clear tax receipt conclusive evidence that all prior taxes are paid.

17 S. D. 448, MILLER v. LEWIS, 97 N. W. 364.

17 S. D. 452, GODFREY v. ROSENTHAL, 97 N. W. 365.

Right of purchaser to marketable title.

Cited in Hobart v. Frederiksen, 20 S. D. 248, 105 N. W. 168, holding purchase of land to be conveyed with clear title under contract was under no obligations to accept land until cloud on title, caused by mortgage remaining unsatisfied of record, was removed.

17 S. D. 461, SHEFFIELD v. EVELETH, 97 N. W. 367.

17 S. D. 465, HALDE v. SCHULTZ, 97 N. W. 369.

Who may contest will.

Cited in note in 130 Am. St. Rep. 188, 192, on who can contest a will.

17 S. D. 475, BAXTER v. CAMPBELL, 97 N. W. 386.

17 S. D. 481, CORNELIUS v. FERGUSON, 97 N. W. 388, Later

appeal in 23 S. D. 187, 121 N. W. 91.

17 S. D. 486, RE WATSON, 97 N. W. 463, 2 A. & E. ANN. CAS. 321.

Nature and validity of occupation tax.

Cited in Salt Lake City v. Christensen Co. 34 Utah, 38, 17 L.R.A.(N.S.) 898, 95 Pac. 523, holding a tax imposed on the carrying on of a business, trade, profession, or calling, was not a direct tax on property; Ex parte Byles, 93 Ark. 612. — L.R.A.(N.S.) —, 126 S. W. 94, holding tax on peddlers valid; State v. Wright, 53 Or. 344, 21 L.R.A.(N.S.) 349, 100 Pac. 296, holding tax on peddlers invalid.

Cited in notes in 129 Am. St. Rep. 251, on constitutional limitations on power to impose license or occupation taxes; 21 L.R.A.(N.S.) 350, on right to discriminate between harmless articles in legislation regulating peddlers.

Legislative power as to taxation.

Cited in Re McKennan, 25 S. D. 369, 33 L.R.A.(N.S.) 606, 126 N. W. 611, holding that legislature has absolute power as to taxation, except as restricted by Constitution.

17 S. D. 500, STATE v. MONTGOMERY, 97 N. W. 716.

Followed without discussion in State v. Montgomery, 17 S. D. 590, 97 N. W. 1119.

Sufficiency of allegation of ownership in information charging larceny.

Cited in State v. Faulk, 22 S. D. 183, 116 N. W. 72, holding that information charging that one stole money of one W. sufficiently alleges ownership.

17 S. D. 506, WASEM v. BELLACH, 97 N. W. 718.

17 S. D. 511, DAVIS v. BRADY, 97 N. W. 719.

17 S. D. 514, TODD v. CARR, 97 N. W. 720.

17 S. D. 514, WELCH v. SYNOGROUND, 97 N. W. 720.

17 S. D. 515, WILSON v. MITCHELL, 65 L.R.A. 158, 106 AM. ST. REP. 784, 97 N. W. 741.

Municipal liability for labor or services.

Cited in note in 27 L.R.A.(N.S.) 1125, on liability of municipality upon implied contract for labor or services.

Limitation of municipal power to contract.

Cited in Bailey v. Sioux Falls, 19 S. D. 231, 103 N. W. 16, on constructive notice of the limitation of the power of municipalities to contract.

Liability of municipality for tort.

Cited in note in 25 L.R.A.(N.S.) 246, on municipal liability for tort in connection with waterworks.

17 S. D. 522, FIRST NAT. BANK v. D. S. B. JOHNSON LAND MORTG. CO. 97 N. W. 748.

17 S. D. 529, COUGHRAN v. GERMAIN, 97 N. W. 743.

17 S. D. 535, STATE EX REL. SCHILLING v. MENZIE, 97 N. W. 745.

17 S. D. 542, ROCHFORD v. SCHOOL DIST. NO. 11, 97 N. W. 747.

17 S. D. 545, MOODY v. HOWE, 97 N. W. 841.

17 S. D. 548, TURNER TWP. v. WILLIAMS, 97 N. W. 842.

Former adjudication.

Cited in McLennon v. Fenner, 19 S. D. 492, 104 N. W. 218, holding that decree dissolving a temporary injunction could not be pleaded as former adjudication where party against whom it was urged was not a party to the action in equity for the injunction.

17 S. D. 553, MADER v. PLANO MFG. CO. 97 N. W. 843.

17 S. D. 558, SWENSON v. SWENSON, 97 N. W. 845.

17 S. D. 563, HICKOX v. BACON, 97 N. W. 847.

Necessity for written authority to agent to sell land.

Cited in Watters v. Dancy, 23 S. D. 481, 139 Am. St. Rep. 1071, 122 N. W. 430, holding that agent has no authority to himself sell owner's land, unless duly authorized in writing.

17 S. D. 569, BRANDREIT v. MINNEAPOLIS & ST. L. R. CO. 97 N. W. 1119.

17 S. D. 570, FALLON v. RAPID CITY, 97 N. W. 1009.**Res gestæ.**

Cited in *Klingaman v. Fish & H. Co.* 19 S. D. 139, 102 N. W. 601, holding evidence as to complaints or statements of physical condition or feeling made by injured person after the injury, where descriptive or narrative in their character, was inadmissible as hearsay.

17 S. D. 579, THOMAS v. STATE, 97 N. W. 1011.**Increase of officer's salary during term.**

Cited in note in 26 L.R.A.(N.S.) 290, on applicability to nonconstitutional officer of constitutional provision against increase of salary during term.

17 S. D. 588, BRITTON v. GUY, 97 N. W. 1045.**Validity of liquor law.**

Cited in *Garrigan v. Kennedy*, 19 S. D. 11, 117 Am. St. Rep. 927, 101 N. W. 1081, 8 A. & E. Ann. Cas. 1125, as upholding without question the validity of the act of 1897.

Discretion in granting or refusing liquor license.

Cited in *Centerville v. Gayken*, 20 S. D. 82, 104 N. W. 910, holding it was within the discretion of town officers to refuse to grant license to sell intoxicating liquors to one having county license.

17 S. D. 590, STATE v. MONTGOMERY, 97 N. W. 1119.**17 S. D. 590, MEADE COUNTY BANK v. DECKER, 98 N. W. 86,
Later appeal in 19 S. D. 128, 102 N. W. 597.****17 S. D. 594, STATE v. COLEMAN, 98 N. W. 175.****Comparison of papers to prove signature.**

Cited in *Mississippi Lumber & Coal Co. v. Kelly*, 19 S. D. 577, 104 N. W. 285, 9 A. & E. Ann. Cas. 449, holding answer in a case bearing admittedly genuine signature was admissible for the purpose of comparison with signature of note in question.

Cited in note in 18 L.R.A.(N.S.) 523, on admission of a document not otherwise relevant as standard of comparison of handwriting.

Admissibility of other crimes.

Cited in *State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 A. & E. Ann. Cas. 87, holding prior false reports admissible in prosecution of bank cashier for making false report to state examiner.

New trial for newly discovered evidence.

Cited in *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding new trial properly denied where new evidence does not tend to prove or disprove issue, but only to impeach witness.

17 S. D. 621, WEILAND v. ASHTON, 98 N. W. 87.

17 S. D. 625, HURON v. WILCOX, 106 AM. ST. REP. 788, 98 N. W. 88.

Title by dedication to a specified public use.

Cited in *Thornton v. Natchez*, 88 Miss. 1, 41 So. 498, holding that without express words relating to forfeitures or reversion, devotion of the land to any other purpose than that for which dedicated, land would not revert to the grantor or his heirs; *Sherman v. Sherman*, 23 S. D. 486, 122 N. W. 439, holding that conveyance, to railroad, of land for railroad purposes, for full value and not reserving right of re-entry, transfers fee.

17 S. D. 629, RICHARDSON v. DYBEDAHL, 98 N. W. 164.

17 S. D. 637, BERNARDY v. COLONIAL & U. S. MORTG. CO. 106 AM. ST. REP. 791, 98 N. W. 166, Later appeal in 20 S. D. 193, 105 N. W. 737.

Effect of recording conveyance of public land before title is perfect in grantor.

Cited in *Osceola Land Co. v. Chicago Mill & Lumber Co.* 84 Ark. 1, 103 S. W. 609, holding purchasers from grantor's heirs had notice under the statute where grantor had conveyed land belonging to the estate of which the equitable title afterwards passed to him by certificate of entry from state and such conveyance was of record; *Dale v. Griffith*, 3 Miss. 573, 136 Am. St. Rep. 546, 46 So. 543, holding grantee's title was protected by recording deed where he had purchased land from entryman after final proof had been made but not forwarded owing to failure to pay proper fees which was afterwards done; *Tilton v. Flormann*, 22 S. D. 324, 117 N. W. 377; *Simonson v. Monson*, 22 S. D. 238, 117 N. W. 133,—holding that subsequent title acquired by grantor by issuance of patent passes to grantee.

Constructive notice of mortgage not in claim of title.

Cited in *Fullerton Lumber Co. v. Tinker*, 22 S. D. 427, 118 N. W. 700, 18 A. & E. Ann. Cas. 11, holding purchaser chargeable with constructive notice of mortgages on records, not in chain of his title.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 18 S. D.

18 S. D. 1, STATE v. PHILLIPS, 98 N. W. 171, 5 A. & E. Ann. Cas. 760.

Who is accomplice.

Cited in *Levering v. Com.* 132 Ky. 666, 680, 136 Am. St. Rep. 192, 117 S. W. 253, 19 A. & E. Ann. Cas. 140, defining an accomplice.

Cited in note in 138 Am. St. Rep. 275, on who is an accomplice.

18 S. D. 11, TROY v. BROWN, 99 N. W. 76, Related case in 140 Iowa 25, 116 N. W. 128.

18 S. D. 14, HICKOK v. W. E. ADAMS CO. 99 N. W. 77.

18 S. D. 20, BLANCHETTE v. FARSON, 99 N. W. 79.

18 S. D. 25, STATE v. PORTER, 99 N. W. 80.

18 S. D. 29, DONOVAN v. WOODCOCK, 99 N. W. 82.

Failure of sureties to justify.

Cited in *Hoffman v. Lewis*, 31 Utah, 191, 87 Pac. 167, holding that appeal is rendered ineffectual where sureties fail to justify when required to do so under statute requiring filing of undertaking and making failure to justify tantamount to failure of undertaking; *Fullerton Lumber Co. v. Tinker*, 21 S. D. 647, 115 N. W. 91, holding rule that appeal becomes nullity when sureties fail to justify after exception thereto inapplicable, as no exception was taken.

18 S. D. 32, RE RENSHAW, 112 AM. ST. REP. 778, 99 N. W. 83.

Presumption favoring regularity of charge in extradition.

Cited in *Kemper v. Metzger*, 169 Ind. 112, 81 N. E. 663, holding that Dak. Rep.—72. 1137

the recitals in a warrant based on a demand accompanied by a duly authenticated copy of an indictment against person demanded that the arrest and return of the fugitive had been demanded on a criminal charge fully set forth in the demand and properly accredited as appears in the return is at least presumptive or a prima facie showing that the fugitive was properly charged in demanding state, with a crime against the laws of that state.

Cited in notes in 112 Am. St. Rep. 133, on extradition proceedings; 11 L.R.A.(N.S.) 428, on right of court of asylum state to examine sufficiency of papers charging offense for which extradition demanded.

18 S. D. 38, SCHNEPPER v. WHITING, 99 N. W. 84.

Mandamus to compel obedience by lower court.

Cited in *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796, holding that a writ of mandate will issue to compel lower court to issue execution for costs of appeal, where such court has been ordered to do so on plaintiff's award of judgment for costs on appeal.

18 S. D. 42, MURPHY v. DAFOE, 99 N. W. 86.

Followed without discussion in *Timber v. Desparois*, 18 S. D. 587, 101 N. W. 879.

Void deed as color of title.

Cited in *Bliss v. Tidrick*, 25 S. D. 533, 32 L.R.A.(N.S.) 854, 127 N. W. 852, holding deed void on face is sufficient color of title for adverse possession.

Cited in note in 11 L.R.A.(N.S.) 785, on invalid tax deed as color of title within general statutes of limitations.

Effect of abandonment on title.

Cited in note in 135 Am. St. Rep. 903, on gain or loss of title by abandonment not including questions under statute of limitations.

18 S. D. 52, BAIRD v. VINES, 99 N. W. 89.

Destruction of negotiability.

Cited in note in 125 Am. St. Rep. 209, on agreements and conditions destroying negotiability.

Conflict of laws.

Cited in notes in 67 L.R.A. 53, on how case determined when proper foreign law not proved; 19 L.R.A.(N.S.) 670, on conflict of laws as to negotiable paper.

18 S. D. 55, LOFTUS v. AGRANT, 99 N. W. 90.

18 S. D. 60, KINKADE v. HOWARD, 99 N. W. 91.

18 S. D. 64, PRESCOTT v. BIDWELL, 99 N. W. 93.

Restraining contracts to protect vendee.

Cited in *Grand Union Tea Co. v. Lewitsky*, 153 Mich. 244, 116 N. W.

1090, upholding statute prohibiting restraining contracts, except on sale of a business avocation or profession, for the mere protection of the vendee.

Cited in note in 6 L.R.A.(N.S.) 849, on validity of stipulation not to engage in particular business, not ancillary to lawful contract.

Distinguished in *Brown v. Edsall*, 23 S. D. 610, 122 N. W. 658, holding that facts showed sale of good will of business as druggist and physician.

18 S. D. 70, SCHOUWEILER v. McCAULL, 99 N. W. 95.

18 S. D. 80, BOWDLE v. JENCKS, 99 N. W. 98.

Conflict of laws as to realty.

Cited in *Fall v. Fall*, 75 Neb. 104, 121 Am. St. Rep. 767, 113 N. W. 175, holding that no interference by other states can be had with the devolution and transfer of title to realty within the limits of another state such property being entirely subject to laws of latter state; *Dal v. Fischer*, 20 S. D. 426, 107 N. W. 534, holding that the laws of the state where realty is situated and where contract relating thereto is to be performed govern as to validity of the contract and not the laws of state when contract is executed; *Hannah v. Vensel*, 19 Idaho, 796, 116 Pac. 115, holding that deed must be construed according to *lex loci rei sitæ*.

Nonprejudicial admission of incompetent evidence.

Cited in *Godfrey v. Faust*, 18 S. D. 567, 101 N. W. 718; *State v. Harris*, 14 N. D. 501, 105 N. W. 621,—holding that where there is sufficient competent evidence to sustain conviction it will be presumed on appeal that any incompetent evidence was not considered by court in arriving at its conclusion and therefore admission was without prejudice.

Specification of errors in bill of exceptions.

Cited in *Tilton v. Florman*, 22 S. D. 324, 117 N. W. 377, holding that specifications in bill of exceptions will not be disregarded because they do not specify particulars wherein evidence is insufficient.

18 S. D. 97, VAL BLATZ BREWING CO. v. DALRYMPLE, 99 N. W. 851.

18 S. D. 102, KEENAN v. DANIELLS, 99 N. W. 853.

18 S. D. 105, DOWAGIAC MFG. CO. v. WHITE ROCK LUMBER & HARDWARE CO. 99 N. W. 854.

Remedy for refusal of conditional vendee to accept.

Cited in note in 68 L.R.A. 105, on remedy of conditional vendor for refusal to accept.

18 S. D. 109, BENNETT v. MOORE, 99 N. W. 855.

Title by adverse possession under payment of taxes.

Cited in *Murphy v. Nelson*, 19 S. D. 197, 102 N. W. 691, as comparing

local statute on adverse possession with payment of taxes, with a similar statute of state of Illinois; *Jackson v. Bailey*, 19 S. D. 594, 104 N. W. 268, holding that no rights are acquired under a tax deed of four years standing at time action is brought, the statute requiring payment of taxes for ten consecutive years before action is brought.

18 S. D. 113, *LUND v. THACKERY*, 99 N. W. 856, Later phase of same case in 23 S. D. 329, 121 N. W. 839.

18 S. D. 122, *FISH v. KIRLIN-GRAY ELECTRIC CO.* 112 AM. ST. REP. 782, 99 N. W. 1092.

Duty of electric light company in wiring private property.

Cited in note in 13 L.R.A.(N.S.) 227, on duty of electric light company as to wiring or fixtures installed in private property.

18 S. D. 131, *FOWLER v. IOWA LAND CO.* 99 N. W. 1095.

Authority of attorney.

Cited in notes in 132 Am. St. Rep. 151, on implied authority of attorney in conducting litigation; 23 L.R.A.(N.S.) 706, on implied power of attorney to bind client for expenses incidental to trial, including associate counsel fees.

Non-prejudicial admission of incompetent evidence.

Cited in *Godfrey v. Faust*, 18 S. D. 567, 101 N. W. 718, holding that judgment must be sustained in spite of the admission of incompetent evidence where there was sufficient competent evidence to support judgment; *Merger v. Madson*, 19 S. D. 400, 103 N. W. 650; *Easton v. Cranmer*, 19 S. D. 224, 102 N. W. 944,—holding that the court must entertain the presumption that incompetent evidence was disregarded in view of a sufficiency of competent evidence.

18 S. D. 145, *STATE v. CALLAHAN*, 99 N. W. 1099.

18 S. D. 150, *STATE v. CALLAHAN*, 99 N. W. 1100.

18 S. D. 155, *BRUCE v. WANZER*, 112 AM. ST. REP. 788, 99 N. W. 1102.

Conclusiveness of recitals in mortgage.

Cited in *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416, holding that recitals in mortgage are not sufficient evidence of execution and delivery of notes and mortgage.

18 S. D. 161, *KIDMAN v. HOWARD*, 99 N. W. 1104.

18 S. D. 166, *TOM SWEENEY HARDWARE CO. v. GARDNER*, 99 N. W. 1105.

Findings of fact by trial court.

Cited in *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918, holding that ap-

pellant must show that findings of trial court were against clear preponderance of evidence before they will be disturbed on appeal on grounds of insufficiency of evidence.

18 S. D. 172, PAXTON & G. CO. v. McDONALD, 99 N. W. 1107.

Pleadings in action on account stated.

Cited in *Jewett Bros. v. Bentson*, 18 S. D. 575, 101 N. W. 715, holding that an allegation in a separate paragraph of complaint in an action for goods sold and delivered that the goods were obtained under false pretenses, when denied by the answer raises a proper triable issue in such action.

18 S. D. 173, CHAMBERS v. MODERN WOODMAN, 99 N. W. 1107.

Admissibility of coroner's verdict to show cause of death.

Cited in *Re Dolbeer*, 149 Cal. 227, 86 Pac. 695, upholding exclusion of verdict at coroner's inquest on an issue of testamentary capacity where the subject of inquest had committed suicide; *Craiger v. Modern Woodmen*, 40 Ind. App. 279, 80 N. E. 429 (dissenting opinion), on inadmissibility of coroner's verdict of suicide in an action by beneficiary on life certificate; *Sullivan v. Seattle Electric Co.* 51 Wash. 71, 130 Am. St. Rep. 1082, 97 Pac. 1109, holding that record of coroner's inquest on body of deceased is not admissible to show cause of death in an action for death by wrongful act.

18 S. D. 182, WINANS v. GRABLE, 99 N. W. 1110.

18 S. D. 190, BURKE v. COLLINS, 99 N. W. 1112.

Denial of grant of permit to do business.

Followed in *McCormick v. Pfeiffer*, 19 S. D. 269, 103 N. W. 31, holding that city council may decide that applicant is unfit to receive liquor license from their own knowledge without a statement of reasons or cause and deny application without other showing.

Distinguished in *Ex parte Hawley*, 22 S. D. 23, 15 L.R.A.(N.S.) 138, 115 N. W. 93, holding void, act authorizing board of agriculture to refuse permits to sell nursery stock on ground of applicant's want of financial ability.

Mandamus to compel issuance of liquor license.

Cited in *Montpelier v. Milla*, 171 Ind. 175, 85 N. E. 6, 17 A. & E. Ann. Cas. 57, holding mandamus proper remedy to compel issuance of liquor license to applicant where it is peremptorily refused by city council and officers without excuse; *Smyth v. Butters*, — Utah, —, 32 L.R.A.(N.S.) 393, 112 Pac. 809, holding that mandamus will not lie to compel county commissioners to issue liquor license.

Cited in note in 27 L.R.A.(N.S.) 1195, 1196, on right to control by mandamus decision of licensing officers as to fitness of applicant for liquor license.

18 S. D. 196, STATE EX REL. KOTILINIC v. SWENSON, 99 N. W. 1114.

Pleading in criminal prosecution.

Cited in *State v. Flute*, 20 S. D. 562, 108 N. W. 248, holding that a formal charge in an indictment for murder is not necessary but indictment is sufficient if offense is stated in ordinary concise language intelligible to a person of common understanding; *State v. Faulk*, 22 S. D. 183, 116 N. W. 72, holding "one gold coin" sufficient description of property in information for larceny.

Presence of accused at trial on a felony.

Cited in *Wood v. State*, 4 Okla. Crim. Rep. 436, — L.R.A.(N.S.) —, 112 Pac. 11, holding that defendant will be presumed to have been present on day on which record was silent as to his presence; *State v. Pearce*, 19 S. D. 75, 102 N. W. 222, on requirement of personal presence of accused at arraignment, receipt of verdict and sentence.

18 S. D. 207, STODDARD v. LYON, 99 N. W. 1116.

Sufficiency of description in assessment roll.

Cited in *Bandow v. Wolven*, 20 S. D. 445, 107 N. W. 204, holding sufficient a description in assessment roll headed across top with words, name of owner, description, what part, Sec. or Lot, Twp. or Block, Range, number of acres of land, under each of which were proper name, numbers and ditto marks.

Laches as bar to avoidance of tax deed.

Cited in *Cornelius v. Ferguson*, 23 S. D. 187, 121 N. W. 91, holding that tax deed valid on face cannot be avoided after three years for mere irregularities in tax proceedings.

18 S. D. 218, FIRST NAT. BANK v. McCARTHY, 100 N. W. 14, Related action 23 S. D. 269, 23 L.R.A.(N.S.) 335, 121 N. W. 853.

18 S. D. 237, CRARY v. CHICAGO, M. & ST. P. R. CO. 100 N. W. 18.

Liability of railroad for maintaining defective fence.

Cited in *Davis Bros. v. LeFlore*, 26 Okla. 729, 110 Pac. 782, holding railroad not liable for killing trespassing cattle, from mere failure to repair fence, which it is not required to erect; *Martin v. Chicago, B. & Q. R. Co.* 15 Wyo. 493, 89 Pac. 1025, holding railroad company not liable for injury caused by failure to keep fence in repair where it was under no duty to maintain such fence, and such failure in absence of duty was not negligence per se.

18 S. D. 247, STEVENS v. OSGOOD, 100 N. W. 161.

Limitation of action on sale under trust deed.

Cited in *Holmquist v. Gilbert*, 41 Colo. 113, 14 L.R.A.(N.S.) 479, 92 Pac. 232; *Brereton v. Benedict*, 41 Colo. 16, 92 Pac. 238,—holding that

a proceeding to sell property after advertisement by trustee under trust deed is not affected by statute of limitation of court action, such sale not being a court action; *Foot v. Burr*, 41 Colo. 192, 13 L.R.A.(N.S.) 1210, 92 Pac. 236, holding that there is no statutory limitation on the time for commencing proceedings for foreclosure under trust deed and beneficiary under deed may demand foreclosure after default in its conditions.

Cited in note in 13 L.R.A.(N.S.) 1210, on effect of bar of other remedies to prevent sale under power in trust deed or mortgage.

Disapproved in *Scott v. District Ct.* 15 N. D. 259, 107 N. W. 61, holding that the statute of limitation of actions applies to a foreclosure out of court under power of sale in trust deed.

18 S. D. 251, STATE EX REL. BERGE v. PATTERSON, 100 N. W. 162.

Limitation as affirmative defense.

Cited in *Moore v. Persson*, 21 S. D. 290, 111 N. W. 633, holding that objection that action for damages by trespassing cattle is not brought in time must be taken by answer, not demurrer.

18 S. D. 262, KUNZ v. DINNEEN, 100 N. W. 165.

Showing to secure reversal of order granting new trial.

Cited in *State v. Crowley*, 20 S. D. 611, 108 N. W. 491, holding that in order to secure the reversal of an order granting a motion for a new trial a stronger showing and clearer case must be made than is required to reverse an order overruling such motion.

18 S. D. 264, RE ELLIOTT, 100 N. W. 431.

Grounds for disbarment of attorney.

Cited in note in 19 L.R.A.(N.S.) 414, on disbarment or suspension of attorney for withholding client's money or property.

18 S. D. 274, CUSTER COUNTY BANK v. CUSTER COUNTY, 100 N. W. 424.

18 S. D. 281, GOULD v. TUCKER, 100 N. W. 427, Later appeal in 20 S. D. 226, 105 N. W. 624.

Effect of death of entryman before issuance of patent to claims.

Cited in *Walker v. Ehresman*, 79 Neb. 775, 113 N. W. 218, holding that an entry man on a timber culling claim has no devisable interest before patent is issued to him.

Cited in note in 34 L.R.A.(N.S.) 411, on liability of claim or interest in public lands for debts contracted before patent issued.

18 S. D. 287, RICHARDS v. TRAVELERS' INS. CO. 67 L.R.A. 175, 100 N. W. 428.

"Voluntary exposure" within meaning of insurance policy.

Cited in note in 22 L.R.A.(N.S.) 783, on voluntary exposure to unnecessary danger within meaning of insurance policy.

Exemptions in accident policies.

Cited in note in 22 L.R.A.(N.S.) 1257, on exemption in accident policy against accident on railroad trains.

18 S. D. 295, HAMLIN COUNTY v. TAUER, 100 N. W. 430.

18 S. D. 298, KRAUSE v. BISHOP, 100 N. W. 434.

Probable cause as question for court.

Cited in *Simmons v. Gardner*, 46 Wash. 282, 89 Pac. 887, holding that where the fact that prosecuting witness told all facts fully and truthfully to attorney who advised prosecution, is uncontradicted, the question of probable cause in instituting process is for the court.

Advice of counsel as defense in malicious prosecution.

Cited in note in 18 L.R.A.(N.S.) 65, on advice of counsel as defense to action for malicious prosecution.

18 S. D. 303, THOMAS v. ISSENMUTH, 100 N. W. 436.

Validity of judgment in action tried by court.

Cited in *Kierbow v. Young*, 21 S. D. 180, 110 N. W. 116, holding judgment in action tried by court unauthorized, where it fails to find ultimate facts material to issues.

18 S. D. 308, HAUSER v. SEELEY, 100 N. W. 437.

18 S. D. 317, MURPHY v. PLANKINTON BANK, 100 N. W. 614

Later appeal in 20 S. D. 178, 105 N. W. 245.

Followed without discussion in *Grigsby v. Plankinton Bank*, 18 S. D. 330, 100 N. W. 1127; *Lyon v. Plankinton Bank*, 18 S. D. 331, 100 N. W. 1127.

Amendment of complaint.

Cited in *Z. J. Fort Produce Co. v. Southwestern Grain & Produce Co.* 26 Okla. 13, 108 Pac. 386, holding that court may allow petition for breach of contract to be amended so as to embrace fraud as basis of action; *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. 135, holding that complaint may be amended before trial so as to change cause of action.

18 S. D. 330, GRIGSBY v. PLANKINTON BANK, 100 N. W. 1127.

18 S. D. 330, LYON v. PLANKINTON BANK, 100 N. W. 1127.

18 S. D. 331, WEILAND v. ASHTON, 100 N. W. 737.

Collateral attack on judgment for irregularities.

Cited in *Juckett v. Fargo Mercantile Co.* 19 S. D. 150, 102 N. W. 604, holding that irregularities as to notice of sale and confirmation thereof are not subject to collateral attack where all parties personally appeared or by attorney at all stages of the proceedings before a court of competent jurisdiction and no appeal therefrom was ever taken.

18 S. D. 335, RE LARSEN, 100 N. W. 738, 5 A. & E. ANN. CAS. 794.

Revocation of will by subsequent marriage.

Cited in *Griffing v. Gislason*, 21 S. D. 56, 109 N. W. 646, holding that subsequent marriage of testator revokes will, where no provision is made for wife.

Distinguished in *Re Adler*, 52 Wash. 539, 100 Pac. 1019, holding under statute that will is not revoked where executed before marriage if it provide for wife therein.

Who may contest will.

Cited in note in 130 Am. St. Rep. 207, on who can contest a will.

18 S. D. 339, HULIN v. BUTTE COUNTY, 100 N. W. 739.**18 S. D. 341, STATE v. SMITH, 100 N. W. 740.**

Specific instances to prove character.

Cited in note in 14 L.R.A.(N.S.) 723, on evidence of specific instances to prove character.

18 S. D. 347, JUCKETT v. FARGO MERCANTILE CO. 100 N. W. 742.

What constitutes statement of case.

Cited in *Bottcher v. Thompson*, 21 S. D. 169, 110 N. W. 108, holding that proposed exceptions following notice of intention to move for new trial is statement of case.

18 S. D. 355, FIRST NAT. BANK v. CRABTREE, 100 N. W. 744.**18 S. D. 358, BABCOCK v. ORMSBY, 100 N. W. 759.****18 S. D. 365, SELBIE v. GRAHAM, 100 N. W. 755.**

Conclusive judgments.

Cited in *Sanford v. King*, 19 S. D. 334, 103 N. W. 28, holding that a judgment of dismissal for failure to prosecute is not conclusive on the merits in subsequent action on same subject; *McLennon v. Fenner*, 19 S. D. 492, 104 N. W. 218, holding that a decree dissolving a temporary injunction is not res judicata in an action at law on the injunction bond against surety thereon, for damage caused by the issuance of the injunction, there being neither identity of subject nor parties; *Mosteller v.*

Holborn, 21 S. D. 547, 114 N. W. 693, holding judgment of res adjudicata on right to exemptions, which was pleaded, but not litigated; McPherson v. Swift, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76, holding that judgment, unless on merits, is no bar to subsequent action; Kammann v. Barton, 23 S. D. 442, 122 N. W. 416, holding judgment not res adjudicata on question of limitations, where statute was not considered. though pleaded.

18 S. D. 379, STATE EX REL. LINDSAY v. BOYDEN, 100 N. W. 761.

County board records kept by auditor.

Cited in *State ex rel. Andrews v. Boyden*, 18 S. D. 388, 100 N. W. 763, holding that records of county board proceedings kept by auditor as ex officio clerk of the board are in legal contemplation, the records of the board kept by the board and in its possession.

18 S. D. 388, STATE EX REL. ANDREWS v. BOYDEN, 100 N. W. 763, Later appeal in 21 S. D. 6, 108 N. W. 897, 15 A. & E. Ann. Cas. 1122.

Right to withdraw name from referendum petition.

Cited in *State ex rel. Mohr v. Seattle*, 59 Wash. 68, 109 Pac. 309, holding that signer of referendum petition may withdraw his name.

18 S. D. 393, STATE EX REL. HOWELLS v. METCALF, 67 L.R.A. 331, 100 N. W. 923.

Regulation of political parties.

Cited in *Walling v. Lansdon*, 15 Idaho, 282, 97 Pac. 396, holding that under the primary laws regulating party delegations and nominations the courts must enforce all rights conferred and such is an enforcement of legal rights of parties interested and not a regulation of internal party political affairs; *Nelson v. King*, 21 S. D. 51, 109 N. W. 649, holding that name of person nominated by petition designating him as Republican cannot be placed on ballot; *State ex rel. Long v. Rexford*, 21 S. D. 86, 109 N. W. 216, holding that organized political party cannot have two candidates for same office; *Healey v. Wipf*, 22 S. D. 343, 117 N. W. 506, holding that legislature can regulate party procedure as to nominations; *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, holding requirement of declaration of present intention to support nominees of party whose ballot challenged elector desires to vote, not invalid.

— Factional disputes.

Cited in *State ex rel. Garn v. Marshall County*, 167 Ind. 276, 78 N. E. 1016, holding that the courts will interfere in a dispute between the regular party organization and a combination of dissenting members who attempt to exercise rights of the regular organization; *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964, holding that the courts have jurisdiction to interfere in a controversy between different factions

in a political party as to who shall represent the party on the official ballot.

Facts judicially noticed.

Cited in note in 124 Am. St. Rep. 55, on facts of which courts will take judicial notice.

18 S. D. 417, GIBSON v. ALLEN, 100 N. W. 1096.

18 S. D. 420, WAALER v. GREAT NORTHERN R. CO. 70 L.R.A. 731, 112 AM. ST. REP. 794, 100 N. W. 1097, Later appeal in 22 S. D. 256, 18 L.R.A.(N.S.) 297, 117 N. W. 140.

Liability for torts by servant.

Cited in Crelly v. Missouri & K. Teleph. Co. 84 Kan. 19, 33 L.R.A. (N.S.) 328, 113 Pac. 386, holding telephone company not liable for assault by local manager on operator on her refusal to sign voucher.

Cited in note in 18 L.R.A.(N.S.) 297, on liability for torts by servants sent to commit trespass.

18 S. D. 426, REEDER v. WILBER, 100 N. W. 1099.

18 S. D. 429, BUCKHAM v. HOOVER, 101 N. W. 28.

18 S. D. 431, MINNESOTA LOAN & INVEST. CO. v. BEADLE COUNTY, 101 N. W. 29.

Reimbursement of purchaser at invalid tax sale.

Cited in note in 31 L.R.A.(N.S.) 1142, 1143, on right of purchaser at invalid tax sale, in absence of statute, to be reimbursed for purchase price, or subsequent taxes.

18 S. D. 437, GEORGE v. KOTAN, 101 N. W. 31.

18 S. D. 441, WEEKS v. CRANMER, 101 N. W. 32.

Defective tax deed as color of title.

Cited in King v. Lane, 21 S. D. 101, 110 N. W. 37, holding person in possession under defective tax deed entitled to recover in action to quiet title, where defendant has no title.

18 S. D. 444, STATE v. KNUTSON, 101 N. W. 33.

18 S. D. 446, JOHNSON v. HILLENBRAND, 101 N. W. 33

18 S. D. 450, PLUNKETT v. LAWRENCE COUNTY, 101 N. W. 35.

18 S. D. 454, DORSEY v. GUNKLE, 101 N. W. 36, 5 A. & E. ANN. CAS. 810.

Interruption of running of statute of limitations.

Cited in Atwood v. Lammers, 97 Minn. 214, 106 N. W. 310, holding

that the application of the proceeds from sale of security to an outlawed indebtedness will not interrupt the running of statute of limitations.

18 S. D. 459, MANITOBA MORTG. & INVEST. CO. v. WEISS, 112 AM. ST. REP. 799, 101 N. W. 37, 5 A. & E. ANN. CAS. 858.

Payment by check.

Cited in *Turner v. Hot Springs Nat. Bank*, 18 S. D. 498, 112 Am. St. Rep. 804, 101 N. W. 348, 5 A. & E. Ann. Cas. 937, on payment by check as being an absolute discharge of indebtedness where check was not diligently presented; *R. H. Herron Co. v. Mawby*, 5 Cal. App. 39, 89 Pac. 872, holding that a debtor who pays with check on a distant bank is discharged from the debt where payment is refused thereon caused by delay of creditor in presenting it properly within day after its receipt with additional time necessary to transmit it to drawee; *People's State Bank v. Brown*, 80 Kan. 520, 23 L.R.A.(N.S.) 824, 103 Pac. 102, holding that failure to present check in reasonable time does not constitute its acceptance absolute payment where the negligence was not a cause of loss to drawer.

Cited in note in 10 L.R.A.(N.S.) 511, 541, on effect of transfer, without indorsement, of worthless check, or note of third person.

18 S. D. 466, MEYER LAND CO. v. PECOR, 101 N. W. 39.

Specific performance of contract.

Cited in *Chambers v. Roseland*, 21 S. D. 298, 112 N. W. 148, holding that in order to be specifically enforceable, terms of contract must be so precise that neither party can reasonably misunderstand them; *Phelan v. Neary*, 22 S. D. 265, 117 N. W. 142, holding that contract is too incomplete for specific performance, where price is not agreed upon.

18 S. D. 470, PETERSON v. CHRISTIANSON, 101 N. W. 40.

18 S. D. 477, JONES v. SIOUX FALLS, 101 N. W. 43.

Municipal liability for defective streets.

Cited in note in 20 L.R.A.(N.S.) 713, on liability of municipality for defects or obstructions in streets.

18 S. D. 487, PAULTON v. KREISER, 101 N. W. 46, 5 A. & E. ANN. CAS. 827.

18 S. D. 490, WHITNEY v. HAZZARD, 101 N. W. 346.

Conclusiveness of refusal to vacate judgment for fraud.

Distinguished in *Roberts v. Pratt*, 152 N. C. 731, 68 S. E. 240, holding denial of motion to set aside judgment for fraud under South Dakota laws rendered the judgment conclusive on that question, the motion being unimpeached.

Right of stockholders to apply to courts for relief.

Cited in *Frederick Mill. Co. v. Frederick Farmers' Alliance Co.* 20 S. D. 335, 106 N. W. 298, holding that stockholders may apply to court for relief without first having made application to board of directors where it appears that there was no board to which the stockholders could apply.

18 S. D. 498, TURNER v. HOT SPRINGS NAT. BANK, 112 AM. ST. REP. 804, 101 N. W. 348, 5 A. & E. ANN. CAS. 937.

18 S. D. 505, CHAPMAN v. GREENE, 101 N. W. 351.

Persons concluded by judgment.

Cited in *State v. Coughran*, 19 S. D. 271, 103 N. W. 31, holding that the record of a judgment quieting title is not admissible in a subsequent action on title brought by a person not a party to former action.

18 S. D. 522, LOCKHART v. HEWITT, 101 N. W. 355.

When question is for jury.

Cited in *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516, holding case properly withheld from jury, where verdict in favor of party asking for submission of case to jury would be set aside; *Coughran v. Western Elevator Co.* 22 S. D. 214, 116 N. W. 1122, upholding verdict, where different impartial minds might reasonably draw different conclusions from evidence.

18 S. D. 523, MEAD v. MELLETTE, 101 N. W. 355.

Right to drain surface water into watercourse.

Cited in note in 24 L.R.A.(N.S.) 904, on draining surface water into water course.

18 S. D. 530, PHILLIPS v. NORTON, 101 N. W. 727.

Limitations on time for execution to justice's judgment.

Cited in *Holton v. Schmarback*, 15 N. D. 38, 106 N. W. 36, as having left unchanged the earlier decisions on the time within which to issue execution on a justices' judgment docket with clerk of circuit court in South Dakota.

Cited in note in 133 Am. St. Rep. 69, on effect of statute of limitations on judgments and executions and proceedings for their enforcement.

Disapproved in *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390, holding that justice's judgment may be transcribed and execution issued from district court after five years from its entry.

18 S. D. 540, CROUCH v. DAKOTA, W. & M. R. CO. 101 N. W. 723.

Execution or judicial sale of corporate franchise or property.

Cited in note in 31 L.R.A.(N.S.) 641, on execution or judicial sale of corporate franchise or property necessary to its enjoyment.

18 S. D. 558, BALL v. DOLAN, 101 N. W. 719, Later appeal in 21 S. D. 619, 15 L.R.A. (N.S.) 272, 114 N. W. 998.

Fulfillment of contract by broker entitling him to commission.

Cited in *Fulton v. Cretian*, 17 N. D. 335, 117 N. W. 344, holding that brokers who contracted to find a purchaser for the excess of sale over \$20 per acre have no grounds for recovery where land was sold for under that sum and no purchaser was found who would pay over the amount stipulated; *Eggland v. South*, 22 S. D. 467, 118 N. W. 719, holding that broker, to earn commissions must produce purchaser able and ready to buy on terms prescribed.

18 S. D. 567, GODFREY v. FAUST, 101 N. W. 718, Later appeal in 20 S. D. 203, 105 N. W. 460.

Effect of admission of incompetent evidence.

Cited in *Re McClellan*, 20 S. D. 498, 107 N. W. 681, holding that the presumption is that in considering evidence on which to base judgment, the incompetent was not considered and judgment was based on the competent evidence.

Proper person to perform representation work on mining claim.

Cited in *Wailes v. Davies*, 158 Fed. 667, holding that a stockholder in a mining company has such a beneficial interest in the unpatented claim that mining work done by him will be taken as representation work and will save forfeiture of claim for the company.

Cited in note in 9 L.R.A. (N.S.) 1137, on effect of assessment work on mining claim by one not owner of legal title.

18 S. D. 572, MOODY v. LAMBERT, 101 N. W. 717.

Followed without discussion in *Moody v. Lambert*, 19 S. D. 160, 102 N. W. 1135; *Anderson v. Lambert*, 21 S. D. 336, 112 N. W. 1143.

18 S. D. 575, JEWETT BROS. v. BENTSON, 101 N. W. 715, Later appeal in 20 S. D. 175, 105 N. W. 173.

18 S. D. 581, QUALEY v. BROOKINGS, 101 N. W. 713.

18 S. D. 587, TIMBER v. DESPAROIS, 101 N. W. 879.

Fatal defects in certificate of acknowledgment.

Cited in note in 108 Am. St. Rep. 569, as to when defects in certificate of acknowledgment are fatal.

Gain or loss of title by abandonment.

Cited in note in 135 Am. St. Rep. 908, on gain or loss of title by abandonment not including questions under statute of limitations.

18 S. D. 594, J. F. KELLEY & CO. v. MEAD, 101 N. W. 882, Later appeal in 20 S. D. 303, 105 N. W. 736.

18 S. D. 600, CLARKE v. CONNERS, 101 N. W. 883.

Followed without discussion in *Clarke v. Zoellner*, 19 S. D. 159, 102 N. W. 1135.

Irregular building loan contracts.

Cited in *Cobe v. Summers*, 143 Mich. 117, 106 N. W. 707, holding that failure of building company to loan money on competitive bids after notice to members causes their loans to be usurious where legal rate of interest is exceeded; *Miller v. Prudential Bkg. & T. Co.* 63 W. Va. 107, 59 S. E. 977, holding that a building loan contract is not protected from usury law where made on a fixed premium in violation of statute and the charge therefor is in excess of legal rate.

18 S. D. 608, BRADY v. SHIRLEY, 101 N. W. 886, 5 A. & E. ANN. CAS. 972.**Right to limit number of witnesses.**

Cited in note in 116 Am. St. Rep. 518, on right of court to limit number of witnesses.

18 S. D. 615, WOODFORD v. KELLEY, 101 N. W. 1069.**Waiver of objection to complaint.**

Cited in *Burgi v. Rudgers*, 20 S. D. 646, 108 N. W. 253, holding that objection to complaint for stating allegations of ownership in the alternative is too late after failure to demurrer and after entering into written stipulation on that issue.

18 S. D. 625, THOMAS v. WILCOX, 101 N. W. 1072.**18 S. D. 632, VESEY v. COMMERCIAL UNION ASSUR. CO. 101 N. W. 1074.**

Followed without discussion in *Wheaton v. Liverpool & L. & G. Ins. Co.* 20 S. D. 62, 104 N. W. 850.

Powers and duties of local insurance agent.

Cited in *People's F. Ins. Asso. v. Goyne*, 79 Ark. 315, 16 L.R.A.(N.S.) 1180, 96 S. W. 365, 9 A. & E. Ann. Cas. 373, holding that a false filling out of an insurance application by agent of insurer acting within the scope of apparent authority precludes insurer from setting up the fraudulent answer to question in application as a defense; *Smith v. Mutual Cash Guaranty F. Ins. Co.* 21 S. D. 433, 113 N. W. 94, holding insurance company bound by advice and suggestions of soliciting agents as to answers to questions in applications; *Fosmark v. Equitable Fire Asso.* 23 S. D. 102, 120 N. W. 777, holding that agent's knowledge of condition of property is knowledge of insured, so that policy cannot be avoided.

Delegation of legislative power.

Cited in *Ex parte Hawley*, 22 S. D. 23, 15 L.R.A.(N.S.) 138, 115 N. W. 93, holding that the board of agriculture could not be clothed with power to require a form of bond which would operate to modify an existing statute.

— To prescribe standard form of policy.

Cited in *Phenix Ins. Co. v. Perkins*, 19 S. D. 59, 101 N. W. 1110, denying power of state auditor to prepare and file a printed form of policy which would operate to abrogate or modify existing statutes.

Parol evidence to vary insurance policies.

Cited in note in 16 L.R.A. (N.S.) 1225, on parol-evidence rule as to varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

Waiver of conditions and forfeitures in insurance policies.

Cited in note in 107 Am. St. Rep. 140, on waiver and provisions on non-waiver or written waiver of conditions and forfeitures in policies.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 19 S. D.

19 S. D. 1, STATE EX REL. CROTHERS v. BARBER, 101 N. W. 1078.

Validity of local option laws.

Cited in *Thalheimer v. Maricopa County*, 11 Ariz. 430, 94 Pac. 1129, holding a local option law was not invalid because it fixed no date for the election and provided for no action until the filing of a petition with the board of supervisors.

Cited in note in 114 Am. St. Rep. 324, 325, on constitutionality of local option laws.

Right to license the sale of intoxicating liquors.

Cited in *State v. Grant*, 20 S. D. 164, 105 N. W. 97, 11 A. & E. Ann. Cas. 1017, holding the issuance of a license to sell intoxicating liquors was unauthorized where the question of granting permits to sell had not been voted on at the election preceding the issuance of the license as required by statute; *State v. McIlvenna*, 21 S. D. 489, 113 N. W. 878, holding that granting of liquor license is prohibited within municipality unless authorized by majority of voters at each annual election.

Cited in note in 15 L.R.A.(N.S.) 945, on constitutional right to prohibit sale of intoxicants.

Construction of statutes.

Cited in *State v. Johnson*, 23 S. D. 293, 22 L.R.A.(N.S.) 1007, 121 N. W. 785, holding that statute should be construed as whole.

— Regulating the sale of intoxicating liquor.

Cited in *State v. Johnson*, 23 S. D. 293, 22 L.R.A.(N.S.) 1007, 121 N. W. 785, holding under a statute prohibiting a saloon keeper from permitting a minor visiting or remaining in the saloon unless accompanied by a parent or guardian the defendant was liable where a minor as a member

Dak. Rep.—73.

1153

of a band entered and remained therein while several pieces of music were played.

**19 S. D. 11, GARRIGAN v. KENNEDY, 117 AM. ST. REP. 927,
101 N. W. 1081, 8 A. & E. ANN. CAS. 1125.**

Validity of civil damage act.

Cited in *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150, holding civil damage act valid.

Saving questions for review.

Cited in *Hahn v. Dickinson*, 19 S. D. 373, 103 N. W. 642, holding where no objection is taken to the instruction of the court on the sufficiency of a demand nothing relevant thereto is presented for review.

19 S. D. 26, MORRIS v. REIGEL, 101 N. W. 1086.

19 S. D. 34, HARMON v. GOGGINS, 101 N. W. 1088.

19 S. D. 37, GLENOVICH v. ZURICH, 101 N. W. 1103.

Priority between mortgages.

Cited in *Loefer v. Plainfield Sav. Bank*, 149 Iowa, 672, 31 L.R.A.(N.S.) 1112, 128 N. W. 1101, holding subsequent mortgagee of J. W. McG. not entitled to priority over prior recorded mortgage by William McG.

19 S. D. 41, ERICKSON v. CONNIFF, 101 N. W. 1104.

Fatal defects in certificate of mortgage.

Cited in *Kenny v. McKenzie*, 23 S. D. 111, — L.R.A.(N.S.) —, 120 N. W. 781, holding acknowledgment to assignment of mortgage invalid.

Cited in note in 108 Am. St. Rep. 576, as to when defects in certificate of acknowledgment are fatal.

19 S. D. 45, WELLER v. HILDERBRANDT, 101 N. W. 1108.

Prejudicial error.

Cited in *Clay v. State*, 15 Wyo. 42, 86 Pac. 17, considering what may constitute prejudicial error.

19 S. D. 50, BARRON v. SMITH, 101 N. W. 1105.

Followed without discussion in *Whitford v. Smith*, 19 S. D. 158, 102 N. W. 1135; *Nichols v. Smith*, 19 S. D. 159, 102 N. W. 1135; *Nichols v. Smith*, 19 S. D. 161, 102 N. W. 606.

Application of libel to the plaintiff.

Cited in *Ball v. Tribune Co.* 123 Ill. App. 235, holding it was a question of fact for the jury under the pleadings and evidence whether an alleged libelous publication referred to the plaintiff; *Dorn v. Cooper*, 149 Iowa, 704, 127 N. W. 661, holding libel not libelous as to partners, where it was not understood as referring to firm.

Cited in note in 23 L.R.A.(N.S.) 730, on right of one not specially

named to maintain action for defamation based on charges against a class or group.

19 S. D. 59, PHENIX INS. CO. v. PERKINS, 101 N. W. 1110.

Unconstitutional delegation of legislative power.

Cited in *Ex parte Hawley*, 22 S. D. 23, 15 L.R.A.(N.S.) 138, 115 N. W. 93, holding the state board of agriculture could not be clothed with power to require a form of bond from sellers of nursery stock which would operate to modify existing statutes; *King v. Concordia F. Ins. Co.* 140 Mich. 258, 103 N. W. 616, 6 A. & E. Ann. Cas. 87, holding an act prohibiting the issuance of fire insurance policies except in accordance with the form provided after the adoption of a standard policy where such standard policy was subject to change within the discretion of the insurance commission.

19 S. D. 75, STATE v. PEARSE, 102 N. W. 222.

Personal presence of accused at trial.

Cited in *Wood v. State*, 4 Okla. Crim. Rep. 436, — L.R.A.(N.S.) —, 112 Pac. 11, holding defendant presumed to have been present on day on which record is silent as to his presence.

19 S. D. 79, MEARS v. SMITH, 102 N. W. 295.

Action by next of kin in interest of estate.

Cited in note in 22 L.R.A.(N.S.) 456, on right of next of kin to maintain action in interest of estate.

Rights of heir in ancestor's personality.

Cited in note in 112 Am. St. Rep. 732, 734, on rights of heir in personal property of ancestor.

19 S. D. 87, BATTELLE v. WOLVEN, 102 N. W. 297.

19 S. D. 90, PRIBBLE v. BROMLEY, 102 N. W. 298.

19 S. D. 91, THOMPSON v. HARDY, 102 N. W. 299.

19 S. D. 106, CHARLES E. BRYANT & CO. v. ARNOLD, 102 N. W. 303.

19 S. D. 108, GERMANTOWN TRUST CO. v. WHITNEY, 102 N. W. 304.

19 S. D. 114, NORRIS v. EQUITABLE FIRE ASSO. 102 N. W. 306.

Followed without discussion in *Nerger v. Equitable F. Asso.* 20 S. D. 419, 107 N. W. 531.

Waiver by insured of demand for arbitration of loss.

Cited in *Bolte v. Equitable Fire Asso.* 23 S. D. 240, 121 N. W. 773,

holding provision in by-laws for arbitration waived by failure of insurer to appoint arbitrator.

Cited in note in 15 L.R.A.(N.S.) 1068, on arbitration as condition precedent to action on insurance policy.

19 S. D. 122, PETERSON v. CHICAGO, M. & ST. P. R. CO. 102 N. W. 595.

Duty of carrier of live stock.

Cited in *Colsch v. Chicago, M. & St. P. R. Co.* 149 Iowa, 176, 34 L.R.A.(N.S.) 1013, 127 N. W. 198, holding railroad only bound to use ordinary care, where live stock is accompanied by shipper.

Cited in note in 16 L.R.A.(N.S.) 884, on duty of carrier to shower hogs during shipment.

Right of carrier to contract against liability for negligence.

Cited in *Bartlett v. Oregon R. & Nav. Co.* 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487, upholding the doctrine that a common carrier could not exempt itself from liability for negligence in the transportation of horses.

Submission of case to jury.

Cited in *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000, holding that case should be taken from jury, where verdict can be reached only by conjecture.

19 S. D. 128, MEADE COUNTY BANK v. DECKER, 102 N. W. 597.

Effect of appeal from order taken too late.

Cited in *Ewing v. Lunn*, 22 S. D. 95, 115 N. W. 527, holding that appeal from order granting new trial, taken too late, is nullity.

19 S. D. 131, FOWLER v. WILL, 117 AM. ST. REP. 938, 102 N. W. 598, 8 A. & E. ANN. CAS. 1093.

Rights of persons holding title by virtue of a quitclaim deed.

Cited in *Schmidt v. Musson*, 20 S. D. 399, 107 N. W. 367, holding no lien was acquired under a mortgage from one having no title at the time, although having apparent title under a quit-claim deed.

Cited in notes in 105 Am. St. Rep. 859, on quitclaim deeds; 12 L.R.A.(N.S.) 242, on precedence as between quitclaim and senior unrecorded deed.

19 S. D. 139, KLINGAMAN v. FISH & H. CO. 102 N. W. 601.

Admissibility of statements by injured person regarding his injuries.

Cited in note in 24 L.R.A.(N.S.) 262, on admissibility of expressions or statements, subsequent to injury, of present pain.

Distinguished in *Mississippi C. R. Co. v. Turnage*, 95 Miss. 854, 24 L.R.A.(N.S.) 253, 49 So. 840, holding in an action for personal injuries the evidence of nonexpert witnesses as to exclamations and declarations of

present pain and suffering were admissible although such declarations were made a considerable time after the accident.

19 S. D. 150, JUCKETT v. FARGO MERCANTILE CO. 102 N. W. 604.

19 S. D. 158, WHITFORD v. SMITH, 102 N. W. 1135.

Words libelous per se.

Cited in note in 116 Am. St. Rep. 806, on what words are libelous per se.

Right of action for defamation.

Cited in note in 23 L.R.A.(N.S.) 730, on right of one not specially named to maintain action for defamation based on charges against a class or group.

19 S. D. 159, NICHOLS v. SMITH, 102 N. W. 1135.

Right of action for defamation.

Cited in note in 23 L.R.A.(N.S.) 730, on right of one not specially named to maintain action for defamation based on charges against a class or group.

19 S. D. 159, CLARKE v. ZOELLNER, 102 N. W. 1135.

19 S. D. 160, MOODY v. LAMBERT, 102 N. W. 1135.

19 S. D. 161, WHITFORD v. SMITH, 102 N. W. 1135.

19 S. D. 161, NICHOLS v. SMITH, 102 N. W. 606.

Followed without discussion in Whitford v. Smith, 19 S. D. 161, 102 N. W. 1135.

19 S. D. 162, PEARSONS v. PETERS, 102 N. W. 606.

Sufficiency of complaint and affidavit for attachment.

Distinguished in Hemmi v. Grover, 18 N. D. 578, 120 N. W. 561, holding that complaint and affidavit for attachment set forth cause of action.

Proceedings to dissolve attachment.

Cited in note in 123 Am. St. Rep. 1035, on proceedings to dissolve attachment.

19 S. D. 167, TYLER v. HAGGART, 102 N. W. 682.

Followed without discussion in Lavin v. Kreger, 20 S. D. 80, 104 N. W. 909.

Location of government boundaries.

Cited in Unzelmann v. Shelton, 19 S. D. 389, 103 N. W. 646, holding on the issue of the location of a government corner a showing of the actual location of such corner controls over the field notes which show a different

location; *Propper v. Wohlwend*, 16 N. D. 110, 112 N. W. 967, holding in the determination of government boundary lines original monuments control over plats and field notes.

Cited in note in 129 Am. St. Rep. 999, on location of boundaries.

19 S. D. 176, *CHRISTOPHERSON v. OLESON*, 102 N. W. 685.

19 S. D. 184, *KERR v. MURPHY*, 69 L.R.A. 499, 102 N. W. 687,
8 A. & E. ANN. CAS. 1138.

Collateral attack because of irregularities in notice.

Cited in *Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250, holding the fact that an order to show cause why real property should not be sold to satisfy debts was not published the statutory number of times does not render the sale of the realty subject to collateral attack.

19 S. D. 197, *MURPHY v. NELSON*, 102 N. W. 691.

19 S. D. 207, *HICKSON v. CULBERT*, 102 N. W. 774.

When resulting trust arises.

Cited in note in 127 Am. St. Rep. 265, on resulting trust in favor of spouse who pays purchase price and takes title in name of other spouse.

19 S. D. 214, *RE NELSON*, 102 N. W. 885.

19 S. D. 224, *EASTON v. CRANMER*, 102 N. W. 944.

Presumption that incompetent evidence was disregarded by trial court.

Cited in *Merager v. Madson*, 19 S. D. 400, 103 N. W. 650, holding where it appeared that there was competent and uncontroverted evidence on which the trial court might base its action it would be presumed the incompetent evidence introduced was disregarded.

19 S. D. 231, *BAILEY v. SIOUX FALLS*, 103 N. W. 16.

19 S. D. 234, *STATE v. YEOGE*, 69 L.R.A. 504, 103 N. W. 17,
9 A. & E. ANN. CAS. 202.

Practice of medicine.

Cited in *State v. Smith*, 233 Mo. 242, 33 L.R.A.(N.S.) 179, 135 S. W. 468, holding that "chiropractor" practices medicine; *People v. Fortch*, 13 Cal. App. 779 119 Pac. 823, holding that legislature has power to define what is practicing dentistry.

Cited in note in 3 L.R.A. (N.S.) 763, on application of statutes regulating practice of medicine to persons giving special kinds of treatment.

19 S. D. 238, IOWA NAT. BANK v. SHERMAN, 117 AM. ST. REP. 941, 103 N. W. 19, Later appeal in 23 S. D. 8, 119 N. W. 1010.

Burden of proof of good faith.

Cited in Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522, holding burden upon purchaser of note obtained by fraud of showing that he is bona fide holder.

Direction of verdict.

Distinguished in Lyon v. Phillips, 20 S. D. 607, 108 N. W. 554, holding trial court properly directed a verdict where the evidence of the title of a chattel mortgage was uncontradicted and there was no evidence of fraud in the transaction.

19 S. D. 242, EVERETT v. STOKES, 103 N. W. 20.

19 S. D. 245, BACKES v. ERICKSON, 103 N. W. 21.

19 S. D. 248, IOWA LOAN & T. CO. v. SCHNOSE, 103 N. W. 22, 9 A. & E. ANN. CAS. 255.

Discharge of sureties.

Cited in Hoffman v. Habighorst, 49 Or. 379, 91 Pac. 20, holding it necessary to discharge accommodation makers on a note by the act of the holder in extending time of payment that he have notice of their relationship as sureties thereon.

Cited in note in 4 L.R.A.(N.S.) 666, on effect upon mortgagor's obligation of modification between mortgagee and subsequent grantees.

Proof and effect of foreign laws.

Cited in note in 113 Am. St. Rep. 880, on proof of foreign laws and their effect.

19 S. D. 260, STATE v. WOOD, 103 N. W. 25.

19 S. D. 263, JEROME v. RUST, 103 N. W. 26.

19 S. D. 269, McCORMICK v. PFEIFFER, 103 N. W. 31.

Prohibition by city of sale of intoxicating liquors.

Cited in Centerville v. Gayken, 20 S. D. 82, 104 N. W. 910, holding the holder of a county license to sell intoxicating liquors might be enjoined from selling it in an incorporated city that has refused to grant a permit.

Cited in note in 27 L.R.A.(N.S.) 1195, 1196, on right to control by mandamus decision of licensing officers as to fitness of application for liquor license.

19 S. D. 271, STATE v. COUGHRAN, 103 N. W. 31.

19 S. D. 284, **LARSON v. CHICAGO, M. & ST. P. R. CO.** 103 N. W. 35.

Dedication and acceptance of street.

Cited in note in 129 Am. St. Rep. 608, on what constitutes dedication to, and acceptance of, a public street.

19 S. D. 293, **SUNDLING v. WILLEY**, 103 N. W. 38, 9 A. & E. ANN. CAS. 644.

Effect of motion by both parties for a directed verdict after the close of the testimony.

Cited in *Saxton v. Perry*, 47 Colo. 263, 107 Pac. 281, holding the effect of a motion by both parties at the close of the testimony for a directed verdict is to give the findings of the court the effect of a general verdict.

Revival of discharged debt.

Cited in note in 135 Am. St. Rep. 381, 384, on revival of debt discharged in bankruptcy.

19 S. D. 302, **C. & J. MICHEL BREWING CO. v. STATE**, 79 L.R.A. 911, 103 N. W. 40.

Followed without discussion in *Steffen v. State*, 19 S. D. 314, 103 N. W. 44.

Compulsory payments.

Cited in note in 22 L.R.A.(N.S.) 867, 877, on voluntariness of payment of license fee exacted under color of authority.

19 S. D. 314, **STEFFEN v. STATE**, 103 N. W. 44.

Compulsory payments.

Cited in note in 22 L.R.A.(N.S.) 867, 876, on voluntariness of payment of license fee exacted under color of authority.

19 S. D. 317, **WATT v. MORROW**, 103 N. W. 45.

Right to subject wife's property to husband's debt.

Cited in *Clark v. Else*, 21 S. D. 112, 110 N. W. 88, holding that wife's property should not be subjected to husband's debts, unless it clearly appears that it was put in her name to defraud his creditors.

19 S. D. 334, **SANFORD v. KING**, 103 N. W. 26.

Validity of special embraced in general enactment.

Cited in *State v. Mudie*, 22 S. D. 41, 115 N. W. 107, holding that particular enactment in statute is operative, where general enactment in same statute embraces it.

Conclusiveness of judgment in ejectment.

Cited in note in 4 L.R.A.(N. S.) 299, on conclusiveness of judgment in actions of nature of ejectment, as to claim of title, previously acquired not in issue.

10 S. D. 342, FARNHAM v. COLEMAN, 1 L.R.A.(N.S.) 1135, 117 AM. ST. REP. 944, 103 N. W. 161, 9 A. & E. ANN. CAS. 314.

Mandamus to compel enforcement of judgment by inferior court.

Cited in note in 24 L.R.A.(N.S.) 887, on mandamus to compel inferior court to enforce its judgment or decree.

Power to punish for contempt.

Annotation cited in *Re Hammond*, 83 Neb. 636, 23 L.R.A.(N.S.) 1173, 120 N. W. 203, holding under the authority of statute a justice had power to punish for a contempt a witness who refused to testify.

Cited in note in 117 Am. St. Rep. 954, on courts, tribunals and persons authorized to punish contempts.

Right of action for personal injuries as asset in bankruptcy.

Cited in note in 12 L.R.A.(N.S.) 1173, on right of action for personal injuries as asset in bankruptcy or insolvency.

10 S. D. 351, LANGMAACK v. KEITH, 103 N. W. 210.

Followed without discussion in *Barry v. Stover*, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672.

Record as prerequisite of foreclosure by advertisement.

Cited in *Hebden v. Bina*, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85, upholding the doctrine that it must appear before a person can foreclose a mortgage by advertisement that he is the owner and the holder of the record title of the mortgage.

Trust deed as mortgage.

Followed in *McVay v. Tousley*, 20 S. D. 258, 129 Am. St. Rep. 927, 105 N. W. 932, holding an instrument whereby the owners of land conveyed to the grantee as trustee to secure the payment of a note executed by the grantor to a third person and providing for the foreclosure of such instrument constituted a mortgage.

Cited in *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. 135, holding that trust deed is mortgage, leaving legal title in grantors.

10 S. D. 358, COLLINS v. GLADIATOR CONSOL. GOLD MIN. MILL. CO. 103 N. W. 385.

10 S. D. 361, COOKE v. McQUATERS, 103 N. W. 385.

Right of plaintiff to dismiss action.

Cited in *Deere & W. Co. v. Hinckley*, 20 S. D. 359, 106 N. W. 138, holding plaintiff might properly dismiss an action where no counter-claim interposed or no reason shown to prevent the dismissal of the action.

Cited in note in 15 L.R.A.(N.S.) 344, on right at common law to take nonsuit where defendant has interposed counterclaim entitling him to affirmative relief.

19 S. D. 367, **BISHOP & B. CO. v. SCHLEUNING**, 103 N. W. 387.

19 S. D. 372, **JONES v. JONES**, 103 N. W. 641, Appeal from taxation of costs in 19 S. D. 592, 104 N. W. 267.

19 S. D. 373, **HAHN v. DICKINSON**, 103 N. W. 642.

19 S. D. 376, **CLIFFORD v. LATHAM**, 103 N. W. 642.

19 S. D. 378, **MEADOWS v. OSTERKAMP**, 103 N. W. 642.

19 S. D. 381, **HURLEY v. McCALLISTER**, 103 N. W. 644.

Conveyance in consideration of support.

Cited in note in 130 Am. St. Rep. 1043, 1046, 1050, on conveyances in consideration of support.

19 S. D. 389, **UNZELMANN v. SHELTON**, 103 N. W. 646.

Location of boundary lines.

Cited in *Propper v. Wohlwend*, 16 N. D. 110, 112 N. W. 967, holding evidence of the location of the original monuments controls over the field notes.

Cited in note in 129 Am. St. Rep. 999, on location of boundaries.

19 S. D. 394, **KIRBY v. MARTINDALE**, 103 N. W. 648, 9 A. & E. ANN. CAS. 493.

19 S. D. 400, **MERAGER v. MADSON**, 103 N. W. 650.

19 S. D. 405, **GOODALE v. WALLACE**, 117 AM. ST. REP. 962, 103 N. W. 651, 9 A. & E. ANN. CAS. 545.

When contract is usurious.

Cited in *Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134, holding that provision that whole sum of principal and interest shall become due on default does not make note usurious.

Cited in notes in 28 L.R.A.(N.S.) 114, on exacting interest for full term upon payment of debt before maturity as usury; 33 L.R.A.(N.S.) 301, on validity of agreement before interest due to pay interest on interest.

19 S. D. 418, **BANKER'S NAT. BANK v. SECURITY TRUST CO.** 103 N. W. 654.

19 S. D. 421, **ALBIEN v. SMITH**, 103 N. W. 655.

19 S. D. 423, **MATHEWSON v. FREDRICH**, 103 N. W. 656.

19 S. D. 427, **KOTHE v. BERLIN TWP.** 103 N. W. 657.

19 S. D. 435, ROCHFORD v. SCHOOL DIST. NO. 6, 103 N. W. 763.

19 S. D. 436, WAEGE v. KOEHLER, 103 N. W. 1135.

19 S. D. 437, WORK v. BRAUN, 103 N. W. 764.

Accounting by redemptioner.

Distinguished in *Barker v. More*, 18 N. D. 82, 118 N. W. 823, holding that mortgagor cannot compel redemptioner to account for difference between what he paid and value of land.

19 S. D. 447, STATE v. LINTNER, 104 N. W. 205.

19 S. D. 453, JACKSON v. PRIOR HILL MIN. CO. 104 N. W. 207.

Presumption of correctness of findings of trial court.

Cited in *Barton v. Koon*, 20 S. D. 7, 104 N. W. 521, holding findings of fact by the trial court will be presumed to be correct in the absence of a showing of a clear preponderance of evidence against them; *Neeley v. Roberts*, 23 S. D. 604, 122 N. W. 655, holding that findings of court will be sustained, unless evidence clearly preponderates against them.

19 S. D. 459, BORNEMAN v. CHICAGO, ST. P. M. & O. R. CO. 104 N. W. 208.

Sufficiency of complaint in action against carrier for injury to trespassing animals.

Cited in *Smith v. San Pedro, L. A. & S. L. R. Co.* 35 Utah, 390, 100 Pac. 673, holding averments that the defendant well knowing that sheep were on the track so negligently, carelessly ran, managed and operated the train so as to run into them and injure them stated a good cause of action.

Evidence of speed.

Cited in note in 34 L.R.A. (N.S.) 792, on evidence as to speed of trains and hand cars.

When direction of verdict is proper.

Cited in *Roberts v. Ruh*, 22 S. D. 13, 114 N. W. 1097, holding direction of verdict proper only in total absence of evidence on some essential issue, or in absence of conflict.

19 S. D. 469, MORAN v. THOMAS, 104 N. W. 212.

Limitations in favor of recorded tax deed.

Cited in *Bandow v. Wolven*, 20 S. D. 445, 107 N. W. 204, holding the mere recording of an instrument in the form prescribed for tax deeds would not of itself cause the running of the statute of limitations; *Cornelius v. Ferguson*, 23 S. D. 187, 121 N. W. 91, holding tax deed recorded for three years bar to action to quiet title.

Cited in note in 27 L.R.A. (N.S.) 347, 350, 352, 356, as to whether void

tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes.

19 S. D. 474, UNION NAT. BANK v. HALLEY, 104 N. W. 213.

19 S. D. 483, QUALE v. HAZEL, 104 N. W. 215.

Unauthorized contract by agent as binding principal.

Cited in *Purkey v. Harding*, 23 S. D. 632, 123 N. W. 69, holding owner not liable on unauthorized contract of sale by broker.

19 S. D. 492, McLENNON v. FENNER, 104 N. W. 218.

Recovery on injunction bond of attorney's fees.

Cited in note in 16 L.R.A.(N.S.) 56, on recovery on injunction bond of attorney's fees necessarily expended in dissolving injunction.

Review of exceptions.

Cited in *Kelly v. Wheeler*, 22 S. D. 611, 119 N. W. 994, holding certificate of judge that exceptions are deemed to be taken to rulings objected to insufficient to review them.

19 S. D. 497, GARDINER v. ROSS, 104 N. W. 220.

19 S. D. 506, PRINGLE v. CANFIELD, 104 N. W. 223.

19 S. D. 514, GARDNER v. HAINES, 104 N. W. 244.

Creation of unlawful preferences by debtor.

Distinguished in *Hoppe Hardware Co. v. Bain*, 21 Okla. 177, 17 L.R.A.(N.S.) 310, 95 Pac. 765, holding a transfer by a debtor of all his assets to a corporation in which all the stock but one share was issued to the wife and brother-in-law in payment of indebtedness was fraudulent as to creditors not assenting thereto.

19 S. D. 525, DICKINSON v. HAHN, 104 N. W. 247, Reversed in 23 S. D. 65, 119 N. W. 1034.

19 S. D. 532, ODELL v. PETTY, 104 N. W. 249.

19 S. D. 534, BLACKMAN v. MULHALL, 104 N. W. 250.

Collateral attack on administrator's or guardian's sale.

Cited in *Brown v. Hannah*, 162 Mich. 33, 115 N. W. 980, holding the sale of lots belonging to the estate of a decedent as one parcel although directed to be sold severally was an irregularity which did not invalidate the sale on collateral attack; *Eaves v. Mullen*, 25 Okla. 679, 107 Pac. 433, holding that guardian's sale is not void on collateral attack because notice of hearing was given only nine days, instead of ten.

19 S. D. 555, **BON HOMME COUNTY v. McLOUTH**, 104 N. W. 256.

19 S. D. 559, **GLOVER v. MANILLA GOLD MIN. & MILL. CO.** 104 N. W. 261.

Right of stockholders to represent corporation in its behalf in an action.

Cited in *Frederick Mill. Co. v. Frederick Farmers' Alliance Co.* 20 S. D. 335, 341, 106 N. W. 298, holding the stockholder of a corporation might be properly permitted to represent the corporation in as far as was necessary to move to vacate a judgment rendered against the corporation in a stipulation signed by the president of the corporation without authority where no board of directors to defend the suit.

19 S. D. 572, **TROUTMAN v. EGGLESTON**, 104 N. W. 257.

19 S. D. 577, **MISSISSIPPI LUMBER & COAL CO. v. KELLY**, 104 N. W. 265, 9 A. & E. ANN. CAS. 449.

Comparison of handwriting.

Cited in *Cochrane v. National Elevator Co.* 20 N. D. 169, 127 N. W. 725, holding exhibit admittedly bearing genuine signature admissible for comparison with disputed signature.

Cited in note in 18 L.R.A.(N.S.) 523, on admission of a document not otherwise relevant as standard of comparison of handwriting.

19 S. D. 585, **STATE v. SCHMIDT**, 104 N. W. 259.

19 S. D. 592, **JONES v. JONES**, 104 N. W. 267.

19 S. D. 594, **JACKSON v. BAILEY**, 104 N. W. 268.

19 S. D. 595, **RICHARDS TRUST CO. v. RHOMBERG**, 104 N. W. 268.

Followed without special discussion in *Miller v. Berry*, 19 S. D. 625, 104 N. W. 311.

19 S. D. 602, **MINERAL SCHOOL DIST. NO. 10 v. PENNINGTON COUNTY**, 104 N. W. 270.

19 S. D. 608, **HARDMAN v. KELLEY**, 104 N. W. 272.

Objection of inconsistent defenses.

Cited in *Rees v. Storms*, 101 Minn. 381, 112 N. W. 419, considering when the objection of inconsistent defences is available.

Right to amend pleadings.

Cited in *Todd v. Bettingen*, 102 Minn. 260, 18 L.R.A.(N.S.) 263, 113 N. W. 906, holding trial court erred in allowing the plaintiff to amend his pleadings after a remand of the cause from the supreme court.

19 S. D. 617, GIBSON v. ALLEN, 104 N. W. 275.

Sealed instrument.

Cited in Philip v. Sterns, 20 S. D. 220, 105 N. W. 467, 11 A. & E. Ann. Cas. 1108, holding the word "seal" at the end of the name in a mortgage made it a sealed instrument within the meaning of a statute providing that sealed instruments shall not be barred until after the expiration of twenty years.

Limitations as to sealed instruments.

Cited in Sprague v. Lovett, 20 S. D. 328, 106 N. W. 134, holding an action to foreclose a trust deed was not barred before the expiration of twenty years from the time of its execution.

Validity of tax deed without seal.

Cited in Northwestern Mortg. Trust Co. v. Levitzow, 23 S. D. 562, 122 N. W. 600, holding absence of seal from tax deed immaterial.

19 S. D. 625, MILLER v. BERRY, 104 N. W. 311.

19 S. D. 632, IOWA FALLS MFG. CO. v. FARRAR, 104 N. W. 449.

Followed without discussion in Bishop & B. Co. v. Schleuning, 20 S. D. 71, 104 N. W. 854; Thompson v. Scroyer, 20 S. D. 72, 104 N. W. 854.

Right of foreign corporation to maintain action on contracts entered into before compliance with statutes.

Cited in American Copying Co. v. Eureka Bazaar, 20 S. D. 526, 9 L.R.A. (N.S.) 1176, 108 N. W. 15, holding a foreign corporation could not maintain an action on a contract entered into before it had complied with the statutory requirements as to right to do business in the state.

Distinguished in State use of Hart-Parr Co. v. Robb-Lawrence Co. 15 N. D. 55, 106 N. W. 406, holding a foreign corporation in an action on a contract entered into in the state need not allege compliance with the statutory requirement imposed on them as a condition precedent to doing business in the state.

19 S. D. 644, STATE EX REL. TAUBMAN v. HUSTON, 117 AM. ST. REP. 970, 104 N. W. 451, 9 A. & E. ANN. CAS. 381.

19 S. D. 646, STATE v. STRUBLE, 104 N. W. 465.

Followed without discussion in State v. Jackson, 20 S. D. 305, 105 N. W. 742.

19 S. D. 653, HARTSHORN v. SMITH, 104 N. W. 467.

19 S. D. 656, SCHAEFER v. CREMER, 104 N. W. 468.

When action for malicious prosecution is maintainable.

Cited in note in 2 L.R.A.(N.S.) 933, 940, as to when action sufficiently at an end to support suit for malicious prosecution.

**19 S. D. 663, FT. PIERRE v. HALL, 117 AM. ST. REP. 972,
104 N. W. 470.**

Right of party to assall judgment.

Cited in Cox v. Anderson, 79 Neb. 76, 112 N. W. 317, holding injunction would not lie to enjoin the enforcement of a judgment of restitution where there was no claim of fraud or mistake or want of jurisdiction.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 20 S. D.

20 S. D. 1, STATE v. BJELKSTROM, 104 N. W. 481.

20 S. D. 7, BARTON v. KOON, 104 N. W. 521.

20 S. D. 12, MILLER v. TJEXHUS, 104 N. W. 519.

20 S. D. 18, STATE v. SHANLEY, 104 N. W. 522.

Objections to panel of grand jury.

Cited in *State v. Cambron*, 20 S. D. 282, 105 N. W. 241, holding improper summoning of additional jurors and lack of authority of court to impanel grand jury because reasons for request therefor were not fully set out by county attorney, not being statutory grounds on which challenge to panel may be interposed cannot be considered on appeal.

Variance between evidence and information.

Cited in *State v. Williams*, 20 S. D. 492, 107 N. W. 830, holding where accused is charged with unlawful sale of intoxicants to several persons jointly, there is a fatal variance where proof shows sale to but one person alone.

20 S. D. 23, STATE v. DELAMATER, 8 L.R.A.(N.S.) 774, 129 Am. ST. REP. 907, 104 N. W. 537, Affirmed in 205 U. S. 93. 51 L. ed. 728, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733.

Restrictions on interstate traffic in intoxicating liquor.

Cited in *Hart v. State*, 87 Miss. 171, 112 Am. St. Rep. 437, 39 So. 523, holding statute making it a misdemeanor for one to act as agent for the seller or buyer of intoxicants the sale of which is unlawful without a license in districts where sale is prohibited by law, is not in conflict with inter-

Dak. Rep.—74.

1169

state commerce clause of the Federal Constitution; *Conrad Seipp Brewing Co. v. Green*, 23 S. D. 619, 122 N. W. 662, holding void, contract of sale of beer without license in violation of statute making such sale misdemeanor.

Cited in note in 19 L.R.A.(N.S.) 309, on license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, as violating the commerce clause.

Distinguished in *R. M. Rose Co. v. State*, 133 Ga. 360, — L.R.A.(N.S.) —, 65 S. E. 770, holding a resident of one state who solicits order by mail for intoxicating liquor in state where sale is prohibited cannot be convicted under statute of latter state making it a misdemeanor to solicit order for sale of intoxicants in district where sale was prohibited.

20 S. D. 39, FOSS v. VAN WAGENEN, 104 N. W. 605.

Evidence of delivery of mortgage.

Cited in *Cable Co. v. Rathgeber*, 21 S. D. 418, 113 N. W. 88, holding that acknowledgment of receipt by mortgagor of copy of mortgage is sufficient evidence of its delivery to him.

20 S. D. 42, SCOTTISH-AMERICAN MORTG. CO. v. RUSSELL, 104 N. W. 607.

Constructive notice of party wall agreement.

Cited in *Hawkes v. Hoffman*, 56 Wash. 120, 128, 24 L.R.A.(N.S.) 1038, 105 Pac. 156, holding notice of existence of party wall by innocent purchaser is not constructive notice of agreement to pay one half the cost of construction by grantor of purchaser.

20 S. D. 46, DOUGHERTY v. CHICAGO, M. & ST. P. R. CO. 104 N. W. 672.

Contributory negligence at railroad crossing.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Lynn*, 171 Ind. 589, 85 N. E. 999, holding a person attempting to cross railroad crossing not guilty of contributory negligence as matter of law where view is partly obstructed and such person before attempting looked and listened, but did not observe approaching train, which gave no signal; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531, holding driver of automobile not guilty of contributory negligence as matter of law in attempting to cross railroad crossing where view was obstructed by building and driver and occupant both looked and listened but did not see switching train being backed onto crossing and because of change of "speed" of automobile the sound of train could not be heard.

Private action for violation of statute.

Cited in note in 9 L.R.A.(N.S.) 342, 345, 367, on private action for violation of statute not expressly conferring it.

20 S. D. 52, WEBBER v. CONKLIN, 104 N. W. 675.

20 S. D. 58, KJETLAND v. PEDERSON, 104 N. W. 677.

20 S. D. 62, WHEATON v. LIVERPOOL & L. & G. INS. CO. 104 N. W. 850.

Instruction, not excepted to, as law of case.

Cited in South Dakota C. R. Co. v. Smith, 22 S. D. 210, 116 N. W. 1120, holding that instruction must be considered law of case, when no exception is taken thereto.

20 S. D. 70, GORDON v. KELLEY, 104 S. W. 605.

20 S. D. 71, BISHOP & B. CO. v. SCHLEUNING, 104 N. W. 854.

20 S. D. 72, THOMPSON v. SCROYER, 104 N. W. 854.

Followed without discussion in Bishop & B. Co. v. Schleuning, 20 S. D. 71, 104 N. W. 854.

20 S. D. 75, BARRETT v. McCARTY, 104 N. W. 907.

20 S. D. 80, LAVIN v. KREGER, 104 N. W. 909.

20 S. D. 82, CENTERVILLE v. GAYKEN, 104 N. W. 910.

20 S. D. 85, HEBERT v. HEBERT, 104 N. W. 911.

20 S. D. 88, BASKERVILLE v. JOHNSON, 104 N. W. 913.

Right to reject goods for breach of warranty.

Cited in note in 27 L.R.A.(N.S.) 918, 919, on right to reject goods for breach of warranty.

20 S. D. 90, STATE EX REL. HELLIER v. VINCENT, 104 N. W. 914.

20 S. D. 93, FOSS v. PETTERSON, 104 N. W. 915.

20 S. D. 98, STATE v. LAMPHERE, 104 N. W. 1038.

Grounds for quashing indictment.

Cited in State v. Fleming, 20 N. D. 105, 126 N. W. 565, holding it not error to refuse to discharge accused for failure to try him at next term, where he is under bail; State v. Cambron, 20 S. D. 282, 105 N. W. 241, holding it is not ground for quashing an indictment that two members of grand jury were irregularly summoned, and that court had no authority to impanel grand jury because reasons therefor were not fully set out in state's attorney's request.

20 S. D. 103, BOWEN v. MUTUAL L. INS. CO. 104 N. W. 1040.

Stipulations in insurance contracts.

Cited in notes in 17 L.R.A.(N.S.) 1149, on effect of stipulation in application or policy of life insurance that it shall not become binding unless

delivered to assured while in good health; 13 L.R.A.(N.S.) 861, on effect of nonwaiver agreement on conditions existing at inception of policy.

Parol evidence to vary insurance contract.

Cited in note in 16 L.R.A.(N.S.) 1185, on parol evidence rule as to varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

20 S. D. 118, ATLAS LUMBER & COAL CO. v. FLINT, 104 N. W. 1046.

Oral contract to answer for another's debt.

Cited in note in 126 Am. St. Rep. 492, on contract to answer for or pay debt of another within statute of frauds.

20 S. D. 122, STATE EX REL. NULL v. CIRCUIT CT. 104 N. W. 1048.

Duties enforceable by mandamus.

Cited in note in 125 Am. St. Rep. 522, on duties, performance of which may be compelled by mandamus.

20 S. D. 133, JOHNSON v. BERRY, 1 L.R.A.(N.S.) 1159, 104 N. W. 1114.

Compliance with statute as condition precedent to maintaining action.

Cited in American Copying Co. v. Eureka Bazaar, 20 S. D. 526, 9 L.R.A.(N.S.) 1176, 108 N. W. 15, holding where statute provides a foreign corporation shall not maintain an action on contract made in state until statutes relating to filing its charter and appointment of agent for service shall have been fully complied with, such corporation cannot maintain action on contract made before compliance with statute; Hahn v. Sleepy Eye Mill Co. 21 S. D. 324, 112 N. W. 843, holding it no defense to action for conversion of wheat on which plaintiff has thresher's lien that bond was signed "William H." and lien "W. J. H.;" Conrad Seipp Brewing Co. v. Green, 23 S. D. 619, 122 N. W. 662, holding void, contract of sale of beer without license in violation of statute making such sale misdemeanor.

Cited in note in 117 Am. St. Rep. 508, on contracts, consideration for which has partly failed, or is partly illegal.

20 S. D. 135, STATE v. EDMUNDS, 104 N. W. 1115, Rehearing in 21 S. D. 5, 108 N. W. 556.

20 S. D. 142, GRIFFIN v. WALWORTH COUNTY, 104 N. W. 1117.

20 S. D. 148, STATE v. HUBBARD, 104 N. W. 1120.

Instruction as to degrees of crime.

Cited in State v. Kapelino, 20 S. D. 591, 108 N. W. 335, holding where there are degrees of crime and the jury are charged with duty of finding

the degree it is proper for the court to charge the jury in respect to the acts necessary to constitute the crime in each degree.

Manslaughter in second degree.

Cited in *State v. Edmunds*, 21 S. D. 5, 108 N. W. 556 (dissenting opinion), on definition of manslaughter in second degree.

20 S. D. 152, MURTHA v. HOWARD, 105 N. W. 100.

20 S. D. 154, KIRBY v. CITIZENS' TELEPH. CO. 105 N. W. 95.

20 S. D. 159, STATE v. CRAM, 105 N. W. 99.

20 S. D. 161, WOOD v. SAGINAW GOLD MIN. & MILL. CO. 105 N. W. 101.

Conclusiveness of findings of court.

Cited in *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding that findings of court must stand, unless evidence clearly preponderates against them.

20 S. D. 164, STATE v. GRANT, 105 N. W. 97, 11 A. & E. ANN. CAS. 1017.

Liability for violation of liquor act.

Cited in *State v. Schell*, 22 S. D. 340, 117 N. W. 505, holding intent of saloon keeper in not keeping saloon closed on Sunday immaterial, or whether sale was made, or anybody entered; *State v. Johnson*, 23 S. D. 293, 22 L.R.A.(N.S.) 1007, 121 N. W. 785, holding that mere temporary call to furnish music is within intent of statute forbidding minor to visit or remain in saloon.

Cited in note in 22 L.R.A.(N.S.) 1011, on statutes regulating admission of minors to saloons.

—By servant.

Cited in *State v. Kinney*, 21 S. D. 390, 113 N. W. 77, holding it no defense to charge of keeping open on Sunday, that saloon was opened by bartender against instructions; *Ollre v. State*, 57 Tex. Crim. Rep. 520, 123 S. W. 1116 (dissenting opinion), on liability of licensee for unlawful sale of intoxicants by his servant.

Cited in note in 33 L.R.A.(N.S.) 422, on criminal responsibility for sale of liquor by partner, servant, or agent.

Instruction as to reasonable doubt.

Cited in note in 16 L.R.A.(N.S.) 263, on propriety of instruction as to what is a reasonable doubt.

20 S. D. 169, MATCHETT v. LIEBIG, 105 N. W. 170.

Conclusiveness of officer's return.

Cited in *Burton v. Cooley*, 22 S. D. 515, 118 N. W. 1028, holding that return of service by office must be regarded as true, on motion to vacate default judgment.

20 S. D. 175, JEWETT BROS. & JEWETT v. BENTSON, 105 N. W. 173.

20 S. D. 178, MURPHY v. PLANKINTON BANK, 105 N. W. 245.

Followed without discussion in *Lyon v. Plankinton Bank*, 20 S. D. 181, 105 N. W. 246.

20 S. D. 181, LYON v. PLANKINTON BANK, 105 N. W. 246.

20 S. D. 182, GARRIGAN v. HUNTIMER, 105 N. W. 278.

20 S. D. 186, SCHLACHTER v. ST. BERNARD'S ROMAN CATHOLIC CHURCH, 105 N. W. 279.

Conclusiveness of recitals in judgment.

Cited in *Boettcher v. Thompson*, 21 S. D. 169, 110 N. W. 108, holding that affirmative showing in bill of exceptions that recitals in judgment are not true prevails over presumption that they are true.

20 S. D. 190, EDGE v. ST. PAUL F. & M. INS. CO. 105 N. W. 281.

Recovery by third person on insurance policy.

Cited in notes in 135 Am. St. Rep. 756, 757, on fire insurance as security for a mortgagee or other lien holder; 18 L.R.A.(N.S.) 208, on effect of breach of insurance policy by mortgagor on rights of mortgagee.

Disapproved in *Brecht v. Law, U. & C. Ins. Co.* 18 L.R.A.(N.S.) 197, 87 C. C. A. 351, 160 Fed. 399, holding where clause in policy of fire insurance provided that if with consent of insurer a third person obtained an interest in insured property the conditions as to alienation of possession should apply in manner expressed in such provisions relating to such interest as should be written on or attached to policy, such third person cannot recover where policy becomes void as the person affecting the insurance.

Construing insurance contract in favor of insured.

Cited in *Breeden v. Aetna L. Ins. Co.* 23 S. D. 417, 122 N. W. 348, holding that limitation of time for notice and proof of accident should be construed most strongly against insurer.

20 S. D. 193, BERNARDY v. COLONIAL & U. S. MORTG. CO. 105 N. W. 737.

Inurement of title.

Cited in *Simonsen v. Monson*, 22 S. D. 238, 117 N. W. 133, holding that subsequent issuance of patent to grantor inures to benefit of prior grantees.

20 S. D. 196, HERMAN v. WINTER, 105 N. W. 457.

Time as essence of option contract.

Cited in *Hanschka v. Vodopich*, 20 S. D. 551, 108 N. W. 28, holding in

option contract time is of the essence of the agreement whether so specified or not.

Cited in note in 24 L.R.A.(N.S.) 93, on tender or payment as condition precedent to suit for specific performance of option contract to convey realty.

Elective acts to be performed at expiration of a lease.

Distinguished in *I. X. L. Furniture & Carpet Installment House v. Berets*, 32 Utah, 454, 91 Pac. 279, holding where lease provided that lessor would at expiration of lease on lessee's election renew the lease, the lessee was required to elect at or before lease expired, and not after it had expired.

20 S. D. 203, GODFREY v. FAUST, 105 N. W. 460.

Admission of incompetent evidence as ground for reversal.

Cited in *Re McClellan*, 20 S. D. 498, 107 N. W. 681, holding a judgment cannot be reversed alone for admission of incompetent evidence, for the presumption is that the court disregarded it and based its findings on the competent evidence in the case.

Crediting on claim, work outside thereof.

Cited in *Hawgood v. Emery*, 22 S. D. 573, 133 Am. St. Rep. 941, 119 N. W. 177, holding that work outside claim may be credited thereon if beneficial thereto.

20 S. D. 210, BARRETT v. BARRETT, 105 N. W. 463.

What constitutes desertion.

Cited in note in 29 L.R.A.(N.S.) 615, on desertion by forcing spouse to leave martial home.

Desertion as ground for divorce.

Cited in note in 119 Am. St. Rep. 624, 629, on desertion as ground for divorce.

20 S. D. 215, HAWLEY v. BOND, 105 N. W. 464.

Entry of judgment on general verdict on failure to answer special interrogatory.

Cited in *Reid v. Rhode Island Co.* 28 R. I. 321, 67 Atl. 328, holding court did not err in entering judgment on general verdict where jury fails to answer special interrogatory where matter in such interrogatory was immaterial and indecisive of the issues.

Admissibility of evidence of possession of property.

Cited in *Jantzen v. Emmanuel German Baptist Church*, 27 Okla. 473, 112 Pac. 1127, holding that witness may testify directly as to ownership of property; *Mosteller v. Holborn*, 20 S. D. 545, 108 N. W. 13, as to propriety of question as to possession of property levied on.

20 S. D. 220, PHILIP v. STEARNS, 105 N. W. 467, 11 A. & E. ANN. CAS. 1108.

Defect of parties in action affecting title to land.

Cited in *Grigby v. Wolven*, 20 S. D. 623, 108 N. W. 250, holding the lien of a mortgagee not made a party to an action to quiet title would not be affected by a judgment in the case.

20 S. D. 226, GOULD v. TUCKER, 105 N. W. 624.

Interest of timber culture entryman before patent is issued.

Cited in *Walker v. Ehresman*, 79 Neb. 775, 113 N. W. 218, holding a timber culture entryman who dies before receiving patent has not a devisable interest, and his heirs takes as donees of the United States and not by inheritance.

Cited in note in 34 L.R.A.(N.S.) 411, on liability of claim or interest in public lands for debts contracted before patent issued.

"Heirs" in timber culture patent.

Cited in *Braun v. Mathieson*, 139 Iowa, 409, 116 N. W. 789, holding when persons coming within the description of "heirs" are determined by the local law, their interests are fixed by the patent itself and not by law of descent and distribution, and holding under local statute widow could not take as heir.

Patent to heirs of timber culture entryman.

Cited in *Braun v. Mathieson*, 139 Iowa, 409, 116 N. W. 789, holding where timber culture entryman dies before patent is issued to him, the patent issued thereafter passes title direct to the heirs who take by purchase and not by descent.

20 S. D. 232, JEWETT BROS. & JEWETT v. SMAIL, 105 N. W. 738.

Prohibition by state of sale of article of interstate commerce.

Cited in *Ex parte Hawley*, 22 S. D. 23, 15 L.R.A.(N.S.) 138, 115 N. W. 93, holding invalid as in conflict with interstate commerce a statute authorizing state board of agriculture to refuse permission for sale of nursery stock by persons who cannot satisfy board of their financial responsibility and integrity; *McDermott v. State*, 143 Wis. 18, — L.R.A.(N.S.) —, 126 N. W. 888 (dissenting opinion), on validity of act prohibiting sale of unmixed syrups unless true to name.

Cited in notes in 15 L.R.A.(N.S.) 331, on injunction against acts of food commissioner which affect sale of foods; 51 L. ed. U. S. 80, on inspection laws as regulations of commerce.

20 S. D. 244, SIOUX FALLS v. NEEB, 105 N. W. 735.

20 S. D. 248, HOBART v. FREDERIKSEN, 105 N. W. 168.

Followed without discussion in *Frederiksen v. Wilcox*, 21 S. D. 296, 111 N. W. 1135.

Time as essence of a contract.

Cited in *Hanschka v. Vodopich*, 20 S. D. 551, 108 N. W. 28, holding time of essence of option contract, whether or not specified therein.

20 S. D. 254, LONGERBEAM v. HUSTON, 105 N. W. 742.**Action for claim and delivery.**

Cited in *Kierbow v. Young*, 20 S. D. 414, 8 L.R.A.(N.S.) 216, 107 N. W. 371, 11 A. & E. Ann. Cas. 1148, holding action of claim and delivery is instituted for purpose of recovering possession of personal property alleged to be in another party's possession and when it affirmatively appears property is not in his possession action will not lie.

Cited in note in 18 L.R.A.(N.S.) 1268, on right to maintain action to recover property in specie against one not in possession.

20 S. D. 258, McVAY v. TOUSLEY, 129 AM. ST. REP. 927, 105 N. W. 932.**Trust deed as mortgage.**

Cited in *Barry v. Stover*, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672, holding a conveyance by trust deed to secure payment of note from grantors to a third person constituted a mortgage; *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. 135, holding trust deed mortgage, leaving legal title in grantors.

20 S. D. 270, FREMONT, E. & M. VALLEY R. CO. v. PENNINGTON COUNTY, 105 N. W. 929, Reaffirmed on later appeal in 22 S. D. 202, 116 N. W. 75.**20 S. D. 275, GORDON v. GORDON, 105 N. W. 244.****20 S. D. 277, BRUCE v. WANZER, 105 N. W. 232.****Bar of action to foreclose mortgage.**

Cited in *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416, holding action to foreclose mortgage barred in 10 years.

20 S. D. 282, STATE v. CAMBRON, 105 N. W. 241.**20 S. D. 290, REMILLIARD v. AUTHIER, 4 L.R.A.(N.S.) 295, 105 N. W. 626.****Judgment as bar.**

Cited in *Kelley v. R. J. Schwab & Sons Co.* 22 S. D. 406, 118 N. W. 696, holding judgment for foreign corporation bar to action by judgment debtor to restrain collection of judgment because corporation was not entitled to sue in state.

20 S. D. 299, NELSON v. NATIONAL DRILL MFG. CO. 105 N. W. 620.

20 S. D. 303, J. F. KELLEY & CO. v. MEAD, 105 N. W. 736.

20 S. D. 305, STATE v. JACKSON, 105 N. W. 742.

20 S. D. 307, SALMER v. CLAY COUNTY, 105 N. W. 623.

20 S. D. 310, SIOUX FALLS BREWING & MALTING CO. v. WOOD, 105 N. W. 1124.

20 S. D. 312, DODSON v. CROCKER, 105 N. W. 929.

20 S. D. 314, COMMERCIAL STATE BANK v. KENDALL, 129 AM. ST. REP. 936, 106 N. W. 53.

20 S. D. 316, FLANDERS v. FRENCH, 106 N. W. 54.

Chattel mortgage of future earnings of machine.

Cited in note in 20 L.R.A.(N.S.) 506, on chattel mortgage of future earnings of threshing outfit.

20 S. D. 322, ISSENHUTH v. RIEGEL, 106 N. W. 58.

20 S. D. 325, HELLAND v. COLTON STATE BANK, 106 N. W. 60.

20 S. D. 328, SPRAGUE v. LOVETT, 106 N. W. 134.

20 S. D. 333, STAFFORD v. LEVINGER, 106 N. W. 123.

20 S. D. 335, FREDERICK MILL. CO. v. FREDERICK FARMERS' ALLIANCE CO. 106 N. W. 298.

Power to make stipulation for judgment.

Cited in Schouweiler v. Allen, 17 N. D. 510, 117 N. W. 866, holding where voters of a school district had legally instructed a school board to issue bonds a stipulation by the school board, in an action by a taxpayer and voter to enjoin the issuance of bonds, that judgment for plaintiff should be entered was void and judgment could not be entered thereon.

Availability of remedy to open default.

Cited in note in 26 L.R.A.(N.S.) 1066, on availability to privies of remedy of party to open default judgment.

20 S. D. 342, PEANO v. BRENNAN, 106 N. W. 409.

20 S. D. 349, INDEPENDENT SCHOOL DIST. NO. 2 v. DISTRICT NO. 37, 106 N. W. 302.

20 S. D. 353, McCOMB v. BASKERVILLE, 106 N. W. 300.

20 S. D. 358, WILSON v. COMMERCIAL UNION ASSUR. CO.
106 N. W. 140.

20 S. D. 359, DEERE & W. CO. v. HINCKLEY, 106 N. W. 138.

20 S. D. 363, KERLEY v. GERMSCHIED, 106 N. W. 136.

20 S. D. 367, STEPHENS v. FAUS, 106 N. W. 56.

Review of evidence.

Cited in Subera v. Jones, 20 S. D. 628, 108 N. W. 26, holding sufficiency of evidence to sustain court's findings cannot be questioned in absence of an appeal from an order denying a new trial; Dring v. St. Lawrence Twp. 23 S. D. 624, 122 N. W. 664, holding that instrument suppressing bill of exceptions, signed by circuit judge, but not attested, is ineffectual for any purpose.

20 S. D. 371, HANNICKER v. LEPPER, 6 L.R.A. (N.S.) 243,
129 AM. ST. REP. 938, 107 N. W. 202.

20 S. D. 375, ROLEWITCH v. HARRINGTON, 6 L.R.A. (N.S.) 550,
107 N. W. 207.

20 S. D. 378, McQUEEN v. BANK OF EDMONTON, 107 N. W.
208.

20 S. D. 384, CORCORAN v. HALLORAN, 107 N. W. 210.

Complaint for goods sold and delivered.

Cited in Rosebud Lumber Co. v. Serr, 22 S. D. 389, 117 N. W. 1042, holding complaint for goods sold alleging incorporation of plaintiff, debt in specific sum sale and delivery at defendant's request, and that amount specified is due, states cause of action.

Validity of verdict awarding interest.

Distinguished in Wiruth v. Lashmett, 85 Neb. 286, 123 N. W. 427, holding in action for damages for fraud in exchange of lands, in which plaintiff alleged he had been damaged in a stated sum and had given as part of purchase price promissory notes, which was admitted in the answer, and cause was submitted to jury under instruction that plaintiff's recovery should be for difference in value of property given and received a verdict for plaintiff for amount of notes and interest from date was a nullity.

Amendment of verdict.

Cited in note in 25 L.R.A. (N.S.) 311, 313, on power of court to amend verdict by adding interest.

20 S. D. 389, SCHMIDT v. MUSSON, 107 N. W. 367, Affirmed on
rehearing in 23 S. D. 231, 121 N. W. 624.

Effect of quitclaim deed.

Cited in Faris v. Finnup, 84 Kan. 122, 113 Pac. 407, holding that pur-

chaser by warranty deed from grantee in quitclaim deed did not have notice of prior unrecorded quitclaim deed by his grantee's grantor.

Cited in note in 25 L.R.A.(N.S.) 1037, on effect of remote quitclaim in chain of title upon rights of subsequent purchaser.

Escrows.

Cited in note in 130 Am. St. Rep. 944, on escrows.

20 S. D. 399, DAVIS v. HOLY TERROR MIN. CO. 107 N. W. 374.

Evidence admissible in action for personal injury.

Cited in note in 32 L.R.A.(N.S.) 1108, on admissibility of evidence of condition before and after accident of property whose defects alleged to have caused injury.

Excessiveness of damages.

Cited in *Maloney v. Winston Bros. Co.* 18 Idaho, 740, — L.R.A.(N.S.) —, 111 Pac. 1080, holding \$10,000 proper damages for fracture of leg of operator of drill.

20 S. D. 414, KIERBOW v. YOUNG, 8 L.R.A.(N.S.) 216, 107 N. W. 371, 11 A. & E. ANN. CAS. 1148.

Action to recover property.

Cited in note in 18 L.R.A.(N.S.) 1272, on right to maintain action to recover property in specie against one not in possession.

20 S. D. 419, NERGER v. EQUITABLE F. ASSO. 107 N. W. 531.

Condition precedent to action on insurance policy.

Cited in *Bolte v. Equitable F. Asso.* 23 S. D. 240, 121 N. W. 773, holding provision in by-laws for arbitration waived by failure of insurer to appoint arbitrator.

Cited in note in 15 L.R.A.(N.S.) 1068, on arbitration as condition precedent to action on insurance policy.

20 S. D. 426, DAL v. FISCHER, 107 N. W. 534.

20 S. D. 433, SCHRINER v. DICKINSON, 107 N. W. 536.

Evidence of agency to avoid personal liability.

Cited in *Dickinson v. National Life & T. Co.* 20 S. D. 437, 107 N. W. 537, holding an insurance company not liable for the unauthorized act of a state agent in certifying in writing that applicant for insurance was to be company physician in examination of applicants to amount of premium on his policy, for which he had given note, such undertaking being an individual one on agent's part, and there being nothing in the writing to indicate he was acting in representative capacity for purpose of creating obligation on part of company.

20 S. D. 437, DICKINSON v. NATIONAL LIFE & T. CO. 107 N. W. 537.

Authority of traveling salesman.

Cited in *Tollerton & W. Co. v. Gilruth*, 21 S. D. 320, 112 N. W. 842,

holding employer not bound by written rebate agreement signed by traveling salesman in his own name.

20 S. D. 440, STATE v. PRATT, 107 N. W. 538, 11 A. & E. ANN. CAS. 1049.

20 S. D. 445, BANDOW v. WOLVEN, 107 N. W. 204, Modified on rehearing in 23 S. D. 124, 120 N. W. 881.

Tax deed as bar to action to quiet title.

Cited in *Northwestern Mortg. Trust Co. v. Levtzow*, 23 S. D. 562, 122 N. W. 600; *Cornelius v. Ferguson*, 23 S. D. 187, 121 N. W. 91,—holding that tax deed, recorded for three years, bars action to quiet title.

Distinguished in *Battelle v. Wolven*, 22 S. D. 39, 115 N. W. 99, holding that tax deed void on face, though recorded for three years, is no bar to action to quiet title.

20 S. D. 456, HANSON v. HENDERSON, 107 N. W. 670.

20 S. D. 459, BARRY v. STOVER, 129 AM. ST. REP. 941, 107 N. W. 672.

Law governing negotiable paper.

Cited in note in 19 L.R.A.(N.S.) 670, on conflict of laws as to negotiable paper.

Right of transferee to foreclose trust deed.

Cited in *McVay v. Bridgman*, 21 S. D. 374, 112 N. W. 1138, holding that transferee of note, not taking assignment of trust deed and allowing transferor to collect note, cannot foreclose deed as against maker.

20 S. D. 464, LEE v. DWYER, 107 N. W. 674.

Presumption as to court's findings.

Cited in *Breeden v. Martens*, 21 S. D. 357, 112 N. W. 960, holding that findings of trial court on disputed questions of fact are presumed correct on appeal.

20 S. D. 466, CALKINS v. FIRST NAT. BANK, 107 N. W. 675.

20 S. D. 473, KEATOR v. FERGUSON, 129 AM. ST. REP. 947, 107 N. W. 673.

Waiver of forfeiture of contract by vendor.

Cited in *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947, holding acceptance by vendor of sum past due, waiver of conditions regarding forfeiture and time; *Walsh v. Selover, B. & Co.* 105 Minn. 282, 117 N. W. 499, holding where vendor of land by his conduct causes vendee to believe that vendor will pay taxes and that vendee may pay lien, vendor cannot thereafter declare a forfeiture of the contract whose strict terms require vendee to pay taxes, because of vendee does not in first instances pay tax direct to county official; *Spolek v. Hatch*, 21 S.

D. 386, 113 N. W. 75, holding that stipulation, making time of essence of contract, is waived by extension of time for payment of balance.

20 S. D. 478, DANIELSON v. RUA, 107 N. W. 680.

20 S. D. 482, BELKNAP v. BELKNAP, 107 N. W. 692.

20 S. D. 487, McVAY v. TOUSLEY, 107 N. W. 828.

20 S. D. 489, STATE v. PLACE, 107 N. W. 829, 11 A. & E. ANN. CAS. 1129.

Coercement of jury.

Cited in Auld v. Cathro, 20 N. D. 461, 32 L.R.A. (N.S.) 71, 128 N. W. 1025, holding that postponement over Sunday of reading of requested evidence to jury is not reversible error, as tending to coerce jury.

Review of misconduct of attorney.

Cited in State v. Kaufmann, 22 S. D. 433, 118 N. W. 337, holding misconduct of state's counsel reviewable on appeal from denial of new trial.

20 S. D. 492, STATE v. WILLIAMS, 107 N. W. 830.

20 S. D. 495, GRANTZ v. DEADWOOD, 107 N. W. 832.

Intoxication of juror as ground for new trial.

Cited in Ewing v. Lunn, 22 S. D. 95, 115 N. W. 527, denying new trial for intoxication of jurors during trial known at time of counsel.

20 S. D. 498, RE McCLELLAN, 107 N. W. 681.

Conclusiveness of court's findings.

Cited in Buchanan v. Randall, 21 S. D. 44, 109 N. W. 513, holding that findings of court must stand unless evidence clearly preponderates against them.

20 S. D. 526, AMERICAN COPYING CO. v. EUREKA BAZAAR, 9 L.R.A. (N.S.) 1176, 108 N. W. 15.

Recovery on contracts by foreign corporation.

Cited in Hould Land & Cattle Co. v. Rocky Mountain Bell Teleph. Co. 17 Wyo. 507, 101 Pac. 939, holding unenforceable a contract by a foreign corporation, which had not complied with constitution and statutes, for the transmission of a message, the constitution forbidding the transaction of business until compliance with the statutes; Flint & W. Mfg. Co. v. McDonald, 21 S. D. 526, 14 L.R.A. (N.S.) 673, 130 Am. St. Rep. 735, 114 N. W. 684, holding that foreign corporation can recover for machinery sold, though it has not filed articles of incorporation or appointed resident agent.

Distinguished in Flint & W. Mfg. Co. v. McDonald, 21 S. D. 526, 14 L.R.A. (N.S.) 673, 130 Am. St. Rep. 735, 114 N. W. 684, holding valid a contract by a foreign corporation, although it had not filed a copy of its

articles nor appointed a resident agent as required by law, whereby corporation sold article, properly a subject of interstate commerce.

Validity of contract in violation of statute.

Cited in *Conrad Seipp Brewing Co. v. Green*, 23 S. D. 619, 122 N. W. 662, holding void contract of sale of beer without license in violation of statute making such sale misdemeanor.

20 S. D. 543, NORTHWESTERN MORTG. TRUST CO. v. ELLIS, 108 N. W. 22.

20 S. D. 545, MOSTELLER v. HOLBORN, 108 N. W. 13.

Review of error in instructions.

Cited in *Palmer v. Hurst*, 22 S. D. 68, 115 N. W. 516, holding that error in instruction is not reviewable, where no exception thereto was taken.

20 S. D. 551, HANSCHKA v. VODOPICH, 108 N. W. 28.

Right to specific performance of option.

Cited in note in 6 L.R.A.(N.S.) 407, on right to specific performance of option as affected by lack of mutuality.

20 S. D. 562, STATE v. FLUTE, 108 N. W. 248.

Sufficiency of description of property in information for larceny.

Cited in *State v. Faulk*, 22 S. D. 183, 116 N. W. 72, holding that "one gold coin" is sufficient description in information of property alleged to have been stolen.

20 S. D. 567, DAVENPORT v. ELROD, 107 N. W. 833.

Construction of constitutions.

Cited in *State ex rel. Andrews v. Boyden*, 21 S. D. 6, 108 N. W. 897, 15 A. & E. Ann. Cas. 1122, holding that established rules of construction applicable to statutes apply to construction of constitutions.

Title of act.

Cited in *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, holding title of primary election law sufficient.

20 S. D. 581, McCABE v. DESNOYERS, 108 N. W. 341.

Time of objection to evidence.

Cited in *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085, 17 A. & E. Ann. Cas. 213, holding objection to testimony on ground of variance comes too late when made for first time on appeal.

20 S. D. 587, MALMBERG v. PETERSON, 108 N. W. 339.

20 S. D. 591, STATE v. KAPELINO, 108 N. W. 335.

Right of accused to be confronted by witnesses.

Cited in note in 129 Am. St. Rep. 28, on constitutional right of accused to be confronted by witnesses.

Instructions as to conviction of lesser offense.

Cited in *State v. Vierck*, 23 S. D. 166, 139 Am. St. Rep. 1040, 120 N. W. 1098, holding that court is not required to instruct jury that they may convict of lesser offense included in that charged.

20 S. D. 599, HINRICKS v. BRADY, 108 N. W. 322, Reversed on rehearing in 23 S. D. 250, 121 N. W. 777.

Rate of interest recoverable by mortgagee.

Distinguished in *Stewart v. Walker*, 80 Neb. 68, 127 Am. St. Rep. 747, 113 N. W. 814, holding where mortgage purports to give the amount, date of execution and maturity and rate of interest borne by notes it secures and is so recorded, the mortgagee may not in a suit against a subsequent purchaser who has only record notice show that notes were dated and matured at earlier day and bore higher rate of interest than was specified in mortgage.

20 S. D. 607, LYON v. PHILLIPS, 108 N. W. 554

20 S. D. 611, STATE v. CROWLEY, 108 N. W. 491.

20 S. D. 612, STATE v. MUNGEON, 108 N. W. 552.

Who is accomplice.

Cited in note in 138 Am. St. Rep. 281, on who is an accomplice.

20 S. D. 618, MURPHY v. RELIANCE GOLD MIN. CO. 108 N. W. 15.

20 S. D. 618, SWEENEY CATTLE CO. v. ERB, 108 N. W. 32.

20 S. D. 620, STATE v. KAUFFMAN, 108 N. W. 246.

20 S. D. 622, HARRIS v. STEARNS, 108 N. W. 247.

Evidence of payment of taxes.

Cited in *King v. Lane*, 21 S. D. 101, 110 N. W. 37, holding that possession of clear tax deed is conclusive evidence that all prior taxes are paid.

20 S. D. 623, GRIGSBY v. WOLVEN, 108 N. W. 250.

20 S. D. 628, SUBERA v. JONES, 108 N. W. 26.

20 S. D. 632, JONES v. JONES, 108 N. W. 23.

20 S. D. 640, CAMPBELL COUNTY v. OVERBY, 108 N. W. 247.

20 S. D. 642, SCHROEDER v. PEHLING, 129 AM. ST. REP. 952, 108 N. W. 252.

20 S. D. 646, BURGI v. RUDGERS, 108 N. W. 253.

Recovery for substantial performance of building contract.

Cited in notes in 134 Am. St. Rep. 693; 24 L.R.A.(N.S.) 349,—on recovery upon substantial performance of building contract.

Objections not made in trial court.

Cited in First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085, 17 A. & E. Ann. Cas. 213, holding objection that there is a variance between pleading and proof comes too late when raised for first time on appeal.

Dak. Rep.—75.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 21 S. D.

21 S. D. 1, GUILLAUME v. FLANNERY, 108 N. W. 255.

21 S. D. 4, STATE EX REL. CHRISTIANSON v. ALLISON, 108 N. W. 556.

Effect of failure to file brief or abstract.

Cited in *Erickson v. Stevenson*, 21 S. D. 96, 110 N. W. 36, holding that appeal is deemed abandoned, where appellant files no abstract or brief.

21 S. D. 5, STATE v. EDMUNDS, 108 N. W. 556.

21 S. D. 6, STATE EX REL. ANDREWS v. BOYDEN, 108 N. W. 897, 15 A. & E. ANN. CAS. 1122.

21 S. D. 13, WILLIAMSON v. ALDRICH, 108 N. W. 1063.

Majority necessary on submitted question.

Cited in *State ex rel. Clark v. Stakke*, 22 S. D. 228, 117 N. W. 129, holding majority of votes cast insufficient under requirement in liquor law of majority of voters.

Distinguished in *Treat v. De Jean*, 22 S. D. 505, 118 N. W. 709, holding that majority of electors voting on bond issue constitutes majority of all electors of city.

21 S. D. 18, SIOUX FALLS ELEC. LIGHT & POWER CO. v. SIOUX FALLS, 108 N. W. 488.

21 S. D. 24, STATE v. CALKINS, 109 N. W. 515.

21 S. D. 26, NEW BIRDSALL CO. v. STORDALEN, 109 N. W. 516.

Who is bona fide holder of note.

Cited in note in 31 L.R.A.(N.S.) 301, on holder of bill or note as collateral as bona fide holder.

21 S. D. 28, GREENWALD v. FORD, 109 N. W. 516.

21 S. D. 42, BEAUMANN v. JEROME, 109 N. W. 513.

21 S. D. 44, BUCHANAN v. RANDALL, 109 N. W. 513.

21 S. D. 47, HARRIS v. KING, 109 N. W. 644.

21 S. D. 51, NELSON v. KING, 109 N. W. 649.

21 S. D. 52, ALDRICH v. RAMOE, 109 N. W. 641.

21 S. D. 55, EWING & H. v. LUNN, 109 N. W. 642, Affirmed on rehearing in 22 S. D. 95, 115 N. W. 527.

21 S. D. 56, GRIFFIN v. GISLASON, 109 N. W. 646.

21 S. D. 65, BRACE v. VAN EPS, 109 N. W. 147 .

Provision of deed for benefit of stranger.

Cited in note in 20 L.R.A.(N.S.) 221, on effect of provision in deed for benefit of stranger.

21 S. D. 72, HOME INVESTMENT CO. v. CLARSON, 109 N. W. 507.

21 S. D. 77, GARVEY v. ELDER, 120 AM. ST. REP. 704, 109 N. W. 508.

21 S. D. 80, NICHOLAS & SHEPARD CO. v. HORSTAD, 109 N. W. 509.

21 S. D. 86, STATE EX REL. LONG v. REXFORD, 109 N. W. 216.

21 S. D. 90, FARMERS' MUT. HAIL & CYCLONE INS. ASSO. v. ROCHE, 109 N. W. 512.

21 S. D. 91, GRIFFING v. GISLASON, 109 N. W. 649.

21 S. D. 91, INTERNATIONAL HARVESTER CO. v. McKEEVER, 109 N. W. 642.

21 S. D. 96, ERICKSON v. STEVENSON, 110 N. W. 36.

21 S. D. 97, GRAY v. BEADLE COUNTY, 110 N. W. 36.

21 S. D. 101, KING v. LANE, 110 N. W. 37.

Followed without special discussion in *Stevens v. Doughty*, 21 S. D. 337, 112 N. W. 1143.

Validity of tax deed.

Cited in *Nicol v. Sherman*, 21 S. D. 189, 110 N. W. 777, holding filing of proof of publication of notice of expiration of redemption period, or notice that certificate would become absolute, essential to validity of tax title; *Batelle v. Knight*, 23 S. D. 161, 120 N. W. 1102, 20 A. & E. Ann. Cas. 456; *Battelle v. Wolven*, 22 S. D. 39, 115 N. W. 99,—holding tax deed, reciting that land sold was least quantity that would sell for amount of tax, void on face.

21 S. D. 108, CATLETT v. STOKES, 110 N. W. 84, Affirmed on rehearing in 23 S. D. 215, 121 N. W. 103.

Conversion by purchaser of mortgaged chattels.

Cited in *Citizens' Nat. Bank v. Osborn-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266, holding affirmation act under claim of title inconsistent with that of mortgagee, necessary to constitute conversion by purchaser of mortgaged chattels.

21 S. D. 112, CLARK v. ELSE, 110 N. W. 88.

21 S. D. 117, DEWEY v. KOMAR, 110 N. W. 90.

21 S. D. 121, STATE v. ALLEN, 110 N. W. 92.

21 S. D. 126, BRINK v. WHISLER, 110 N. W. 94.

21 S. D. 128, FARLOW v. CHAMBERS, 110 N. W. 94.

Signing contract in ignorance of contents.

Cited in *Haag v. Burns*, 22 S. D. 51, 115 N. W. 104; *McNinch v. Northwest Thresher Co.* 23 Okla. 386, 138 Am. St. Rep. 803, 100 Pac. 524; *Reed v. Coughran*, 21 S. D. 257, 111 N. W. 559,—holding party failing to read contract estopped from setting up its nonconformity to oral agreement.

Cited in note in 138 Am. St. Rep. 812, on signing contracts in ignorance of their contents.

21 S. D. 134, LOCKARD v. LOCKARD, 110 N. W. 104.

21 S. D. 140, ROY v. HARNEY PEAK TIN MIN. MILL. & MFG. CO. 9 L.R.A.(N.S.) 529, 130 AM. ST. REP. 706, 110 N. W. 106.

21 S. D. 145, **KENNEDY v. AGRICULTURAL INS. CO.** 110 N. W. 116.

21 S. D. 151, **GARDNER v. WELCH**, 110 N. W. 110.

21 S. D. 159, **DEERING & CO. v. MORTELL**, 16 L.R.A.(N.S.) 352, 110 N. W. 86.

Necessity for acceptance of guaranty.

Cited in *Bank of California v. Union Packing Co.* 60 Wash. 456, 111 Pac. 573, holding unnecessary notice of acceptance of unconditional present guaranty of advances by bank to corporation.

21 S. D. 165, **HOME LODGE ASSO. v. QUEEN INS. CO.** 110 N. W. 778.

Loss within meaning of fire insurance contract.

Cited in note in 133 Am. St. Rep. 1092, as to what are losses or damages by fire within meaning of insurance.

21 S. D. 169, **BOETTCHER v. THOMPSON**, 110 N. W. 108.

21 S. D. 173, **DAVIS v. BROWN COUNTY COAL CO.** 110 N. W. 113.

21 S. D. 180, **KIERBOW v. YOUNG**, 110 N. W. 116.

21 S. D. 182, **DRAKE v. DRAKE**, 110 N. W. 270.

21 S. D. 183, **STEERE & B. v. GINGERY**, 110 N. W. 774.

Right of realty broker to commissions.

Cited in *Park v. Towne*, 22 S. D. 216, 116 N. W. 1123, holding broker entitled to commissions for procuring exchange of realty.

21 S. D. 189, **NICOL v. SHERMAN**, 110 N. W. 777.

21 S. D. 191, **JEROME v. RUST**, 110 N. W. 780, **Reversed on rehearing** in 23 S. D. 409, 122 N. W. 344.

21 S. D. 194, **HEFFRON v. TREBER**, 130 AM. ST. REP. 711, 110 N. W. 781.

Effect of holding over without formally exercising option for renewal of lease.

Cited in note in 29 L.R.A.(N.S.) 175, on holding over after expiration of lease, without formally exercising option for extension or renewal.

21 S. D. 198, **PETER v. PLANO MFG. CO.** 110 N. W. 783.

Recovery for breach of warranty.

Cited in *Aultman Engine & Thresher Co. v. Boyd*, 21 S. D. 303, 112 N.

W. 151, holding evidence not insufficient, as matter of law, to justify finding by jury that vendee complied with requirements of warranty of threshers, so as to entitle him to recover for breach thereof; *Acme Harvesting Mach. Co. v. Barkley*, 22 S. D. 458, 118 N. W. 690, on presence and knowledge of vendor's agent as waiver of notice of failure of machine to fulfill warranty.

Notice to vendor of defects in machine.

Distinguished in *Northwest Thresher Co. v. Mehlhoff*, 23 S. D. 476, 122 N. W. 428, on notice by vendee of defects in thresher.

Insurance company as bound by waiver by agent.

Cited in *Breeden v. Aetna L. Ins. Co.* 23 S. D. 417, 122 N. W. 348, holding insurer bound by waiver, by general manager, as to notice of accident, though policy provides that no agent can waive its condition.

21 S. D. 203, ALLEN v. PETERSON, 111 N. W. 538.

21 S. D. 204, STATE v. GILBERT, 111 N. W. 538.

Followed without discussion in *State v. McMillan*, 21 S. D. 208a, 111 N. W. 540; *State v. Harvey*, 21 S. D. 208b, 111 N. W. 540; *State v. Kirsh*, 21 S. D. 209a, 111 N. W. 540.

21 S. D. 208, STATE v. McMILLAN, 111 N. W. 540.

21 S. D. 208, STATE v. HARVEY, 111 N. W. 540.

21 S. D. 209, STATE v. KIRSCH, 111 N. W. 540.

21 S. D. 209, McCLELLAN'S ESTATE, 111 N. W. 540.

21 S. D. 217, CLARK v. ELSE, 111 N. W. 543.

21 S. D. 218, WINDHORST v. BERGENDAHL, 130 AM. ST. REP. 715, 111 N. W. 544.

Presumption as to foreign law.

Cited in *Maloney v. Winston Bros. Co.* 18 Idaho, 740, — L.R.A.(N.S.) —, 111 Pac. 1080, holding that court will assume that same law prevails in foreign state, in absence of anything to contrary.

21 S. D. 223, NELSON v. LYBECK, 111 N. W. 546.

21 S. D. 228, FURBER v. WILLIAMS-FLOWER CO. 3 L.R.A. (N.S.) 1259, 111 N. W. 548, 15 A. & E. ANN. CAS. 1216.

Validity of contract to issue stock for services.

Cited in *Rogers v. Gladiator Gold Min. & Mill. Co.* 21 S. D. 412, 113 N. W. 86, holding stock, trust fund, so that contract to issue stock for services to trustee individually to aid him in disposing of stock is illegal.

21 S. D. 234, TODENHOFT v. DE ROOS, 111 N. W. 550.

21 S. D. 237, STATE v. HORN, 111 N. W. 552.

Error in instructions to jury.

Cited in *State v. Frazer*, 23 S. D. 304, 121 N. W. 790; *State v. Vierck*, 23 S. D. 166, 139 Am. St. Rep. 1040, 120 N. W. 1098,—holding that failure to instruct as to conviction for lesser offense is not available as error where no request to instruct is made.

21 S. D. 242, MILLER v. CHICAGO & N. W. R. CO. 111 N. W. 553.

21 S. D. 247, GOODFELLOW v. KELSEY, 111 N. W. 555.

Sale by one joint broker as depriving other of commissions.

Cited in *Chambers v. Mittnacht*, 23 S. D. 449, 122 N. W. 434, holding that one joint broker cannot sell mining property and deprive other of his share of commissions.

21 S. D. 254, CLARK v. LAWRENCE COUNTY, 111 N. W. 558,
Affirmed on rehearing in 23 S. D. 77, 120 N. W. 764.

21 S. D. 257, REED v. COUGHRAN, 111 N. W. 559.

Estoppel to deny written contract.

Cited in *McNinch v. Northwest Thresher Co.* 23 Okla. 386, 138 Am. St. Rep. 803, 100 Pac. 524, holding that party able to read cannot after execution of written contract complain that it does not embody parties' verbal understanding.

21 S. D. 261, MILBANK v. WESTERN SURETY CO. 111 N. W. 561.

Yea and nay vote.

Cited in *Whittaker v. Deadwood*, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590, holding that record of vote on paving ordinance showing that eight aldermen voted in favor of it sufficient compliance with requirement of yea and nay vote.

21 S. D. 269, GARRIGAN v. HUNTIMER, 111 N. W. 563.

21 S. D. 272, BROWN v. HOLLISTER, 111 N. W. 564.

21 S. D. 276, STATE EX REL. HAFF v. SCHLACHTER, 111 N. W. 566.

21 S. D. 280, FRITZ v. WATERTOWN, 111 N. W. 630.

Municipal liability for defects in streets.

Cited in note in 20 L.R.A.(N.S.) 576, 580, 717, 730, on liability of municipality for defects or obstructions in streets.

21 S. D. 285, LUNSCHEON v. WOCKNITZ, 111 N. W. 632.

21 S. D. 290, MOORE v. PERSSON, 111 N. W. 633.

21 S. D. 295, FREDERIKSEN v. WILLOOX, 111 N. W. 1135.

21 S. D. 295, POLK v. CARNEY, 130 AM. ST. REP. 719, 112 N. W. 147.

21 S. D. 298, CHAMBERS v. ROSELAND, 112 N. W. 148.

Specific performance of contract of sale.

Cited in Phelan v. Neary, 22 S. D. 205, 117 N. W. 142, holding contract of sale, containing no agreement as to price, too uncertain for specific performance; Hughes v. Payne, 22 S. D. 293, 117 N. W. 363, holding that contract of sale, omitting price by mistake, may be reformed and specially enforced.

21 S. D. 300, PLANO MFG. CO. v. THOMPSON, 11 L.R.A. (N.S.) 396, 130 AM. ST. REP. 722, 112 N. W. 149.

21 S. D. 303, AULTMAN ENGINE & THRESHER CO. v. BOYD, 112 N. W. 151.

21 S. D. 305, STATE v. PRATT, 112 N. W. 152.

21 S. D. 314, McARTHUR v. McCOY, 112 N. W. 155.

21 S. D. 318, HUSTON v. BENJAMIN, 112 N. W. 842.

21 S. D. 320, TOLLERTON & W. CO. v. GILRUTH, 112 N. W. 842.

21 S. D. 324, HAHN v. SLEEPY EYE MILLING CO. 112 N. W. 843.

Action by chattel mortgagor against third persons after condition broken.

Cited in note in 137 Am. St. Rep. 900, on actions maintainable by chattel mortgagor against third persons after condition broken.

21 S. D. 333, SCOTT v. TREBILCOCK, 112 N. W. 847.

21 S. D. 336, ANDERSON v. LAMBERT, 112 N. W. 1143.

21 S. D. 337, STEVENS v. DOUGHTY, 112 N. W. 1143.

21 S. D. 337, STEWART v. TOMLINSON, 112 N. W. 849.

21 S. D. 341, SUTTON v. WHETSTONE, 112 N. W. 850.

21 S. D. 349, **BAILEY v. WRIGHT**, 112 N. W. 853.

21 S. D. 353, **DOYLE v. BIRDSSELL**, 112 N. W. 855.

21 S. D. 357, **BREEDEN v. MARTENS**, 112 N. W. 960.

21 S. D. 368, **NORBECK & N. CO. v. PEASE**, 112 N. W. 1136.

21 S. D. 374, **McVAY v. BRIDGMAN**, 112 N. W. 1138.

21 S. D. 379, **JOAS v. JORDAN**, 113 N. W. 73.

General assignment within bankruptcy act.

Disapproved in *Re Courtenay Mercantile Co.* 186 Fed. 352, holding that assignment of debtor's property for benefit of assenting creditors is general assignment within bankruptcy act.

21 S. D. 386, **SPOLEK v. HATCH**, 113 N. W. 75.

21 S. D. 390, **STATE v. KINNEY**, 113 N. W. 77.

Liability for violation of liquor law.

Cited in *State v. Schell*, 22 S. D. 340, 117 N. W. 505, holding intent of saloonkeeper immaterial to offense of keeping open on Sunday, or whether or not sale was made.

Error of instruction which assumes fact as proved.

Cited in *Bolte v. Equitable F. Asso.* 23 S. D. 240, 121 N. W. 773, holding instruction that insurer is liable, not reversible error, where undisputed evidence shows issuance of policy and loss by fire; *State v. Madison*, 23 S. D. 584, 122 N. W. 647, holding it no error for court to instruct jury that evidence as to possession of liquors and license was undisputed; *Ollre v. State*, 57 Tex. Crim. Rep. 520, 123 S. W. 1116 (dissenting opinion), on liability of saloonkeeper for sale of liquor by agent on Sunday against former's instructions.

21 S. D. 393, **CRANE & O. CO. v. JONES**, 113 N. W. 80.

21 S. D. 396, **STATE v. BENNETT**, 113 N. W. 78.

Error in statements by counsel.

Cited in *State v. Jones*, 21 S. D. 469, 113 N. W. 716, holding statement by state's attorney that accused has not denied witness' statement, reversible error; *State v. Kaufmann*, 22 S. D. 433, 118 N. W. 337, holding indirect references by state's attorney to failure of accused to testify, reversible error.

21 S. D. 400, **FIRST NAT. BANK v. DOEDEN**, 113 N. W. 81.

Law governing negotiable paper.

Cited in note in 19 L.R.A.(N. S.) 670, 671, on conflict of laws as to negotiable paper.

21 S. D. 404, STATE v. MELLETTE, 113 N. W. 83.

**21 S. D. 412, ROGERS v. GLADIATOR GOLD MIN. & MILL. CO.
113 N. W. 86.**

21 S. D. 418, CABLE CO. v. RATHGEBER, 113 N. W. 88.

21 S. D. 424, SKELLY'S ESTATE, 113 N. W. 91.

Authority of attorney in conducting litigation.

Cited in note in 132 Am. St. Rep. 159, on implied authority of attorney in conducting litigation.

**21 S. D. 433, SMITH v. MUTUAL CASH GUARANTY FIRE INS.
CO. 113 N. W. 94.**

Parol evidence to vary insurance contract.

Cited in note in 16 L.R.A.(N.S.) 1250, on parol-evidence rule as to varying or contracting written contracts, as affected by doctrine of waiver or estoppel as applied to insurance policies.

21 S. D. 446, HUSTON v. BENJAMIN, 113 N. W. 459.

21 S. D. 447, BRANDHUBER v. PIERRE, 113 N. W. 569.

**21 S. D. 449, BOWLER v. FIRST NAT. BANK, 130 AM. ST.
REP. 725, 113 N. W. 618, Reaffirmed in later appeal in 23 S.
D. 71, 115 N. W. 517.**

Necessity for registering or recording of transfer.

Cited in note in 18 L.R.A.(N.S.) 1233, as to when local law is deemed to require registering or recording of transfer, within § 60a of bankruptcy act.

21 S. D. 461, KRUG v. KAUTZ, 113 N. W. 622.

21 S. D. 465, STATE v. GLOVER, 113 N. W. 625.

21 S. D. 469, STATE v. JONES, 113 N. W. 716.

21 S. D. 471, COOPER v. HARVEY, 113 N. W. 717.

Validity of statutes to cure defective acknowledgment.

Cited in *Kenny v. McKenzie*, 23 S. D. 111, — L.R.A.(N.S.) —, 120 N. W. 781, holding that act of 1903 c. 1, did not validate foreclosure under assignment with defective acknowledgment.

Cited in note in 31 L.R.A.(N.S.) 1080, on constitutionality of statutes curing defective acknowledgments of conveyances.

**21 S. D. 480, DEWEY v. SIBERT, 113 N. W. 721, 16 A. & E.
ANN. CAS. 151.**

21 S. D. 484, JACKSON v. FIRST STATE BANK, 113 N. W. 876.

21 S. D. 489, STATE v. McILVENNA, 113 N. W. 878.

Sufficiency of indictment for illegal liquor sale.

Cited in *State v. Ely*, 22 S. D. 487, 118 N. W. 687, 18 A. & E. Ann. Cas. 92; *State v. Mudie*, 22 S. D. 41, 115 N. W. 107,—holding indictment charging sale of liquors without license, sufficient, without statement that license could have been procured at place of sale.

21 S. D. 494, STATE v. JACKSON, 113 N. W. 880, 16 A. & E. ANN. CAS. 87.

21 S. D. 500, STATE v. LEPINE, 113 N. W. 1076.

21 S. D. 504, EDWARDS v. CHICAGO, M. & ST. P. R. CO. 110 N. W. 832.

21 S. D. 511, LENNAN v. POLLOCK STATE BANK, 110 N. W. 834.

21 S. D. 515, EX PARTE BROWN, 114 N. W. 303.

21 S. D. 520, STOTT v. CHAMBERLAIN, 114 N. W. 683.

21 S. D. 526, FLINT & W. MFG. CO. v. McDONALD, 14 L.R.A. (N.S.) 673, 130 AM. ST. REP. 735, 114 N. W. 684.

Replevin by foreign corporation without filing articles of incorporation.

Cited in *Rex Buggy Co. v. Dineen*, 23 S. D. 474, 122 N. W. 433, holding that foreign corporation after termination of agency in state can replevy its property without complying with statute as to filing of articles of incorporation.

21 S. D. 532, STATE v. WILCOX, 114 N. W. 687.

21 S. D. 537, NERGER v. COMMERCIAL MUT. FIRE ASSO. 114 N. W. 689.

21 S. D. 541, NEILSON v. OIUM, 114 N. W. 691.

21 S. D. 547, MOSTELLER v. HOLBORN, 114 N. W. 693.

Judgment as res adjudicata.

Cited in *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416, holding judgment not res adjudicata as to statute of limitations which was pleaded, but not considered.

21 S. D. 554, HALLET v. AGGERGAARD, 14 L.R.A.(N.S.) 1251, 114 N. W. 696.

Inference as to character of transaction on margin.

Cited in 22 L.R.A.(N.S.) 176, on inference as to character of transaction on margin.

21 S. D. 561, PHILLIPS v. HINK, 114 N. W. 699.

21 S. D. 566, LOISEAU v. ARP, 14 L.R.A.(N.S.) 855, 130 AM. ST. REP. 741, 114 N. W. 701.

21 S. D. 574, INGALLS v. CHRISTOPHERSON, 114 N. W. 704.

21 S. D. 580, LAWRENCE v. EWERT, 114 N. W. 709.

21 S. D. 591, HICKOX v. EASTMAN, 114 N. W. 706.

Estoppel to assert title.

Cited in note in 30 L.R.A.(N.S.) 8, on estoppel of landowner permitting title to remain in another, to assert it as against latter's creditors.

21 S. D. 598, STATE v. HAM, 114 N. W. 713.

21 S. D. 606, STATE v. LANDERS, 114 N. W. 711.

What is voluntary confession.

Cited in note in 18 L.R.A.(N.S.) 775, 778, 784, as to when confession voluntary.

21 S. D. 612, STATE v. VEY, 114 N. W. 719.

Admissibility of evidence wrongfully obtained.

Cited in notes in 136 Am. St. Rep. 150, on admissibility of evidence wrongfully obtained; 18 L.R.A.(N.S.) 770, 775, 784, 785, 797, 870, as to when confession voluntary; 34 L.R.A.(N.S.) 64, on admissibility against defendant of documents or articles taken from him.

Subsequent evidence as rendering ruling erroneous.

Cited in State v. Frazer, 23 S. D. 304, 121 N. W. 790, holding that ruling on objection to witness because not indorsed on information for assault cannot be rendered erroneous by subsequent disclosure of identity of names of witness and person assaulted.

21 S. D. 619, HALL v. DOLAN, 15 L.R.A.(N.S.) 272, 114 N. W. 998.

Right of broker to commissions.

Cited in note in 21 L.R.A.(N.S.) 329, on right to commission on sale by owner after, to customer introduced within, time limited.

Mutuality of contract.

Cited in note in 19 L.R.A.(N.S.) 601, on mutuality of contract giving

real-estate broker exclusive authority or promising him commissions in case of sale by anyone else, but not in terms imposing any obligation upon him.

Contract of sale by real estate broker.

Cited in note in 17 L.R.A.(N.S.) 216, on power of real-estate broker to make contract of sale.

21 S. D. 628, LEMON v. LITTLE, 114 N. W. 1001.

21 S. D. 639, SCHOTT v. SWAN, 114 N. W. 1005.

21 S. D. 643, STOLLE v. STUART, 114 N. W. 1007.

21 S. D. 647, FULERTON LUMBER CO. v. TINKER, 115 N. W. 91.

NOTES
ON THE
SOUTH DAKOTA REPORTS.
CASES IN 22 S. D.

22 S. D. 1, NORDNESS v. MUTUAL CASH GUARANTY F. INS.
CO. 114 N. W. 1092.

22 S. D. 7, FOUNTAIN CITY DRILL CO. v. LINDQUIST, 114 N.
W. 1098.

22 S. D. 13, ROBERTS v. RUH, 114 N. W. 1097.

22 S. D. 14, MINDER v. FIRST NAT. BANK, 114 N. W. 1094.

22 S. D. 23, EX PARTE HAWLEY, 15 L.R.A. (N.S.) 138, 115
N. W. 98.

Facts which will be judicially noticed.

Cited in note in 124 Am. St. Rep. 41, on facts of which courts will
take judicial notice.

Power to impose license or occupation tax.

Cited in note in 129 Am. St. Rep. 270, on constitutional limitations on
power to impose license or occupation taxes.

22 S. D. 30, STATE v. MATEJOUSKY, 115 N. W. 96.

22 S. D. 39, BATTELLE, WOLVEN, 115 N. W. 99.

Limitations as running in favor of void tax deed.

Cited in note in 27 L.R.A. (N.S.) 348, 355, as to whether void tax deed
sets in motion special statutes of limitations governing actions to recover
lands sold for taxes.

22 S. D. 41, STATE v. MUDIE, 115 N. W. 107.

Sufficiency of indictment for illegal liquor sale.

Cited in *State v. Ely*, 22 S. D. 487, 118 N. W. 687, 18 A. & E. Ann. Cas. 92, holding that indictment for selling liquor without license need not allege that business could have been engaged in at place of sale.

22 S. D. 51, HAGG v. BURNS, 115 N. W. 104.

**22 S. D. 57, WOLFINGER v. THOMAS, 133 AM. ST. REP. 900,
115 N. W. 100.**

Amendment of complaint.

Cited in *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. 135, holding that complaint alleging that defendants were only entitled to certain amount of water under contract may be permitted to be amended by alleging that plaintiffs are owners of water right and entitled to water designated in location notices.

22 S. D. 65, HAYNIE v. BENNETT, 115 N. W. 515.

22 S. D. 68, PALMER v. HURST, 115 N. W. 516.

22 S. D. 71, BOWLER v. FIRST NAT. BANK, 115 N. W. 517.

22 S. D. 74, SEARS v. SWENSON, 115 N. W. 519.

22 S. D. 79, COMEAU v. HURLEY, 115 N. W. 521.

22 S. D. 83, ROCHFORD v. BARRETT, 115 N. W. 522.

Parol evidence to vary writing.

Cited in *Rectenbaugh v. Northwestern Port Huron Co.* 22 S. D. 410, 118 N. W. 697, holding that rule against variation of writing by parol evidence is not violated by evidence that written contract was obtained by fraud.

Burden of showing bona fide purchaser of negotiable instrument.

Cited in note in 22 L.R.A.(N.S.) 719, as to whether fact that negotiable instrument was, contrary to agreement, transferred before happening of a certain contingency, imposes burden of showing bona fides upon holder.

Sufficiency of constructive notice.

Cited in note in 29 L.R.A.(N.S.) 356, 387, on what circumstances sufficient to put purchaser of negotiable paper on inquiry.

**22 S. D. 89, NORTHWESTERN PORT HURON CO. v. ZICKRICK,
115 N. W. 535, Later phase of same case in 22 S. D. 353, 117
N. W. 685.**

22 S. D. 95, EWING v. LUNN, 115 N. W. 527.

Affidavit of juror to impeach verdict.

Cited in note in 31 L.R.A.(N.S.) 930, on admissibility of affidavit of juror to show misconduct outside jury room not inhering in verdict.

22 S. D. 109, KLATT v. HIGHLAND PARK HOSE CO. 115 N. W. 1074.

22 S. D. 111, STATE EX REL. CHILSON v. HARRIS, 115 N. W. 533.

22 S. D. 114, GRIMSRUD SHOE CO. v. JACKSON, 115 N. W. 656.

Burden of proving want of consideration.

Cited in note in 135 Am. St. Rep. 769, on burden of proving want of consideration.

22 S. D. 123, GILMAN v. CARPENTER, 115 N. W. 659.

Judgment as res judicata.

Cited in Kammann v. Barton, 23 S. D. 442, 122 N. W. 416, holding that judgment in action to quiet title by grantee of mortgagor against mortgagee is not res adjudicata as to mortgagor in foreclosure action.

22 S. D. 132, CHARNOCK v. JONES, 16 L.R.A.(N.S.) 233, 115 N. W. 1072.

Right of subrogation.

Cited in note in 16 L.R.A.(N.S.) 474, on right of assignee of equity of redemption procuring discharge of mortgage, to subrogation or revival as against junior lien.

22 S. D. 135, RE WILKEN, 115 N. W. 1075.

22 S. D. 137, STATE v. ARCHER, 115 N. W. 1075.

22 S. D. 139, GREDER v. STAHL, 115 N. W. 1129.

22 S. D. 142, EDMONT IMPLEMENT CO. v. N. S. TUBBS SHEEP CO. 115 N. W. 1130.

Review of errors not discussed in brief.

Cited in Bolte v. Equitable F. Asso. 23 S. D. 240, 121 N. W. 773, holding that assignments of error, not discussed in appellant's brief will be considered abandoned.

Gain or loss of title by abandonment.

Cited in note in 135 Am. St. Rep. 905, on gain or loss of title by abandonment not including questions under statute of limitations.

Dak. Rep.—76.

22 S. D. 146, MORROW v. WIPF, 115 N. W. 1121.

Validity of statute void in part.

Cited in *Pugh v. Pugh*, 25 S. D. 7, 32 L.R.A.(N.S.) 954, 124 N. W. 959, holding that valid part of statute, separable from invalid part, will be held constitutional.

Validity of primary election laws.

Cited in *Healey v. Wipf*, 22 S. D. 343, 117 N. W. 521, holding primary election law valid, though it prescribes exclusive method of nominations; *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041, holding valid, law precluding person from having his name appear on general election official ballot as party candidate unless he received plurality of votes at preceding primary.

Cited in note in 22 L.R.A.(N.S.) 1137, 1138, 1141, 1142, 1145, 1146, on constitutionality of primary election laws.

22 S. D. 163, BOVEE v. DE JONG, 116 N. W. 83.

22 S. D. 165, McPHERSON v. SWIFT, 133 AM. ST. REP. 907, 116 N. W. 76.

What constitutes partnership.

Cited in note in 18 L.R.A.(N.S.) 1090, on effect of agreement to share profits to create partnership.

Judgment as res adjudicata.

Cited in *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416, holding judgment not res adjudicata as to statute of limitations which is pleaded, but not considered.

Right of attorney to enter retraxit.

Cited in note in 25 L.R.A.(N.S.) 1314, on right of attorney to enter retraxit.

22 S. D. 183, STATE v. FAULK, 116 N. W. 72.

22 S. D. 189, McFARLAND v. CRUICKSHANK, 116 N. W. 71.
"Grounds" for appeal from justice's court.

Cited in *Halvorsen v. Myren*, 23 S. D. 263, 121 N. W. 782, holding section 303 of Code as to grounds of appeal, applicable to justice's court.

22 S. D. 191, MISSOURI RIVER TELEPH. CO. v. MITCHELL, 116 N. W. 67.

Estoppel to contest illegal claims or expenditures.

Cited in note in 137 Am. St. Rep. 372, on estoppel of county or municipal corporation to contest illegal claims or expenditures.

22 S. D. 200, STATE EX REL. SIMONS v. NYQUIST, 118 N. W. 754.

22 S. D. 202, FREMONT, E. & M. VALLEY R. CO. v. PENNINGTON COUNTY, 116 N. W. 75.

22 S. D. 206, BALLINGER v. McLAUGHLIN, 116 N. W. 70.

Validity of primary election laws.

Cited in *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, holding invalid, provision of primary election law requiring payment of fees for filing nominating petitions.

Cited in note in 22 L.R.A.(N.S.) 1142, on constitutionality of primary election laws.

22 S. D. 210, SOUTH DAKOTA CENTRAL R. CO. v. SMITH, 116 N. W. 1120.

Burden of proof as to consideration.

Cited in note in 135 Am. St. Rep. 773, on burden of proving want of consideration.

22 S. D. 214, COUGHRAN v. WESTERN ELEVATOR CO. 116 N. W. 1122.

22 S. D. 216, PARK v. TOWNE, 116 N. W. 1123.

22 S. D. 220, KOCH v. LUNSCHEN, 116 N. W. 1124.

22 S. D. 223, CENTRAL BANKING & T. CO. v. PUSEY, 116 N. W. 1126.

22 S. D. 226, DOBBS v. ATLAS ELEVATOR CO. 117 N. W. 128.

22 S. D. 228, 451, STATE EX REL. CLARK v. STAKKE, 117 N. W. 129, 118 N. W. 703.

Majority vote on submitted proposition.

Cited in note in 22 L.R.A.(N.S.) 480, on basis for computation of majority essential to adoption of proposition submitted at general election

Distinguished in *Treat v. DeJean*, 22 S. D. 505, 118 N. W. 709, holding that majority of electors voting for bond issue constitutes majority of all electors of city.

22 S. D. 233, CLARK v. DEADWOOD, 18 L.R.A.(N.S.) 402, 117 N. W. 131.

22 S. D. 238, SIMONSON v. MONSON, 117 N. W. 133.

22 S. D. 242, DRISKILL v. REBBE, 117 N. W. 135.

22 S. D. 256, WAALER v. GREAT NORTHERN R. CO. 18 L.R.A. (N.S.) 297, 117 N. W. 140.

22 S. D. 262, CROUCH v. DAKOTA W. & M. RIVER R. CO. 117 N. W. 145.

22 S. D. 265, PHELAN v. NEARY, 117 N. W. 142.

Right to specific performance.

Cited in note in 128 Am. St. Rep. 400, on refusal of specific performance of valid contract for other reason than that property is of a particular class.

22 S. D. 272, PHILLIPS v. INTERNATIONAL HARVESTER CO. 117 N. W. 146.

22 S. D. 277, TOSSINI v. DONAHUE, 117 N. W. 148.

22 S. D. 282, PALMER v. SCHURZ, 117 N. W. 156.

22 S. D. 291, STATE v. FRAZER, 117 N. W. 366.

22 S. D. 293, HUGHES v. PAYNE, 117 N. W. 363.

22 S. D. 298, LINDQUIST v. NORTHWESTERN PORT HURON CO. 117 N. W. 365.

22 S. D. 361, BURLEIGH v. HECHT, 117 N. W. 367.

Laches as bar to action to quiet title.

Cited in Sherman v. Sherman, 23 S. D. 486, 122 N. W. 439 (dissenting opinion), on application of doctrine of laches to action to quiet title and to regain possession and to recover rents and profits.

Suspension of limitations against nonresidents.

Cited in note in 25 L.R.A.(N.S.) 26, on applicability to nonresidents of provision suspending limitations until "return" of absent defendant.

22 S. D. 316, COMEAU v. HURLEY, 117 N. W. 371.

22 S. D. 314, NORTHWESTERN PORT HURON CO. v. IVERSON, 133 AM. ST. REP. 920, 117 N. W. 372.

22 S. D. 322, BROOKINGS v. NATWICK, 18 L.R.A.(N.S.) 1259, 133 AM. ST. REP. 927, 117 N. W. 376, 17 A. & E. ANN. CAS. 1254.

Personal liability for assessment.

Cited in notes in 133 Am. St. Rep. 931, 935, as to whether a personal liability may be created for an assessment; 29 L.R.A.(N.S.) 770, on personal liability of property owner for assessments for local improvements.

22 S. D. 324, TILTON v. FLORMANN, 117 N. W. 377.

22 S. D. 340, STATE v. SCHELL, 117 N. W. 505.

Followed without discussion in *State v. Fairchild*, 22 S. D. 343, 117 N. W. 506.

What constitutes violation of liquor law.

Cited in *State v. Johnson*, 23 S. D. 293, 22 L.R.A.(N.S.) 1007, 121 N. W. 785, holding that temporary call to furnish music is within intent of statute forbidding minor to visit or remain in saloon; *State v. Woodward*, 68 W. Va. 66, 30 L.R.A.(N.S.) 1004, 69 S. E. 385, holding intent of saloon keeper, making of sale, or entry of anyone, immaterial to offense of keeping open on Sunday.

22 S. D. 343, STATE v. FAIRCHILD, 117 N. W. 506.**What constitutes violation of liquor law.**

Cited in *State v. Woodward*, 68 W. Va. 66, 30 L.R.A.(N.S.) 1004, 69 S. E. 385, holding intent of saloon keeper, making of sale, or entry of anyone, immaterial to offense of keeping open on Sunday.

22 S. D. 343, HEALEY v. WIFE, 117 N. W. 521.**Validity of primary election laws.**

Cited in *State ex rel. Shepard v. Superior Ct.* 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233, holding valid, statute providing that candidate's name shall not appear on ballot more than once; *State ex rel. McGrath v. Phelps*, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041, holding valid, law precluding person from having name on general election ballot as party candidate unless he received plurality of votes at preceding primary.

Cited in note in 22 L.R.A.(N.S.) 1143, on constitutionality of primary election laws.

22 S. D. 351, FULLER & JOHNSON MFG. CO. v. CHILD, 117 N. W. 523.**22 S. D. 353, NORTHWESTERN PORT HURON CO. v. ZICK-RICK, 117 N. W. 685.****22 S. D. 355, RE EGAN, 117 N. W. 874.****22 S. D. 365, MEE v. CARLSON, 29 L.R.A.(N.S.) 351, 117 N. W. 1033.****Payment of individual debt by commercial paper of corporation.**

Cited in note in 31 L.R.A.(N.S.) 169, on right of taker of commercial paper of corporation for officer's individual debt.

22 S. D. 377, MEYER v. CHICAGO, M. & ST. P. R. CO. 117 N. W. 1037.

22 S. D. 377, **TOSINI v. CASCADE MILLING CO.** 117 N. W. 1037.

22 S. D. 382, **FLICKINGER v. CORNWELL**, 117 N. W. 1039.

22 S. D. 389, **ROSEBUD LUMBER CO. v. SEER**, 117 N. W. 1042.

22 S. D. 395, **BARNHART v. ANDERSON**, 118 N. W. 31.

Destruction, cancellation or redelivery of delivered but unrecorded deed.

Cited in note in 18 L.R.A.(N.S.) 1171, on effect of destruction or cancellation, or redelivery to grantor for that purpose, of delivered but unrecorded deed.

22 S. D. 406, **KELLEY v. R. J. SCHWAB & SONS CO.** 118 N. W. 696.

22 S. D. 410, **RECTENBAUGH v. NORTHWESTERN PORT HURON CO.** 118 N. W. 697.

22 S. D. 417, **CRAIGO v. CRAIGO**, 118 N. W. 712.

22 S. D. 425, **STATE v. HOLBORN**, 118 N. W. 704.

22 S. D. 427, **FULLERTON LUMBER CO. v. TINKER**, 118 N. W. 700, 18 A. & E. ANN. CAS. 11.

22 S. D. 433, **STATE v. KAUFMANN**, 118 N. W. 337.

22 S. D. 451, **STATE EX REL. CLARK v. STAKKE**, 118 N. W. 703.

"Majority vote" on submitted proposition.

Cited in note in 22 L.R.A.(N.S.) 480, on basis for computation of majority essential to adoption of proposition submitted at general election.

22 S. D. 453, **MARKS v. MARKS**, 118 N. W. 694.

22 S. D. 458, **ACME HARVESTING MACH. CO. v. BARKLEY**, 118 N. W. 690.

22 S. D. 467, **EGGLAND v. SOUTH**, 118 N. W. 710.

Consideration for discharge of debt.

Cited in note in 21 L.R.A.(N.S.) 1006, on payment of part of undisputed debt as consideration for its discharge.

Right of broker to commission.

Cited in note in 34 L.R.A.(N.S.) 1051, on effect upon broker's right to commission, of owner's sale to broker's customer at reduced price.

22 S. D. 475, **MANNIE v. HATFIELD**, 118 N. W. 817.

22 S. D. 480, **JONES v. WINSOR**, 118 N. W. 716.

22 S. D. 487, **STATE v. ELY**, 118 N. W. 687, 18 A. & E. ANN. CAS. 92.

Application of statutes forbidding sale of liquors.

Cited in note in 26 L.R.A.(N.S.) 895, as to whether statutes forbidding sale of certain class of liquor include nonintoxicating liquor.

22 S. D. 493, **STATE v. TARLTON**, 118 N. W. 706.

What constitutes malicious mischief.

Cited in notes in 128 Am. St. Rep. 165, on malicious mischief; 19 L.R.A. (N.S.) 273, on definition of "malice" as requisite of offense of malicious mischief.

22 S. D. 501, **CORSON v. SMITH**, 118 N. W. 705.

22 S. D. 505, **TREAT v. DE JEAN**, 118 N. W. 709.

22 S. D. 513, **STATE v. HEFFERNAN**, 25 L.R.A.(N.S.) 868, 118 N. W. 1027.

22 S. D. 515, **BURTON v. COOLEY**, 118 N. W. 1028.

22 S. D. 521, **CARNEY v. TWITCHELL**, 118 N. W. 1030.

22 S. D. 529, **STATE v. CARLISLE**, 118 N. W. 1033.

22 S. D. 534, **BARDEY v. MUELLER**, 118 N. W. 1035.

22 S. D. 541, **HALL v. FEENEY**, 21 L.R.A.(N.S.) 518, 118 N. W. 1038.

22 S. D. 550, **STATE v. PIRKEY**, 118 N. W. 1042, 18 A. & E. ANN. CAS. 192.

22 S. D. 560, **CARLSON v. STUART**, 119 N. W. 41, 18 A. & E. ANN. CAS. 285.

22 S. D. 563, **RE EGAN**, 119 N. W. 42.

22 S. D. 566, **CABLE v. MAGPIE GOLD MIN. CO.** 119 N. W. 174.

22 S. D. 573, **HAWGOOD v. EMERY**, 133 AM. ST. REP. 941, 119 N. W. 177.

22 S. D. 578, **KELLOGG v. FINN**, 133 AM. ST. REP. 945, 119 N. W. 545, 18 A. & E. ANN. CAS. 363.

22 S. D. 584, **STATE v. SUTTERFIELD**, 119 N. W. 548.

22 S. D. 590, **KIMMITT v. DEITRICH**, 119 N. W. 986.

22 S. D. 593, **JEPSEN v. MAROHN**, 21 L.R.A.(N.S.) 935, 119 N. W. 988.

Right of broker to commissions.

Cited in *Lichty v. Daggett*, 23 S. D. 380, 121 N. W. 862, holding that broker did not procure purchaser on vendor's terms of assumption of mortgage with interest, where purchaser did not agree to pay interest demanded by mortgagee.

Cited in note in 29 L.R.A.(N.S.) 533, on effect of contract making broker's right to commissions dependent upon "sale" or other conditions beyond that ordinarily implied.

22 S. D. 598, **RITCHIE v. PEOPLE'S TELEPH. CO.** 119 N. W. 990.

Compensation of corporate officers.

Cited in note in 136 Am. St. Rep. 920, on right of corporate officers to compensation for services rendered.

22 S. D. 611, **KELLY v. WHEELER**, 119 N. W. 994.

22 S. D. 621, **McNISH v. WOLVEN**, 119 N. W. 999.

22 S. D. 625, **JONES v. LONGERBEAM**, 119 N. W. 1000.

22 S. D. 630, **KIME v. BANK OF EDMONTON**, 119 N. W. 1003.

22 S. D. 638, **IVERSON v. SOO ELEVATOR CO.** 119 N. W. 1006.

Chattel mortgage on future crops on land to be acquired.

Cited in note in 19 L.R.A.(N.S.) 911, on validity of chattel mortgage on crops to be grown on land in which mortgagor has no present interest.

NOTES

ON THE

SOUTH DAKOTA REPORTS.

CASES IN 23 S. D.

23 S. D. 1, PEEVER MERCANTILE CO. v. STATE MUTUAL F. ASSO. 119 N. W. 1008, 19 A. & E. ANN. CAS. 1236.

Delivery and acceptance of insurance policies.

Cited in note in 138 Am. St. Rep. 60, on delivery and acceptance of insurance policies.

23 S. D. 8, STATE v. YEGGE, 119 N. W. 1036.

23 S. D. 8, IOWA NAT. BANK v. SHERMAN, 119 N. W. 1010.

23 S. D. 16, LUMLEY v. MILLER, 119 N. W. 1014.

23 S. D. 34, ST. PAUL, M. & M. R. CO. v. HOWARD, 119 N. W. 1032.

23 S. D. 38, GAFFNEY v. MENTELE, 119 N. W. 1030.

23 S. D. 43, DANFORTH v. EGAN, 139 AM. ST. REP. 1030, 119 N. W. 1021, 20 A. & E. ANN. CAS. 418.

Right to transact legal business for another.

Cited in note in 24 L.R.A.(N.S.) 754, 756, on right of disbarred or suspended attorney or unlicensed person to transact legal business for another.

Judicial notice of record of court.

Cited in note in 29 L.R.A.(N.S.) 905, on judicial notice of court's own record in other actions.

23 S. D. 55, CHAMBERLAIN v. QUARNBERG, 119 N. W. 1026.

23 S. D. 65, DICKINSON v. HAHN, 119 N. W. 1034.

23 S. D. 70, ROOD v. DUTCHER, 120 N. W. 772, 20 A. & E. ANN. CAS. 480.

23 S. D. 77, CLARK v. LAWRENCE COUNTY, 120 N. W. 764.

23 S. D. 78, HENDRICKSON v. ANDERSON, 120 N. W. 765.

23 S. D. 82, LYON v. BERTOLERO, 120 N. W. 766.

23 S. D. 86, RICHARDSON v. HOWARD, 120 N. W. 768.

23 S. D. 90, TRAXINGER v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. 120 N. W. 770.

23 S. D. 95, WOOD v. DODGE, 120 N. W. 774.

Oral promise to pay another's debt.

Cited in note in 32 L.R.A.(N.S.) 599, on contemporaneous promise to pay where benefit inures to another, as within statute of frauds.

23 S. D. 102, FOSMARK v. EQUITABLE FIRE ASSO. 120 N. W. 777.

Estoppel to avoid insurance policy.

Cited in Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 311, 30 L.R.A.(N.S.) 539, 127 N. W. 837, holding insurer estopped from avoiding policy because interest of insured was other than unconditional and sole ownership, where insured's interest was known to insurer and its agent.

23 S. D. 111, KENNY v. MCKENZIE, — L.R.A.(N.S.) —, 120 N. W. 781.

23 S. D. 120, BIDWELL v. SMITH, 120 N. W. 880.

23 S. D. 124, BANDOW v. WOLVEN, 120 N. W. 881.

23 S. D. 126, QUINN v. CHICAGO, M. & ST. P. R. CO. 22 L.R.A.(N.S.) 789, 120 N. W. 884.

Liability for damming stream by bridge.

Cited in note in 28 L.R.A.(N.S.) 158, on liability for damming stream by bridge.

Liability for damages resulting from grading of street.

Cited in note in 29 L.R.A.(N.S.) 127, on liability of municipality damming surface water by grading street.

23 S. D. 137, MILLER v. McCONNELL, 120 N. W. 888.

23 S. D. 141, GRIFFING v. DUNN, 120 N. W. 890, 20 A. & E. ANN. CAS. 579.

23 S. D. 150, OLSON v. DAY, 120 N. W. 883, 20 A. & E. ANN. CAS. 516.

23 S. D. 153, STATE EX REL. DAKOTA CENTRAL TELEPH. CO. v. HURON, 120 N. W. 1008.

23 S. D. 158, SENN v. CONNELLY, 120 N. W. 1097.

23 S. D. 161, BATELLE v. KNIGHT, 120 N. W. 1102, 20 A. & E. ANN. CAS. 456.

Running of limitations in favor of void tax deed.

Cited in note in 27 L.R.A.(N.S.) 348, 355, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes.

23 S. D. 166, STATE v. VIERCK, 120 N. W. 1098, 139 AM. ST. Rep. 1040.

23 S. D. 174, STATE v. LA MONT, 120 N. W. 1104.

Admissibility of evidence as to intent.

Cited in note in 23 L.R.A.(N.S.) 384, on right of one to testify as to his intent.

23 S. D. 181, BARNES v. NELSON, 121 N. W. 89, 20 A. & E. ANN. CAS. 544.

23 S. D. 187, CORNELIUS v. FERGUSON, 121 N. W. 91.

Running of limitations in favor of void tax deed.

Cited in note in 27 L.R.A.(N.S.) 346, as to whether void tax deed sets in motion special statutes of limitations governing actions to recover lands sold for taxes.

23 S. D. 191, L. LAMB LUMBER CO. v. ROBERTS, 121 N. W. 93.

23 S. D. 195, GRANT v. POWERS DRY GOODS CO. 121 N. W. 95.

23 S. D. 209, STATE v. HOLBURN, 121 N. W. 100.

23 S. D. 215, CATLETT v. STOKES, 121 N. W. 103.

23 S. D. 217, **STARCHER v. GREGORY**, 121 N. W. 388.

23 S. D. 220, **HANSON v. KITTERMAN**, 121 N. W. 389.

23 S. D. 221, **BYRNE & H. DRY GOODS CO. v. WILLIS-DUNN CO.**, 29 L.R.A. (N.S.) 589, 121 N. W. 620.

Effect of consolidation, merger or absorption of corporation on unsecured liabilities.

Cited in note in 32 L.R.A. (N.S.) 616, on effect of consolidation, merger, or absorption of corporation, on unsecured liabilities, in absence of statutory or contract provision.

23 S. D. 231, **SCHMIDT v. MUSSON**, 121 N. W. 624.

23 S. D. 232, **MAGPIE GOLD MIN. CO. v. SHERMAN**, 121 N. W. 770, 20 A. & E. ANN. CAS. 595.

23 S. D. 240, **BOLTE v. EQUITABLE FIRE ASSO.** 121 N. W. 772.

23 S. D. 250, **HINRICHS v. BRADY**, 121 N. W. 777.

23 S. D. 260, **WOLF v. SNEVE**, 121 N. W. 781.

23 S. D. 263, **HALVORSEN v. MYREN**, 121 N. W. 782.

23 S. D. 265, **KENNEDY v. GARRIGAN**, 121 N. W. 782.

23 S. D. 269, **MCCARTHY v. FIRST NAT. BANK**, 23 L.R.A. (N.S.) 335, 121 N. W. 853.

23 S. D. 293, **STATE v. JOHNSON**, 22 L.R.A. (N.S.) 1007, 121 N. W. 785.

Defense to prosecution for illegal liquor sale.

Cited in notes in 25 L.R.A. (N.S.) 670, on ignorance of minority of purchaser of liquor as defense to prosecution for sale; 25 L.R.A. (N.S.) 801, on effect on liability under liquor dealer's bond of ignorance of purchaser's intoxication or minority.

23 S. D. 298, **DEETERS v. CLARKE**, 121 N. W. 788.

23 S. D. 304, **STATE v. FRAZER**, 121 N. W. 790.

23 S. D. 308, **BUNDAY v. SMITH**, 121 N. W. 792.

23 S. D. 311, **BROOKINGS COUNTY v. MURPHY**, 121 N. W. 798.

23 S. D. 323, STATE v. EGLAND, 121 N. W. 798, 139 AM. ST. REP. 1066.

23 S. D. 329, HINGTGEN v. THACKER, 121 N. W. 839.

23 S. D. 335, STATE v. CLEVELAND, 121 N. W. 841.

23 S. D. 338, RUSSELL v. WRIGHT, 121 N. W. 842.

23 S. D. 352, SMITH v. YANKTON, 121 N. W. 848.

Contributory negligence as bar to liability for defective street.

Cited in note in 21 L.R.A.(N.S.) 661, 602, on contributory negligence as affecting municipal liability for defects and obstructions in streets.

23 S. D. 367, WEITZEL v. LEYSON, 121 N. W. 866.

23 S. D. 380, LICHTY v. DAGGETT, 121 N. W. 862.

Power of realty broker to make contract of sale.

Cited in note in 23 L.R.A.(N.S.) 983, on power of real estate broker to make contract of sale.

23 S. D. 395, BALDWIN v. BOHL, 122 N. W. 247.

23 S. D. 400, MILES v. PENN MUT. L. INS. CO. 122 N. W. 249.

23 S. D. 405, CHICAGO & N. W. R. CO. v. ROLFSON, 122 N. W. 343.

23 S. D. 409, JEROME v. RUST, 122 N. W. 344.

23 S. D. 412, EMPSON v. RELIANCE GOLD MIN. CO. 122 N. W. 346.

23 S. D. 417, BREEDEN v. ÆTNA L. INS. CO. 122 N. W. 348.

23 S. D. 423, MAAG v. STUVERAD, 122 N. W. 350.

23 S. D. 424, CENTERVILLE v. TURNER COUNTY, 122 N. W. 350.

23 S. D. 429, YANKTON, BD. OF EDU. v. SCHOOL DIST. NO. 19, 122 N. W. 411.

23 S. D. 431, MASON v. FIRE ASSO. 122 N. W. 423.

23 S. D. 442, KAMMANN v. BARTON, 122 N. W. 416.

23 S. D. 449, CHAMBERS v. MITTNACHT, 122 N. W. 434.

23 S. D. 462, MEADOWS v. OSTERKAMP, 122 N. W. 419.

23 S. D. 465, STATE v. KAMMEL, 122 N. W. 420.

23 S. D. 474, REX BUGGY CO. v. DINNEEN, 122 N. W. 433.

23 S. D. 476, NORTHWEST THRESHER CO. v. MEHLHOFF, 123 N. W. 428.

23 S. D. 481, WATTERS v. DANCEY, 122 N. W. 430, 139 AM. ST. REP. 1071.

Power of realty broker to make contract of sale.

Cited in note in 23 L.R.A.(N.S.) 983, on power of real estate broker to make contract of sale.

23 S. D. 486, SHERMAN v. SHERMAN, 122 N. W. 439.

Title conveyed by deed to railroad for right of way.

Cited in Gilbert v. Missouri, K. & T. R. Co. 107 C. C. A. 320, 185 Fed. 104, holding that conveyance to railroad for right of way conveys fee, so that railroad can extract oil from land conveyed.

23 S. D. 509, ACME HARVESTING MACH. CO. v. HINKLEY, 122 N. W. 482.

23 S. D. 514, INTERNATIONAL HARVESTER CO. v. HAY-WORTH, 122 N. W. 412.

23 S. D. 521, WOLD v. SOUTH DAKOTA C. R. CO. 122 N. W. 583.

23 S. D. 525, FARRAR v. YANKTON LAND & INVEST. CO. 123 N. W. 585.

23 S. D. 528, STATE v. McCALLUM, 122 N. W. 586.

23 S. D. 531, GEDDIS v. NORTHWESTERN TRUST CO. 122 N. W. 587.

23 S. D. 538, WHITTAKER v. DEADWOOD, 122 N. W. 590, 139 AM. ST. REP. 1076.

Validity of assessment for local improvements.

Cited in notes in 28 L.R.A.(N.S.) 1181, on assessments for improvements by front-foot rule; 32 L.R.A.(N.S.) 304, on local assessment for benefits on property exempt general taxation.

23 S. D. 548, INK v. ROHRIG, 122 N. W. 594.

23 S. D. 553, MARIN v. TITUS, 122 N. W. 596.

23 S. D. 556, WICKHEM v. ALEXANDRIA, 122 N. W. 597.

23 S. D. 558, STINE v. FOSTER, 122 N. W. 598.

23 S. D. 562, NORTHWESTERN MORTG. TRUST CO. v. LEVT-ZOW, 122 N. W. 600.

23 S. D. 564, CHICAGO, M. & ST. P. R. CO. v. MASON, 122 N. W. 601.

23 S. D. 570, HOLLISTER v. STRAHON, 122 N. W. 604.

23 S. D. 573, McGEARY v. BROWN, 122 N. W. 605.

Inspection of books by stockholder.

Cited in note in 30 L.R.A.(N.S.) 291, on right of stockholder to inspect books.

23 S. D. 582, WORK v. BRAUN, 122 N. W. 608.

23 S. D. 582, WILLIAMS BROS. LUMBER CO. v. KELLY, 122 N. W. 646.

23 S. D. 584, STATE v. MADISON, 122 N. W. 647.

Admissibility of evidence wrongfully obtained.

Cited in notes in 136 Am. St. Rep. 154, on admissibility of evidence wrongfully obtained; 34 L.R.A.(N.S.) 59, on admissibility against defendant of documents or articles taken from him.

23 S. D. 596, STATE v. HAYES, 122 N. W. 652.

23 S. D. 604, NEELEY v. ROBERTS, 122 N. W. 655.

23 S. D. 610, BROWN v. EDSALL, 122 N. W. 658.

23 S. D. 619, CONRAD SEIPP BREW CO. v. GREEN, 122 N. W. 662.

23 S. D. 624, DRING v. ST. LAWRENCE TWP. 122 N. W. 664.

23 S. D. 629, STATE v. PETERSON, 122 N. W. 667.

Sufficiency of special verdict.

Cited in note in 24 L.R.A.(N.S.) 12, on what special verdict must contain.

23 S. D. 632, PURKEY v. HARDING, 123 N. W. 69.

23 S. D. 636, BALDWIN v. ABERDEEN, 26 L.R.A.(N.S.) 116, 123 N. W. 80.

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